REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 48 OF 2013

JOSEPH MURIUKI MUTHIGE ..... APPLICANT/APPELLANT

-VERSUS-

REPUBLIC .....RESPONDENT

JUDGMENT

1. The appellant **Joseph Muriuki Muthige** was charged with the offence of defilement of a girl contrary to **Section 8 (1)** as read with **Section 8 (3)** of the **Sexual Offences Act No. 3 of 2006** in Criminal Case No. 70 of 2012 before the Chief Magistrate's Court at Kerugoya. He was also charged with a second count of indecent act with a child contrary to **Section 11 (1)** of the **Sexual Offences Act**. The particulars of the charge of defilement are that on 27th January, 2012 within Kirinyaga County unlawfully and intentionally caused his penis to penetrate the vagina of E.W.N. a girl aged 14 years.

2. The appellant pleaded not guilty to the charges. He was tried and convicted on the charge of defilement and was sentenced to serve twenty(20) years imprisonment.

3. The appellant was aggrieved and filed this appeal, initially raising seven grounds but in his amended grounds of appeal he settled for four grounds which are as follows:

i. That the learned trial magistrate erred in law and facts by

denying him his constitutional rights to interpretation to a language he could understand as required under Article 150 (2) (m) of the Constitution and Section 197 and 198 of the Criminal Procedure Code.

ii. That the learned trial Magistrate erred in law and in facts by admitting unsworn evidence to convict.

iii. That the learned trial Magistrate erred in law and facts by

failing to consider that the age of the victim was not proved to the required standards.

iv. That he was not accorded a fair and impartial trial as

guaranteed under the Constitution Article 50 (2), (c), (g),

(h) and hence the proceedings are flawed.

Based on these grounds he prays the Court to allow the appeal, quash the conviction and set aside the sentence.

4. This is a first appeal and so I have a duty to analyse the evidence and arrive at my own independent decision but also bearing in mind that the trial Magistrate had the benefit to see the witnesses when they testified and assess their demeanor, as such leave room for that. This was so held in the case of **Okeno -V- R (1972) E.A. 32**.

5. The appellant appeared in Court for plea on 30th January, 2012 when the charges were read to him in Kiswahili. The complainant E.W. was subjected to a *voire dire* examination. The Court found that she did not understand the meaning of the oath and she gave unsworn statement. She told the Court that she was a pupil at [Particulas withheld] Primary School in class three and was aged 14 years. The complainant, E.W. told the Court that on 27th January, 2012 at around 4.00 p.m. the appellant called her as she was on her way home from school. E.W. told the Court that she knew the appellant as Binadamu. The appellant told E.W. to go and pick something that he had been sent by her father. E.W. followed the appellant upto his mother's house whereupon he told her to wait as he looked for the house keys. His

brother Paul came with the keys then left. The appellant led her to the house and told her to engage in bad habits. The appellant held her by the neck. He then removed her biker and lifted her legs. The appellant removed his trousers half way then penetrated her vagina with his penis. The appellant penetrated her repeatedly where he had lad her on the ground and spread some clothes. The complainant experienced a lot of pain. The appellant then left her. She went home and informed her aunt S.W what had happened. The aunt and complainant's brother went to the home of appellant where they found him. They then proceeded to the Police Patrol Base. The complainant was then escorted to hospital.

6. The evidence by the complainant was not challenged in cross-examination. There was nothing to stop the Court from relying on her testimony. I am of the view that the evidence of E.W. was reliable, she knew the appellant and gave candid evidence on how the appellant defiled her.

7. P.W. 2 was S.W. who testified that on 27th January, 2012 at around 5.00 p.m. the complainant E.W. went home and asked her uncle K why he did not protect her and yet the appellant tried to strangle her. P.W.2 became interested and enquired whether he had done something to her. It is then she checked her private parts and saw a discharge. P.W. 2 took the complainant to Kutus Patrol Base where she reported and the complainant was given a note to go for treatment.

8. P.W. 3 A. N. M. is the complainant's father. He told the Court that on 27th January, 2012 the complainant went home crying and asked her brother K why he could not go to her rescue when the appellant tried to strangle her. W examined her and found that she had been defiled. P.W. 3 looked for appellant and had him arrested. He took him to Kutus Police Patrol Base. P.W. 3 testified that the complainant is 14 years old.

9. Further evidence was adduced by P.W. 4 Hezron Macharia a clinical officer at Kerugoya District Hospital. he testified that on 27 th January, 2012 he examined the complainant who was a girl aged 14 years and complained of having been sexually assaulted by a person well known to her on the same date at 4.00 p.m. On examination he found that the pant was blood stained, she had bruises on labia majora and minora. The hymen was broken. The cervix and vagina were normal. A whitish vaginal discharge was seen. No spermatozoa was seen. The age of injuries was four hours. He estimated the age of the patient to be 14 years. He confirmed that there was defilement. He then filled a P.3 form on 29th January, 2012 which he produced in Court as exhibit 1 and treatment notes exhibit 2.

10. P.W. 4 testified that he examined the male accused who was Joseph Muriuki Muthige the appellant. He had no injuries on the genitalia. Urinalysis revealed red blood cells. No pus cells seen. He had multiple injuries on his body which were classified as harm. He was alleged to have defiled the complainant.

11. Evidence by P.W. 4 corroborates the evidence of the complainant that she was defiled.

12. P.W. 5 **A.N. K.** testified that on 27th January, 2012 E. W. went home and told him he had been defiled by Binadamu. He went with a group to look for him. They found the appellant in a shamba and arrested him. They took him to Kutus patrol base and made a report.

13. P.W. 6 A.N.M. who is the complainant's father had testified as P.W. 3.

14. P.W. 7 Police Constable Wilson Juma from Kutus Police Station confirmed the testimony of P.W. 1, 2, 3 and 5 on how they went to the Patrol Base and reported. He testified that the appellant had been beaten by members of the public. He then charged him.

15. I have considered this evidence and I am of the view that it was cogent and overwhelming. The appellant was well known to the complainant. This matter was reported to the aunt immediately and the complainant was escorted to hospital where the clinical officer confirmed that the complainant was defiled. The appellant did not challenge the evidence of the witnesses during cross-examination.

16. I am of the considered view that the evidence was reliable and sufficient to sustain a conviction.

17. I now embark on the grounds of appeal. The first issue raised was language. The appellant claims that he took plea in Kiswahili but during the trial, the proceedings show there was a clerk but no interpretation took place on many occasions. He submits that he only understands Kiswahili and some witnesses like P.W. 4 and 7 gave evidence in English but there is no indication that there was interpretation. He relies on the case of **Abdala -V- Republic (1989) KCR 456** where it was held that it is a fundamental right of an accused person charged with criminal offence to have the assistance of an interpreter. He also cited the case of **Diba Wako Kiyoto –V- R** and **Kati Kenga -V- Republic (2007) E.A. 133**. The appellant also relied on **Section 197** and **198** of the **Criminal Procedure Code** which demonstrates that interpretation for an accused person into a language that he fully understood is required.

18. In response the State submits that nowhere in the proceedings did the appellant raise or address the trial Court on the issue that he did not understand the proceedings or the language used in the proceedings. That his failure to raise the same is a confirmation that he perfectly understood the proceedings. That if he did not understand the proceedings he could have raised the issue with the trial court. This he never did.

19. **Article 50 (2) (m)** of the **Constitution** provides:

> ***"Every accused person has the right to a fair trial which includes the right (m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial."***

The appellant took plea in Kiswahili which he confirms he understands. The appellant is not candid when he submits that he only understands Kiswahili. The record, at page 20 shows that the appellant gave his defence in Kikuyu. He stated that he knew why he was in

Court and gave his defence and denied that he committed the offence. This shows that he understood the proceedings. The record from page 17 shows that though the language is not indicated the appellant understood the proceedings. After Section 211 Criminal Procedure code was complied with he indicated that he would give unsworn statement and call no witness.

At page 18 the appellant responded to an application for adjournment. There is every indication that the appellant followed the proceedings despite the fact that the Court did not indicate the language.

20. From the record, P.W. 1 gave evidence in Kiswahili and it is presumed that she used the same language after she was stepped down. P.W. 2 gave evidence in Kiswahili. The appellant understood the language. P.W. 3 gave evidence in Kikuyu. The fact that appellant gave defence in Kikuyu leads to the conclusion that he understood the language. P.W. 4 testified in English. The appellant never complained to the trial Court that he could not understand his evidence due to language barrier. There was an interpreter in Court and he must have interpreted the proceedings. For P.W. 5 it was not indicated which language he used but the appellant cross-examined him at the end of his testimony. P.W.6 testified in Kiswahili while P.W. 7 testified in English.

21. Under **Article 50** of the **Constitution**, the appellant had to draw the attention of the Court to the fact that he did not understand the language used so that the Court could avail him an interpreter. He is raising the complaint too late in the day. It would be a different situation if he had informed the trial magistrate that he did not follow the proceedings and no interpreter was availed.

22. It may not be concluded that because he did not cross-examine the witnesses he did not follow the proceedings. This is because even those who testified in Kiswahili and Kikuyu were not cross-examined. The submission is false. Though the Court made a mistake by not indicating the language, the fact that the appellant participated in the proceedings and cross-examined some witness leads me to the conclusion that the appellant understood the proceedings. The High Court when dealing with this issue in the case of **Munyasia Mutisya -V- Republic 2015 eKLR** duty J in a persuasive decision stated:

> ***"The subsequent hearing date do not have any indication of the language used wither by the court or by the witnesses.***
>
> ***That was a mistake. The court should have indicated the language used by the court and the witnesses and translation if any. I however, note that the appellant participated fully in the trial by cross examining witnesses. He cross-examined P.W. 1. He cross-examined P.W.2. He cross examined P.W. 4, 5, 7, 8 and 9. In my view therefore he understood the proceedings and the language used. In my view if the appellant had not understood the language used he would not have cross examined the witnesses. He would also have raised the issue of him not being able to cross examine witnesses. There is no record that he complained. He also does not allege on appeal that he raised the issue and the court ignored it. The appellant also gave a clear sworn defence and he was cross examined and answered the questions. That in my view in totality shows that the appellant understood the proceedings and the language used in court."***

I am persuaded by this decision. It should also be noted that a party may indicate a language which he prefers to use in Court but that does not mean he does not understand other languages. Under **Article 50 (Supra)** the Court is obligated to ask for an interpreter if the accused states that he does not understand the language or the trial magistrate realizes that the appellant does not understand the language. There is nothing on record to show that the appellant did not understand the language.

23. The proceedings show that it was not recorded whether there was interpretation. However there was a Court clerk. There is every indication that the appellant understood the language, followed the proceedings and gave a defence to the evidence tendered. He is taking advantage of the mistake by Court not indicating the language. But the law catches up with him as he never complained before the trial court that he could not follow the proceedings.

24. The second ground is that the trial magistrate admitted unsworn evidence. The appellant submits that P.W.1 who was a key witness gave unsworn evidence which the Court used to convict him. The P.W. 1 was a minor aged 14 years. A '*voire dire'* examination was conducted on her and the Court found that she did not understand the meaning of Oath. She directed that the witness gives unsworn evidence. **Section 19** of the **Oaths and Statutory Declarations Act Cap. 15 Laws of Kenya** provides:

> ***"Where in any proceedings before any court or person having by law or consent of the parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court, or such person as aforesaid, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such other person as aforesaid, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that section."***

The Court was supposed to satisfy itself that the witness had sufficient intelligence to justify the reception of her evidence and understands the need to tell the truth. The trial Magistrate found that the minor did not understand the meaning of the Oath but would be able to give unsworn evidence. The trial Magistrate directed herself properly as required under **Section 19** of the **Oaths and Statutory Declarations Act** (supra). The unsworn evidence by the minor is admissible. The appellant was not precluded from cross-examining the witness. Indeed he was given the opportunity to cross-examine P.W.1 and the record shows that he did cross examine P.W.1. In the case of **J.M.J. v Republic [2014] EKLR** the Court in dealing with a similar issue held:

> ***"It is apparent from this provision of the law [Section 19 of the Oaths and Statutory Declarations Act, Chapter 15, Laws of Kenya] that while evidence of a child of tender years may be received though not on oath, the court must satisfy itself that first, the child is possessed of sufficient intelligence to justify the reception of the evidence and second, that he understands the duty of speaking the truth."***

In this case, the Court satisfied itself that P.W. 1 was possessed of sufficient intelligence but she did not understand the meaning of oath therefore she gave unsworn evidence.

25. Lastly the appellant submits that he was not accorded a fair trial as guaranteed under **Article 50 (2) (c) (g) (h)** of the **Constitution**. He submits that the Court ought to have informed him of his right to legal representation. **Article 50 (2) (c) (g) (h)** (**Supra**) provides:

> ***"Every accused person has the right to fair trial which includes the right :-***
>
> ***(c) to have adequate time and facilities to prepare a defence.***
>
> ***(g) to choose, and be represented by an advocate and to be informed of this right promptly.***
>
> ***(h) to have an advocate assigned to the accused person by the State and at state expense if substantial injustice would otherwise result and to be informed of this right promptly."***

The appellant was given enough time and facility to prepare his defence. He contends that he was not informed of his right to legal representation. The provision states that accused has the right to choose and to be represented by an advocate. The appellant never chose to be represented by an advocate. The appellant was not in any way hindered or prevented from enjoying the right to be represented by an advocate. The right was not denied.

26. In my view the wording of the article shows that the first step is for an accused person to choose to be represented where upon the Court would promptly inform him of the right to legal representation. The appellant never chose to be represented by a counsel. As such his right to legal representation was not violated. The appellant was charged with the offence of defilement. The appellant never brought to the attention of the Court that substantial injustice would occur. The Court had to be moved to order an advocate to be assigned. By looking at the offence charged the trial Court would not tell that a substantial injustice would otherwise occur. In the case of **Joseph Ndungu Kagiri V Republic [2016] eKLR** the Court stated:

> ***"A reading to the provisions of the constitution on the right to legal representation at the expense of the state is not automatic but qualified. In other words an accused person must prove that unless he or she is assigned an advocate by the State, substantial injustice would occur. The Constitution does not give the meaning of "substantial injustice." Similarly, it fails to enumerate circumstances under which an accused person is entitled to a state funded counsel. In order to define what substantial injustice is the courts have suggested some factors whose presence in a given circumstance may make one conclude that substantive injustice would occur should the trial proceed with the accused being unrepresented.***
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> ***In Dominic Kamau Macharia vs R the court explained that substantive injustice would occur in cases such as where there are complex issues of law or fact, where the accused is unable to conduct his own defence, or where public interest requires that representation be provided. Substantial injustice may be said to be subject to three tests, first, the complexity of the case. This is discernible from the issues of fact and law which may not be comprehended by the accused. The second test relates to the seriousness or nature of the offence in question. A serious offence may attract public interest to the extent that the public may require that some form of representation to be accorded to the accused owing to the nature of the offence. The third and final test relates to the ability of the accused person to conduct his own defence. Language difficulties experienced during the trial may be a perfect indicator of an accused person's inability to conduct a defence.***

In this case, the appellant herein has not satisfied any of the tests stated above to demonstrate that substantial injustice was occasioned to him due to the fact that he was unrepresented.

27. The fourth ground is on the age of the minor. The appellant submits that the age of the minor was not proved. The minor stated that she is 14 years old. Her aunt P.W. 2 and her father P.W. 3 testified that the complainant was aged 14 years. The clinical officer P.W. 4 who examined P.W. 1 testified that the minor was aged fourteen (14) years. The age assessment report exhibit 4 indicates that she was 14 years and further that she was under eighteen.

28. Proof of the age of the victim in sexual offences is very crucial as age is a determining factor on the sentence to be meted. The prosecution discharged the burden of proof on the age of the complainant.

29. In the case of **Fred Omar Omondo V Republic [2014] eKLR** the court in dealing with the issue of proof of age stated:

> ***"In the case of JOSEPH KIETI SEET -VS- REPUBLIC [2014], H.C. AT MACHAKOS, CRIMINAL APPEAL NO. 91 OF 2011, the learned Mutende, J., held as follows:***
>
> ***"It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omuroni –Versus- Uganda, Court of Appeal Criminal Appeal No. 2 of 2000. It was held thus:***
>
> ***"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense……."***
>
> ***The foregoing holdings are applicable in the instant case in various ways. At the trial P.W.2, the complainant herein stated that***

she was 12 years old. Both P.W.3 and P.W. 4 who were the complainant's biological parents stated that the complainant was aged 12. On the other hand the charge sheet indicated that the complainant was aged 12 as well as the P3 form that was produced in court as P. Exhibit 1.

Furthermore, the trial court which had the opportunity of seeing P.W. 2 did not doubt her age."

In this case, P.W.1, P.W. 3 who was her father and P.W. 4 the clinical officer all confirmed that P.W.1 was aged 14 years old. Even the trial court that had an opportunity of seeing the witness did not doubt her age and there is no reason for the appellate court to doubt.

30. I am of the view that the prosecution proved that the complainant was aged 14. The evidence by her father P.W. 3 and the testimony of the clinical officer was sufficient to prove the age of the complainant. The prosecution is under an obligation to prove the age of the complainant. It is not only a birth certificate which can prove age. The testimony of a parent who knows when the minor was born coupled with the age assessment by a doctor and the clinical officer afford adequate proof of the age of the minor. It is as a result of this evidence that the appellant was charge under **Section 8 (3)** of the **Sexual Offences Act**.

31. Did the prosecution prove its case beyond any reasonable doubts. My view is that the evidence adduced by the prosecution was cogent and overwhelming. It left no doubt on the mind of the court that the appellant is the one who committed this offence. The charge was proved to the required standards. The appeal is without merits. I dismiss it.

Dated and delivered at Kerugoya this 21st day of December, 2017.

L. W. GITARI

JUDGE

Ruling is read out. Appellant present, Mr. Sitati State Counsel, court assistant Naomi Murage this 21st day of December, 2017.

L. W. GITARI

JUDGE

21.12.2017