REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 50 OF 2013

JAMES MAINA KARANI…….APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence of the Senior Principal Magistrate's Court (S. N. Ndegwa) at Kerugoya, Criminal Case No. 33 of 2012 dated 7th June, 2012)

JUDGMENT

1. **JAMES MAINA KARANI,** the appellant herein was charged before Kerugoya Senior Principal Magistrate's Court Criminal Case No. 33 of 2012 with two counts of offences namely:

i. **Defilement of a girl contrary to Section 8(1) of the Sexual Offences Act No. 3 of 2006.**
ii. **Subjecting a child to early marriage contrary to Section 14 as read with Section 20 of the Children's Act No. 8 of 2001.**

The particulars in count 1 is that on diverse dates between the month of August 2011 and January 2012 at ***[particulars withheld]*** Village within Kirinyaga county defiled **H M S** a girl aged 10 years, while the particulars of count II were that in the same place and within the same period, he unlawfully subjected the same child to early marriage.

2. The appellant denied both counts and the case was heard upon which the appellant was found guilty in both counts and sentenced to serve life imprisonment in the first count and 12 months in the second count with both sentences ordered to run concurrently. The appellant was dissatisfied with both conviction and sentence and preferred this appeal raising initially 5 grounds and later raising additional 7 grounds with leave from this court. The grounds listed in the petition of appeal were as follows:

i. ***That he pleaded not guilty.***
ii. ***That the learned magistrate erred in law and in fact by not considering appellant's hearing impairment.***
iii. ***That the learned magistrate erred in law and fact by failing to consider that the prosecution failed avail the complainant's parents in court.***
iv. ***That the learned trial magistrate erred in law and facts by relying on a single evidence delivered by a medical officer that the child had been defiled yet not giving sufficient evidence to show that the child had been defiled beyond reasonable doubt.***
v. ***That the learned trial magistrate erred in law and fact by relying on evidence delivered by the medical officer which evidence was not conclusive.***
vi. ***That the learned trial magistrate erred in law and fact in making judgment against the weight of***

evidence.

vii. ***That the learned magistrate erred in law and fact in not recording the language in which the proceedings were conducted.***

viii. ***That the learned trial magistrate erred in law and fact in conducting the proceedings in a language that the appellant was not conversant with.***

ix. ***That the learned trial magistrate erred by failing to find that the age of the complainant was not proved beyond reasonable doubt.***

x. ***That the learned trial magistrate erred in law and fact in failing to consider the defence available to the appellant under Section 8(5) of the Sexual Offences Act No. 3 of 2006.***

xi. ***That the learned trial magistrate erred by failing to consider defence.***

xii. ***That the learned trial magistrate erred in law by meting out maximum sentences in both counts.***

3. This appeal was canvassed through written submissions by both parties. The appellant made his written submissions through his learned counsel M/S Magee Wa Magee Advocates who ably made comprehensive submissions supported by cited authorities.
4. The appellant's counsel has faulted the trial court for failure to record the language in which the proceedings against the appellant were conducted which is the 2nd ground in his supplementary petition of appeal. He pointed the instances where the language used was not indicated. These are given as 26th January, 2012, 1st February, 2012, 2nd February 2012,, 9th February, 2012, 16th February, 2012, 1st march, 2012, 15th march, 2012, 27th March, 2012, 10th April, 2012, 17th April, 2012, 30th April, 2012, 14th May, 2012 and 7th June, 2012
5. The appellant in addition to the above has also contended that the proceedings were conducted in a language that the appellant was not conversant with and added that he has had a hearing impairment which made him unable to follow proceedings well. Citing **Sections 198(1)** of the **Criminal Procedure Code** and **Article 50(2)** of the **Constitution** the appellant argued that the trial court had a duty to interprete the court language to the appellant as he had the right to have the assistance of an interpreter. He conceded that though part of the proceedings were conducted in Kiswahili which he understood the instances pointed above were conducted in English which the appellant did not understand. He pointed out that the criminal evidence given by P.W.2, a clinical officer, P.W.4 and P.W.5 were done in English which really prejudiced him.
6. In his contention, Section 211 of the Criminal Procedure Code was not properly complied with since the language used to explain to him the options he had to defend himself was not explained to him in a language he understood. It was submitted that the conviction of the appellant based on the above anomalies rendered the same unsafe. The following authorities were cited in support of that position namely:

1. **<u>Antoine Ernesta –Vs- R [1962] 1 E.A. 505 CAN – An authority from Court of Appeal.</u>**
2. **<u>Samuel Githua Ngari and Ngari –Vs- Republic [2014] eKLR (High Court).</u>**

7. The appellant has also argued that the age of the complainant was not established beyond reasonable doubt. He argued that he was charged under **Section 8(1)** and **(2)** of the **Sexual Offences Act** which deals with defilement of minors aged 11 years or less and that although the charge sheet gave the particulars of the age of the complainant as 10 years old, the evidence tendered in court in his view was not conclusive as the medical officer (P.W.2) who testified on the question of age did not tell the court about his qualification or expertise on age assessment, knowledge or expertise. He pointed out that the age assessment report produced just showed that the minor was aged below 18 years but was not precise.
8. This Court has looked at these grounds in the petition and considers that the determination of the 2 grounds above will dispose of this appeal.
9. The respondent did brief written submissions on the main ground of the appeal which is on the question of language used in the proceedings or trial. The State has submitted that the language used was English and Kiswahili and that the appellant fully participated by cross-examining the witnesses who testified. It is contended that the fact that the appellant did not cross-examine P.W.2 and P.W.4 should not be attributed to the fact that the appellant did not understand the language used.
10. The respondent further defended the trial court against the accusation that it did not quite explain

to the appellant person the implication of the ruling of a case to answer in a language the appellant understood. It was argued on behalf of the state that the appellant understood it well that is why he opted to give unsworn statement in defence.

11. On the question of language used during trial of the appellant, it is true that one of the important aspects of a fair trial is making sure that an accused person is conversant with the language used in court and that is why as correctly pointed out by the appellant's counsel **Section 198** of the **Criminal Procedure Code** and **Article 50 (2) m** of the **Constitution** requires that interpretation must be accorded to an accused in a language he/she is conversant with. This is a constitutional right of an accused person and must be protected for the interest of attaining a fair trial. The appellant has contended that the proceedings during his trial were conducted in English and pointed out the instances aforesaid that he argued that there was no indication by the trial court that interpretation was done. I have looked at all the instances cited and noted that the trial court failed to indicate whether interpretation was carried out to the appellant. I find that in some instances like on 2nd February, 2012, 16th February, 2012 and 27th March, 2012, the appellant as the respondent contended participated in the proceedings notwithstanding that the trial court did not indicate on its records that interpretation was carried out. This I agree could well mean that interpretation was most probably done but inadvertently the trial magistrate did not indicate on record that interpretation was actually done from English to Kiswahili which was the language the accused indicated at the plea stage that he clearly understood. The appellant could as well be taking advantage of that loophole to get away or avoid the course of justice. However, I am persuaded by the appellant's submissions that conviction of the appellant could not have been safe if it is based on assumptions. I fully agree with the cited decision in **Samuel Githua Ngari and Anor –Vs- R [2014]** where Hon. Justice Githua made the following observations while quoting with approval the Court of Appeal decision in **DIBA WAKO KIYOTO –VS- R (1986) KLR 48;**

> ***"It is a fundamental right of an accused charged with a criminal offence to have the assistance of an interpreter through whom the proceedings shall be interpreted to him in a language which he understands……."***

I agree that it was imperative for the trial court to demonstrate through the court record that either the proceedings were conducted in a language the accused indicated he understood or that it was interpreted to the language he understood. It is therefore apparent that failure by a trial court to do so rendered the trial unfair and unconstitutional to the appellant. This is the position taken by the cited decisions from Court of Appeal in **Benard Wachira Kamonye -Vs- Republic [1989] KLR 456.**

12. In the light of the above, I find that the omission by the trial court to indicate in the proceedings during the trial of the appellant for the serious offence he was facing rendered the trial of the appellant unfair. The conviction was not safe and given the serious nature of the offence facing the appellant the trial court ought to have exercised better caution and clearly indicated in the proceedings the language used and whether interpretation was done in order to satisfy the demands of the law that the appellant was subjected to a fair trial.
13. I find it important to consider the age factor of the complainant and sentiments expressed in this appeal. This Court finds that an age of a minor or a victim in sexual offences cases is crucial especially given the fact that the law prescribes different sentences depending on the age of the victim. It is imperative therefore for the prosecution or the trial court to ensure that the issue of age is really established for the interest of justice. And justice is two way here because it applies equally to both an accused and the victim. It is not necessary in my considered view to produce a birth certificate to establish an age of a victim. A medical report including a P3 will do. I find in this instance that the P3 tendered in court as Exhibit 1 clearly indicated that the minor was aged 10 years as per the particulars given in the charge sheet. However I find that the medical officer called to testify did not do justice to the victim as he introduced a document (Exhibit 2) which really introduced an element of doubt unnecessarily. This is because he assessed the age of the minor as below 18 years and to make the matter doubtful the prosecution omitted to lead him into tendering evidence regarding his qualifications or his expertise in age assessment to cement or give due weight to his evidence. I find that the omission had the undesired effect of creating a

doubt on the age of the complainant where none existed because given the observations made by the trial learned magistrate in her judgment, I have no doubt that she had reason to believe that the minor was aged 10 years old.

In the light of the foregoing, I will allow this appeal, set aside both conviction and sentences on both counts. I have carefully considered the case in totality of the evidence tendered and especially what the appellant told the trial court in his defence and have come to the conclusion that it is only fair and in the interest of justice to invoke my discretion under **Section 354 (3) (a) (1)** of the **Criminal Procedure Code** and order for a retrial. The appellant herein shall be tried afresh in a different court of competent jurisdiction. In that respect I order that he shall be taken to the Chief Magistrate Kerugoya for retrial. It is so ordered.

Dated and delivered at Kerugoya this 22nd day of March, 2016.

R. K. LIMO

JUDGE

22.3.2016

Before Hon. Justice R. Limo J.,

State Counsel Sitati

Court Assistant Willy Mwangi

Appellant present.

Interpretation English/Kiswahili

Kiragu holding brief for Magee for the appellant.

Sitati for State present.

Judgment signed, dated and delivered in the open court in the presence of Kiragu holding brief for Magee for the appellant and Sitati for State.

R. K. LIMO

JUDGE

22.3.2016