REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 1 OF 2014

JEREMIAH GICHUKI GACHANJA…….APPELLANT

VERSUS

REPUBLIC……..…..……..RESPONDENT

(An appeal from the conviction and sentence of the Principal Magistrate's Court (T. M. Mwangi) at Gichugu, Sexual Offence Case No. 8 of 2013 dated 18th December, 2013)

JUDGMENT

1. **JEREMIAH GICHUKI GACHANJA,** the appellant herein faced a charge of defilement contrary to ***Section 8(1)(2)*** of the ***Sexual Offences Act NO. 3 for 2006*** in **GICHUGU P.M.'s COURT Sexual Offence Case No. 8 of the 2013** where he was tried found guilty and convicted to serve life imprisonment.
2. The particulars of the charge at the trial court were that on 20th March, 2013 at ***[particulars withheld]*** village Kanjuu Sub location in Kirinyaga East District of Kirinyaga County, the appellant defiled E W, a child aged 5 years old. The appellant had denied the charge but the trial court upon hearing 7 prosecution witnesses and 3 defence witnesses found that the appellant was guilty as charged and convicted him accordingly. The appellant felt aggrieved by both the conviction and sentence of life imprisonment and filed this appeal raising 13 grounds as follows:
3. ***(i) That the appellant pleaded not guilty.***

(ii) That the learned trial magistrate erred in law and fact in convicting the appellant without any evidence connecting the appellant to the crime.

(iii) That the learned magistrate erred in law and fact in convicting the appellant without any credible and/or cogent evidence by the prosecution.

(iv) That the learned magistrate erred in law and fact in

convicting the appellant by believing the prosecution witnesses without putting sufficient scrutiny on the contradictions in the evidence of prosecution witnesses.

(v) That the learned magistrate erred in law and fact by misdirecting his mind on irrelevant matters.

(vi) That the learned magistrate erred by convicting the appellant when the case had not been proved beyond reasonable doubt.

(vii) That the learned trial magistrate erred in law and fact in arriving at the judgment in absence of any direct evidence connecting the appellant with the crime/offence charged.

(viii) That the learned magistrate erred in law and in fact in convicting the appellant yet the ingredients of the offence were not provided (age of complainant not provided).

(ix) That the learned magistrate erred in law and fact in convicting the appellant without warning himself of the danger of convicting the appellant without any independent corroborative evidence.

(x) That the learned trial magistrate erred by not weighing the evidence by the prosecution to the sentence to be meted on the appellant.

(xi) That the learned trial magistrate erred in law by sentencing the appellant before inquiring into his age and any other mitigating circumstance.

(xii) That the learned trial magistrate erred in law by

disbelieving the defence witness without giving any reason.

(xiii) That non-custodial sentence should have been considered by the trial magistrate before imposing a custodial one.

4. The appellant in this appeal chose to proceed with his appeal through written submissions. The appellant in his written submissions dated 16th September, 2015, argued grounds 2, 3, and 6 together. In his view, the prosecution did not prove their case beyond reasonable doubt. The appellant's counsel attacked the evidence of P.W.1, the mother to the complainant terming it as hearsay evidence. It was contended that the evidence should not have been admitted. In the same vein, the evidence of P.W.2 – one **T N** was equally faulted for being hearsay as she only reported what the child told her.
5. On the evidence of P.W.3, the appellant submitted that apart from being hearsay, the court should not have concluded that the child's limping gait was synonymous with defilement. On the whole, the appellant submitted that the evidence of P.W.1, P.W.2, and P.W.3 did not connect the appellant with the offence and that the trial court should have acquitted the appellant.
6. On the ground 4 of the petition of appeal, it was submitted that the trial court erred by believing P.W.6 – **Mercy Wamuyu Gakuhi** a clinical officer who filled the P3 form but did not treat the child. It has been argued that the witness relied on treatment notes from other medical personnel but did not confirm to court that she was conversant with their handwriting. The appellant has therefore submitted that the trial court should not have admitted the evidence contained in the P3 since the treatment notes of DIFATHAS Hospital of KIANYAGA SUB-DISTRICT HOSPITAL were used and this rendered the evidence hearsay.
7. It was further submitted that the medical officer called PW6 did not conclusively say that the child had been defied as she did not physically examine the child. The appellant further argued that though P.W.7 – another medical officer from DIFATHAS Hospital was called to testify he did not tender treatment card as evidence of defilement.
8. The appellant submitted that the evidence of P.W.6 and P.W.7 should not have been admitted as they were not experts. He faulted the trial learned magistrate for believing the prosecution witnesses and not doing the same to the defence witnesses.
9. The Respondent through Mr. Sitati learned state Counsel opposed the appeal and supported the finding of the trial court both on conviction and sentence. On the question of production of P3 and treatment notes by P.W.6, the respondent cited **Section 77** of **Documents Act** arguing that P.W.5's treatment notes produced as Exhibit a and 1b respectively were produced by a professional and a medical officer and the trial court found them admissible without need for further interrogation. He submitted that P.W.7 the maker of treatment notes (Exhibit 1b) was later

called) to testify and therefore the appellant's contention that makers were not called is without basis.

10. The respondent further contended that the act of defilement was committed by the appellant and that the 7 witnesses called by the prosecution established their case beyond reasonable doubt. He pointed out that the complainant called as P.W.4 told the trial court clearly what happened to her after she went out in the garden to eat mangoes. The state argued that Section 124 of Evidence Act, stipulates that even the evidence of the minor alone if believed was sufficient to convict the appellant. It was contended that the prosecution case went further than that as the evidence of the minor was corroborated by her mother (P.W.1) and her nursery teacher P.W.2 who noticed the child walking with difficulty.
11. The respondent further pointed out P.W.7 – a medical officer who examined the victim confirmed defilement and that the P3 form produced and treatment chit produced as Prosecution Exhibit 1a and Prosecution Exhibit 1b respectively proved that the offence of defilement had been committed.
12. On identity of the appellant, the state submitted that he was positively identified by the victim who referred him by name – Gichuki and that the minor knew him well as they were neighbours and related. It was further contended that the offence took place during the day and so there was no chance of a mistaken identity.
13. The respondent countered the appellant's contention that there was bad blood between him and the complaint's parents submitting that no evidence was adduced to show that the complainant's parents had reason to fix the appellant.
14. On the ground that the defence evidence was not considered by the trial court, the respondent submitted that the trial court considered the same only that the evidence adduced was found unreliable. Mr. Sitati pointed out that the evidence of D.W.2 and D.W.3 were unreliable as they confessed that they had discussed the case at home before coming t court and had been called to assist the appellant and that they could not recall the exact date they had accompanied the appellant from school.
15. This Court has considered this appeal and the written submissions in support of the petition. I have also considered the opposition from the respondent through **Mr. Sitati** for the Office of Director of Public Prosecutions. There is no doubt that the appellant was convicted of a serious offence that carries a mandatory life sentence as prescribed under **Section 8(2)** of **Sexual Offences Act No. 3 of 2006**. It is important for this court to carefully consider the appeal and re-evaluate the evidence tendered before the trial court to determine whether the trial court arrived at the correct conclusion based on the evidence tendered before it.
16. The 1st ground in the petition is a bit superfluous. The appellant denied the charge and that is why the trial court proceeded to hear the case otherwise if he admitted the charge there would have been no need to call the witnesses.
17. The appellant argued grounds 2, 3 and 6 together in his appeal which grounds actually touches on the weight of the prosecution case. According to the appellant, the evidence of P.W.1 the mother of the child, P.W.2, and P.W.3 her teachers were all hearsay. I have re-evaluated their evidence and I do not find the appellant's contention to be true. P.W.1, **J M M**, testified that she was the mother of the child and told the court that her child was then aged 5 years old. She, at a later stage in the proceedings produced a copy of birth certificate as Prosecution Exhibit 2 to prove the age of the minor. I have seen the said exhibit which shows that the minor was born on 2nd October, 2007 which shows that at the time of the incident, the child was 5 years and about 5 months old. The mother told the court how she was called to the school where her child schooled which at the time was a nursery school. She was told by her teacher P.W.2, **T N N** what the child had reported and on checking the child's genitalia noticed some redness and decided with the teachers to take the child to Difatha's Hospital for medical check up and treatment. The same evidence was confirmed or corroborated by P.W.2 and P.W.3 who were teachers in the school. P.W.2 in particular told the trial court that she noticed that the child was walking with difficulty and suspected that something was amiss. Her suspicion was confirmed when the child told her what had happened to her. I find that the trial court analysed these evidence well. The evidence was also direct and not hearsay. The contention that the evidence was hearsay does not hold any water.
18. On the issue of tendering of P3 form and treatment chit as evidence by P.W.6, **Mercy Wamuyu**

Gakuhi, a clinical officer at Kianyaga Sub district Hospital, I do agree with the appellant that the maker of the documents should have been the one producing the documents in normal circumstances. There is however, nothing wrong with one expert familiar with handwriting of a fellow expert tendering evidence on behalf of one who cannot be procured for one reason or other. I note that the appellant at the trial did not object the production of treatment chits (P. Exhibit 1(b)) by P.W.6. The witness (P.W.6) was the maker of P3 (P. Exhibit 1a). I have also noted that the prosecution later secured the attendance of P.W.7 **Sylvester Wanja Njiru**, a clinical officer in charge of Ndifathas Health Centre where the child was treated and examined. The appellant did not therefore suffer any prejudice in the production of the treatment chit as P. Exhibit 1b by P.W.6. So even if the appellant has argued that P.W.6 did not physically examine the child or the complainant in the case, P.W.7 who did the actual examination was called and testified conclusively that the minor had been defiled. I find that the learned trial magistrate properly directed himself on the weight of evidence tendered by both P.W.6 and P.W.7 both of whom were medical experts. It is instructive to note that both witnesses confirmed that the minor had been defiled. I also agree with the submissions made by the learned counsel Mr. Sitati for the state that **Section 124** of the **Evidence Act** lowers the standard of proof in that a trial court can be perfectly in order to find a conviction on the basis of the evidence of a victim alone so long as the court has reasons to believe that the witness (victim) is telling the truth. I find that the trial court in its judgment noted that the minor testified honestly and with innocence of a child of tender years. That finding in my view was crucial as it cemented the strength of the fact that the case of defilement had been proved beyond reasonable doubt. The evidence against the appellant was so overwhelming that the learned trial magistrate was correct to find conviction against the appellant. The witnesses called by the prosecution were found credible by the trial court and there is no basis raised by the appellant to attack their credibility.

19. The appellant stated that the complainant's parents had a grudge with his parents and that the differences may have driven them to conspire to fix him. However, I find that the trial magistrate evaluated the allegations well and correctly found them to be baseless. All the witnesses apart from P.W.1 and P.W.4 were independent witnesses who had no interest in having the appellant convicted. I also find appellant's argument that his witnesses were not believed unfairly by the trial court to be equally unfounded. The defence witnesses who were D.W.2 **Stephen Mwangi** and D.W.3 **Alex Muthike Nyaga** gave evidence which I have re-evaluated and find it to be of no significance to the appellant's defence that he did not defile the minor. This is because apart from telling the trial court that they could not recall the material date they were with the appellant, they further told the court that at the material time of the offence, they were not with the appellant. Their evidence was further weakened by their admission that they had discussed at home, prior to turning up in court to testify, about the case and had decided to come to court and help the appellant. I find that the trial court again was right in the evaluation of the defence case in its judgment. The same was correctly placed on the scales of justice and the prosecution case carried far much more weight – and hence the conviction of the appellant.
20. The age of the complainant was duly established by the production of the birth certificate tendered as Prosecution Exhibit 2. The minor was aged 5 years 5 months as indicated above. The 8th ground of appeal in this appeal does not carry any water as that fact was established beyond reasonable doubt.
21. I also find that the trial magistrate duly cautioned himself in his judgment on the question of relying on evidence of P.W.4 who was the only witness to the act of defilement. Although I do not find the same necessary in finding a conviction in offences of the kind the appellant faced, it nonetheless answers the concern raised in ground 9 of the appellant's petition of appeal.
22. The respondent submitted that all the ingredients of the offence were established and proved at the trial. The age of the minor was established and proved as indicated above. The act of defilement was established and proved by evidence tendered by prosecution witnesses including the P3 and treatment chit produced as exhibits. The offence occurred during the day and more so the fact that the minor knew the appellant well as he was a neighbourt and was known to her by name which she confirmed in court. The minor was terrified and traumatized by the episode and this court has found that the trial court went to great lengths to protect the witness and allow her to recover in order to testify in court. Her demeanor was well captured by the trial magistrate and I find that in the circumstances the appellant was positively identified as the person who committed the act of

defilement. I find that all the ingredients of the offence were proved beyond reasonable doubt.

23. On sentence, I find the appellant's contention that his age should have been a factor to be considered by the trial court before sentencing is really without basis. This Court on seeing the appellant at first thought that he was under 18 years because of his youthful looks. I inquired from the appellant's counsel who confirmed that the appellant was aged 22 years at time of hearing this appeal. When I checked at the proceedings, I noted that the trial magistrate interestingly had also noted the same and in fact went further to conduct an inquiry about his age and established that at the material time of the offence he was aged 20 years. There is no doubt therefore in the trial court's mind that it was dealing with an adult and in view of the provisions of **Section 8(2)** of the **Sexual Offences Act**, the trial court's hands were actually tied. There is only one sentence prescribed by law and that is life imprisonment. I am afraid this Court is in the same position. Despite all the mitigating factors the appellant really should not have committed the offence against an innocent young child aged 5 years 5 months. This Court is unable to disturb the sentence meted out by the trial court because that is simply what the law prescribes.

The upshot of this is that I find no merit in this appeal. The same

is dismissed. The conviction and sentence is upheld. 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

Sitati for State present

Miss Kiragu holding brief for Mugera for the appellant.

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