REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 6 OF 2015

JOSEPH MAINA alias MUHONI……APPELLANT

-Versus-

REPUBLIC ……RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 434 of 2014 in the Senior Principal Magistrate's Court at Kajiado before Hon. E. Mbicha (RM) dated 9.4.2014)

JUDGEMENT

This is an appeal against the judgement of the magistrate court sitting in Kajiado on 9th April, 2014 wherein the learned trial magistrate convicted and sentenced the appellant to life imprisonment for the offence of defilement.

The appellant had been charged as follows:

COUNT I

Defilement contrary to section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006.

PARTICULARS OF THE OFFENCE

Joseph Maina Gema alias Muhuni: Between 28th day of September, 2012 and 19th June 2013 in Kajido District within Kajiado County intentionally and unlawfully caused his genital organ – penis to penetrate genital organ (vagina) of F.N.C a girl aged 6 years.

COUNT II

Indecent act with a child contrary to Section 11 as read with Section 11(1) of the Sexual Offences Act No.3 of 2006.

PARTICULARS OF THE OFFENCE

Joseph Maina Gema alias Muhuni: Between the 28th day of September 2012 and 19th day of June 2013 Majengo Estate in Kajiado County, intentionally and unlawfully caused his genital organ (penis) to come into contact with the genital organ/vagina of F.N a girl aged 6 years.

At the trial, the appellant denied both charges and pleaded not guilty to the same. The prosecution called seven witnesses in support of their case. The appellant testified in his defence and gave unsworn

testimony and called no witness.

At the conclusion of the trial, the case against the appellant was considered by the learned trial magistrate who convicted and sentenced him to life imprisonment.

MEMORANDUM OF APPEAL

The appellant not satisfied with the judgement handed down by the learned trial magistrate appealed to this court. The notice of appeal was filed on 12.6.2014 together with the memorandum of appeal which contained the following grounds:

1. ***That the learned trial magistrate erred in law and fact by relying on evidence which was contradictory in breach of Section 163 of the Evidence Act.***
2. ***That the learned trial magistrate erred in both law and fact by failing to observe that the provisions of Section 137(d) Criminal Procedure Code.***
3. ***That the learned trial magistrate erred in law and fact by ignoring the provisions of Section 169 and 211 of the Criminal Procedure Code.***
4. ***That the learned trial magistrate erred in law and face by failing to observe the provisions of Section 124, 125 and 129 of the Evidence Act.***
5. ***That the learned trial magistrate erred in law and fact by failing to make a finding that the case was not proved beyond reasonable doubt.***
6. ***That the learned trial magistrate erred in law and fact by flouting the provisions of Section 329 of the Criminal Procedure Code.***

DUTY OF THE FIRST APPELLATE COURT

This being the first appellate court it is mandated to look on the evidence adduced at the trial court afresh, re-evaluate and re-assess it and reach its own conclusion. See **NJOROGE Vs. REPUBLIC KLR 19**. I therefore wish to consider and evaluate evidence afresh that was adduced before the trial court.

EVIDENCE ADDUCED AT THE TRIAL COURT

PW1 F.N.C. a girl aged 6 years testified that she knew appellant who lived in their plot. She testified that in the year 2012 while playing outside their plot with her friend L.M. PW2, appellant called her to his court. She decided to leave her friend PW2 outside playing and entered appellant's house. It was while inside appellant's house that appellant removed her underwear and put his finger into her vagina. This act occasioned pain but appellant ordered her to go back but with threats not to tell anybody.

She further testified that in the month of August same year while playing outside their plot with PW2 appellant called her to his house. The appellant again according to her testimony placed her on his thighs, put his finger on her vagina and also his penis. When he finished she testified that appellant put some dirt inside the private parts. She further claimed in her testimony that appellant threatened to cut her and throw her in a cemetery.

On another occasion she further told the trial court that appellant called her, in his house placed her on the bed, removed the underpants and put his penis on the vagina and later poured his dirt on her. After finishing she cleaned the dirt with her pants and went outside to play. She summed the number of times to ten which appellant had sexual intercourse with her. It was at this point when she experienced some discharge from her private parts. She reported to a pastor's wife.

PW2 L.M. A friend to PW1 herself aged 6 years. She testified that while playing outside with (PW1) appellant called PW1 into his house. She claimed that door was not closed, when she saw appellant remove his penis and put it between (PW1) legs. She was later to be escorted by PW4 mother to PW1 to explain what she had seen on that particular day.

PW3 was **LOISE MBAIRE NJOROGE**: She testified that the mother of PW1 used to purchase

medicine from her chemist to treat (PW1) condition. In the month of June it was her testimony that PW4 informed her that (PW1) condition was getting worse which required that they seek further medical intervention at Kajiado District Hospital. She further testified that being a chemist who dispensed medicine to her for sometimes, she decided to conduct a physical examination. According to her the private parts of PW1 were in bad condition. It was then she advised that PW4 seeks specialized medical attention.

PW4 was **D.W**: She testified that PW1 F.N. was her daughter who was born on 20th July 2007. She was in possession of her birth certificate. She testified that on 28.9.2012 she took (PW1) to the hospital when she diagnosed of discharge from her private parts. There was medication prescribed for her which she dispensed and administered but the condition did not improve. It was in her testimony that she was referred to Kajiado District Hospital for better management. On examination at Kajiado District Hospital, according to her evidence medical report confirmed an infection.

On 18.6.2013 when she passed through (PW1) had alleged that appellant does insert his penis to her vagina. This made her to proceed to Nairobi Women Hospital where on examination (PW1) was formed to have lost her virginity. This was according to the examination and report by Dr. Daniel Ngugi (PW6) who testified on behalf of the Maureen Muola of the same hospital. He testified that on examination of the genitelia of PW1 revealed that recurrent vaginal discharge, and her hymen had been penetrated. The medical report was produced exhibit 2.

PW5 DR. MAUREEN W. WAHINYA examined (PW1) on 21.6.2013. she found on the physical state of the genitelia that PW1 had a perforated hymen and whitish/yellow discharge. He estimated the age of the injuries to be five months. He produced the p3 form as exhibit 1.

PW7 NO. 53610 P.C. LUCY OKUMU was a police officer at Kajiado police station who received PW4 report about the alleged defilement of (PW1). She commenced investigations by recording statements and issuing p3 form from which was duly filled by PW5 at Kajiado District Hospital. On receipt of the medical report which showed that (PW1) had been defiled she charged the appellant accordingly.

The appellant was placed in his defence. He gave unsworn statement and denied having committed the offences of defilement and indecent act against the complainant.

The learned trial magistrate after analyzing the evidence said interalia:

> ***"This has been a material and realizable corroboration. The accused defence does not sufficiently ware down or rebuilt the plaintiff's case. I do hold that the prosecution case has been watertight and beyond any iota whatsoever of reasonable doubt. I have no hesitation whatsoever in convicting the accused on the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2000."***

HEARING ON APPEAL

The appellant relied on the grounds of appeal and challenged both the conviction and sentence. In his view this was a fabrication by the mother of the complainant. The basis of the disagreement in his argument being disagreement and dispute for non-payment of three months' rent. When he moved from the area police pursued him after one month and an offence of defilement preferred against him.

In reply to the appeal and submissions, the learned Senior Prosecution Counsel opposed the appeal and submitted as follows:

That the 7 witnesses called by the prosecution established the ingredients of the offence of defilement beyond reasonable doubt. He took the court through the evidence analysis to highlight nature of evidence adduced to prove each element of the offence. He further submitted on the provisions of the law appellant raised to buttress his appeal.

This was in respect to Section 163 and Section 124 of the Evidence Act Cap 80 of the Laws of Kenya. On Section 163, learned prosecution counsel submitted that the evidence of (PW1) who gave a sworn testimony was not impeached. It was also consistent with the testimony of other witnesses.

As regards Section 137 of the Criminal Procedure Code. He submitted that there no a time a plea bargaining agreement was reached between the parties. In any event he challenged and contended that no such agreement would be reached to compound and compromise sexual offences cases involving children.

On Section 124 of Cap 80 he submitted that the trial court admitted a voire dire and was satisfied that PW1 and PW2 understood the oath and duty to tell the truth. The two witnesses were therefore competent to testify in a criminal proceedings. He urged the court to confirm the conviction and sentence of the trial court as the case by the prosecution was proved beyond reasonable doubt.

ANALYSIS AND RESOLUTION

I intend to determine this appeal based on the law and the grounds of appeal formulated by the appellant. After all it is his appeal. I need to address my mind to which the prosecution has to prove in order to sustain a charge of defilement and according to Section 8(1) of the Sexual Offences Act No. 3 of 2006.

These are:

1. ***There was penetrative sexual intercourse of a female.***
2. ***That the female was a minor whose age must be established.***
3. ***That it was the accused/appellant who had sexual intercourse with the female minor.***

Arguing on the offence, the appellant denied it in totality and blamed it on a fabrication by mother of the complainant due to a rent payment dispute. What the appellant is asking this court to determine is whether the prosecution proved the offence of defilement beyond reasonable doubt.

For this the appellant submitted that the prosecution failed to prove evidence of corroboration before the appellant was convicted. According to him, the piece of evidence relied upon by the trial court was not the type to corroborate the evidence of the prosecution.

He cited Section 124 and Section 125 of the Evidence Act. Section 124 provides for corroboration as a requirement in criminal cases. This section also flags the provisions of Section 19 of Cap 15 of the Laws of Kenya dealing with Oaths and Statutory Declarations particularly on receiving of evidence of children.

Under Section 19 of Cap 15 of the Laws of Kenya where the trial court is dealing with children of tender years as witnesses; it must confirm and be satisfied with the following:

1. ***Whether the child understands the nature of an oath or***
2. ***If the child, in the opinion of the court does not understand the nature of oath, whether the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth***.

It follows therefore that the trial magistrate is under a duty to conduct an inquiry whether the child understands nature of the oath. In the event there is doubt, then the trial court is mandated to determine if he possesses sufficient evidence to justify receipt of the evidence and that the child understands the duty of telling the truth.

In 2003 an amendment was occasioned to Section 124 creating a provision to omit requirement for corroboration of evidence of a child of tender years. It states as follows:

> ***"Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is alleged victim of the offence, the court shall receive the***

evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth."

In the instant case there were two children called as witnesses by the prosecution (PW1) and PW2. The court conducted a voire dire which discerned from the record as follows:

"My name is F.N.C I am six (6) years. I go to school at [particulars withheld] Primary School. I am in Class One. I go to church. I can't remember the name of the church. We are taught about God in church and school. We are told that God is in heaven and the devil is found in hell. We are told in church to speak the truth. Telling lies is bad. Anyone who says lies will be burnt in hell. I will speak the truth. I will say the truth when I carry the bible."

PW2 voire dire in contention reads as follows:

"My name is L.M. I am six (6) years. I go to school at [particulars withheld]Academy. I am in top class. I go to church at A.I.C. township. I go to Sunday School. In church we are told to speak the truth if you speak the truth you go to heaven. If you lie you go to hell. I do not know why people take oath."

In the first voire dire of (PW1) the trial court concluded that the child understands the importance of oath and can give evidence on oath. From the requirement of the law the trial magistrate did establish that the child understands nature of an oath and duty of telling the truth.

This is in contradiction with the second voire dire for PW2. From the requirement of the law I am satisfied that the voire dire was defective. The trial magistrate did not establish that the said child witness understands the nature of an oath and the duty of telling the truth. There is no evidence that the trial magistrate satisfied himself that the child was possessed of sufficient intelligence to justify the reception of his evidence and that he understands the duty of speaking the truth.

Besides the voire dire for PW2 being defective, the record by the trial magistrate raises that disturbing legal omission. The trial magistrate made an order to receive the unsworn testimony of PW2 but failed to comply with Section 208 (2) and (3) of the Criminal Procedure Code.

Section 2 states: as

"The accused person or his advocate may put questions to each witness produced against him."

Section 3

"If the accused person does not employ an advocate, the court shall, at the close of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any questions to that witness and shall record his answer."

The trial magistrate in the matter appears to have taken the view that any witness who gives unsworn evidence is not subjected to cross-examination. The right to challenge evidence adduced against an accused is one of the tents of a right to fair trial provided for under Article 50 of the Constitution.

There was no indication that the prosecutor was aware of the provisions of Section 208 (3) Criminal Procedure. He should have brought it to the attention of the trial court. I am of the conceded view that the evidence of PW2 has no probative value. The same is therefore declared worthless. The trial magistrate did not comply with Section 208 (3) of C.P.C on accused testing the evidence of PW1 by way of cross examination.

The question for this court's consideration is whether the conviction could still stand on the other

evidence on record. On first ingredient of penetration, I have analysed the evidence of PW1, the complainant. There is sufficient proof that appellant stayed in the same plot. She stated that and evidence on record shows that complainant had been to the appellant's house approximately ten times on diverse dates. The appellant in all those instances pushed his finger and or his penis into her vagina. She suffered pain from acts of defilement by the appellant. The appellant according to PW1 could even go ahead and insert some dirt in her private parts, after withdrawing from pushing his penis.

This eventually occasioned an infection to the private parts in the form of whitish/yellowish discharge per her testimony which was corroborated by testimony of PW3 and PW4. PW3 and PW4 told the court that they physically saw the discharge, when they pay a call and observed PW1.

PW1's private parts were examined by Dr. Maureen Wahinya of Kajiado District Hospital and Dr. Maureen Muola of Nairobi Women Hospital whose reports were relied by court. The medical reports from PW5 and PW6 confirmed that PW1 had been defiled. The age of sexual assault assessed at least five months according to the medical findings. Due to the sexual assault her hymen was perforated.

In my view there is sufficient evidence to show that the act of penetration occurred against the complainant. The defence herein by way of unsworn testimony did not dislodge prosecution case on this element. I agree with the prosecution counsel that evidence adduced proved penetration of the minor. This ground therefore fails.

Secondly, PW2 tendered evidence that she was born on 2.11.2007. She produced a birth certificate that shows her age to be six (6) years. That evidence was not challenged by the appellant. See the case of **HILARY NYONGESA Vs. REPUBLIC** where **MWILU J**. as she then was stated interalia: as

> ***"Age is such a critical aspect in sexual offences that it has to be conclusively proved***
>
> ***…… And this because more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim."***

On the basis of the birth certificate I am satisfied that the learned trial magistrate came to the right conclusion on the age of the complainant.

Thirdly, the other point of contention is whether it was indeed the appellant who subjected the complainant to the unlawful sexual intercourse. PW1 F.C. testified that she was subjected to sexual intercourse severally on diverse dates. During her testimony she could count the number of occasions she was defiled by appellant who stayed in the same plot lured and enticed her to his house. According to her testimony the house was in the same plot. He placed her on his thighs sometimes he could do it while complainant was standing. In all these material days the appellant either put his penis to her vagina or tried with his finger.

The acts by appellant are consistence with the definition of penetration as defined under Sexual Offences Act.

> ***'Thus penetration means partial or complete insertion of the genital organ of a person into the genital organs of another person.'***

The complainant knew the appellant well. Her evidence is consistent with the chronology events that transpired between her and appellant. The complainant (PW1) finally confided her ordeal in the hands of appellant to the pastor's wife PW3. PW3 further stated that she informed PW4 mother to the complainant. The mother PW4 in her testimony took up the matter with the police.

When the appellant was arrested and charged he denied the evidence of the complainant places him directly at the scene. There is evidence that he had the opportunity to commit the offence and concealing it from other numbers of the neighbourhood. He was one of the tenants within the plot. Indeed medical evidence confirmed the truthfulness of her statement. The sworn evidence of the complainant was

accepted by the trial magistrate as truthful and reliable.

The appellant defence that he knew nothing of the charge is neither here nor there. The appellant had lived in the same plot for all those years the victim was defiled. He was therefore positively recognized as the assailant. The acts of defilement used to happen during broad daylight. In a nutshell the conviction of the appellant was based on sound and overwhelming evidence.

I uphold the conviction of the learned trial magistrate that the prosecution had proved beyond reasonable doubt that it was indeed the appellant who defiled the victim.

In this appeal the appellant raised the ground of non-compliance with Section 169 of the Criminal Procedure Code. Section 169 deals with contents of the judgement. It provides that the judgement should be written under the direction of the presiding officer in a language of the court and shall contains points of determination and decision thereon.

I have perused the judgement by the learned trial magistrate. It has been written in English language. The analysis of evidence and points of determination are contained between page 6, 7 and 8. The decision reached

Falls under the relevant Section (2) of the Sexual Offences Act. The trial magistrate complied with the provisions of Section 169 of C.P.C. There was no irregularity as argued by the appellant. This ground fails.

Concerning Section 163 of the evidence Act the appellant submitted that the trial magistrate erred in law when he acted on evidence presented by incompetent witnesses. In the present appeal the learned trial magistrate conducted a voire dire examination of PW1. PW1 identified appellant as one who defiled her. PW1 knew the appellant prior to the incident. The testimony on recognition was supported by PW4. They knew his name and stayed the same plot with them. In evidence of PW1 who was defiled was corroborated with that of PW3, PW4 and also medical reports by PW5 and PW6. The trial magistrate convicted the appellant on the strength of the prosecution case. There are no irregularities or contradictions in the evidence. Pointed out which could have caused a miscarriage of justice. This ground under Section 163 of the Evidence Act also fails.

Further the appellant contended that the trial magistrate flouted Section 137(d) of the Criminal Procedure Code. Section 137(d) refers to the description or designation of accused persons in a charge or information ad requires it to be as clear as reasonably practicable in the circumstances.

In the instant case the charge sheet shows the appellant name is properly indicated. There is no dispute as to the identity of the person referred to in the charge sheet. This court was not told the nature of the violation envisaged by the appellant. This ground also lacks merit.

Finally in the case before me the appellant was sentenced to life imprisonment. Sentencing is a discretionary matter for the trial magistrate. The appellate court would not interfere with the sentence unless it is shown that it is based on wrong principles, or manifestly excessive or harsh to induce a sentence of shock; and or there are exceptional circumstances which would render justice if the sentence was not reduced. That only if one or the other of these questions can be answered in the affirmative should the appellate court interfere with the sentence. In the case of **REPUBLIC Vs. BULL CR. APPEAL 164.** There is a further guiding principle stated as follows:

> ***"In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it."***

In my view I must point out that defilement is a very serious offence which calls for appropriate custodial sentence to mark the gravity of the offence, emphasize public disapproval and serve as warning to the would be offenders; to punish the perpetrators and above all to protect young and vulnerable girls of this

country. I believe that is the basis which gave rise to the amendment of the law by our legislature to provide for minimum sentences for sexual offences under Sexual Offences Act No. 3 of 2006.

The appellant was charged and convicted of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. Section 8(2) prescribes the appropriate sentence for a conviction under Section 8(1).

The trial magistrate imposed a sentence of life imprisonment. There is no justification in interfering with the findings and order on sentence by the trial court.

DECISION

I hereby confirm the sentence to imprisonment for life. The appeal is therefore unmeritorious on both conviction and sentence. The judgement of the lower court delivered on 9/4/2013 is hereby affirmed.

Dated, delivered, singed at Kajiado this 18th day of January, 2016.

R. NYAKUNDI

JUDGE

Representation

Appellant

Mateli, court clerk

Ms. Wairimu Prosecution Counsel for the DPP Present

Right of appeal explained to the accused/appellant.