REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 124 OF 2013

R M……..……..…….....……APPELLANT

VERSUS

REPUBLIC……..……..…….…..……..RESPONDENT

Being an appeal from the judgment of the Principal Magistrate's Court (T. M. Mwangi) Gichugu Sexual Offence Case No. 3 of 2013 delivered on 12th July, 2013

JUDGMENT

1. R M, the appellant , herein was charged with defilement contrary to **Section 8 (1) (2)** of **Sexual Offences Act No. 3 of 2006** vide Gichugu Principal Magistrate's Court Sexual Offence No. 3 of 2013. The particulars were that on the 5th day of January, 2013 at unknown time during the day Kirinyaga East District within Kirinyaga County, he intentionally and unlawfully caused his penis to penetrate the vagina of R K E a child aged 4 years. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to **Section 11 (1)** of the **Sexual Offences Act No. 3 of 2006**. The Appellant denied the offence and the matter proceeded to full hearing upon which the Appellant was found guilty and convicted to serve life imprisonment.

2. The record of proceedings from the trial court shows that the prosecution called six (6) witnesses to prove their case. The Appellant on his part opted to give unsworn defence and called no witness(s) in his defence. The trial court found that the case against the Appellant had been proved to the required standard and convicted him handing him a life sentence as provided by law. The Appellant was aggrieved and filed this appeal.

3. Before I look at the grounds in his petition of appeal I will examine the case and the evidence adduced by the prosecution in order to evaluate whether a correct conclusion was deduced by the trial court.

4. The case against the Appellant involved a minor of tender age. The mother of the victim – E W G (P.W. 1) told the trial court that the minor was born on 24th May, 2008 and produced a birth certificate (prosecution exhibit 1) to prove the fact. This showed that at the material time the child was aged 4 years 9 months. The clinical officer (Hezron Macharia Maina) called as P.W. 6 also corroborated this fact.

5. The evidence adduced at the trial court also showed that the Appellant was a close relative of the victim. The mother of the victim told the trial court that the Appellant was her paternal uncle – a brother

to her father and the minor told the trial court that they lived together at their grandmother's place. The evidence of the victim (P.W. 2) was that she was at home in the company of another child called F, when the Appellant tricked F to go away by offering a sweet and then took the opportunity to defile the minor. This evidence was corroborated by P.W. 4, M N N – the grandmother to the minor who told the trial court that on 7th January, 2013 she noticed that the victim was passing urine with some pain and upon examination, she noticed that the girl had been raped. She informed her mother and together they took the child to the hospital after reporting the incident at Kianyaga Police Station. This information was a corroboration to what the mother (P.W.1), had earlier told the trial court.

6. The medical evidence presented was adduced through the evidence of a clinical officer Hezron Macharia Maina (P.W. 6) who told the court that upon examination of the child, he observed some tears and laceration on her private parts and that the hymen was broken all indicating that the minor had been defiled. He produced the P3 and treatment card as exhibits 2 and 3 respectively to prove that defilement had occurred.

7. When placed on his defence the Appellant opted to give unsworn statement of defence denying the offence. He told the trial court that the evidence adduced was false as he was not at home on the material date and that had he committed the offence the child could have suffered so much that she could not have been able to walk on her own.

8. The learned trial magistrate in her judgment dismissed the defence of alibi as an after-thought. The trial court upon evaluating the evidence tendered found that the prosecution witnesses had spoken the truth and found them honest, credible and forthright. She concluded that the prosecution case had been proved beyond reasonable doubt and convicted the Appellant sentencing him to life imprisonment.

9. The Appellant felt aggrieved and sought to quash and set aside the said judgment on six (6) grounds namely:-

> ***(i) That the learned trial magistrate overlooked the contradictions and inconsistencies in the prosecution case.***
>
> ***(ii) That the learned trial magistrate failed to take into account the complainant's first assertion that she had been injured by a stick.***
>
> ***(iii) That the learned trial magistrate failed to take into account the fact that key prosecution witness did their statement after the complainant and the mother had testified.***
>
> ***(iv) That the trial learned magistrate made an error in law by invoking Section 150 of the Criminal Procedure Code to summon an eye witness who was not properly examined for being too small.***
>
> ***(v) That the learned trial magistrate erred by not taking into account that the only eye witness (Francis) was not called as a witness yet they were playing with the complainant on the alleged date.***
>
> ***(vi) That the learned magistrate erred in law by failing to give the appellant the benefit of doubt.***

10. In his submissions made through Ngangah, Learned counsel for the Appellant, the Appellant faulted the prosecution for marking a birth notification for identification but later changing their mind by recalling P.W. 1 to produce a birth certificate which was not mentioned by the investigating officer. The Appellant pointed out the apparent inconsistency between the name of the child victim given in the particulars on the Charge Sheet which was R K E while the birth certificate produced as exhibit 1 showed that the child was known as R V K. He further pointed out that the treatment card and P3 all referred to R K E. He contended that the only conclusion drawn from the inconsistency was that the birth certificate did not belong to the complainant in the case as no effort was made by the prosecution at the trial to show that the two set of names referred to one and the same person. The Appellant submitted that because of

the anomaly the age of the victim in his view was not proved beyond reasonable doubt and that it was unsafe for the trial court to base its harsh sentence of life imprisonment on a fact that was not proved. It was contended that the best the trial court could have done was to give the benefit of doubt to the Appellant.

11. The Appellant also contended that the date of the offence presented another inconsistency on the prosecution case. He pointed out that the date of the offence given on the Charge Sheet was 5th January, 2013 and that she was taken to hospital on 7th January, 2013 but according to the treatment card (Prosecution exhibit III) and P3 (Exhibit II), the child was taken to hospital on 7th January, 2012. The Appellant submitted that this anomaly was fatal to the prosecution case given that the evidence adduced was to relate to an offence committed on 5th January, 2013. In his view the prosecution ought to have clarified the discrepancies given the serious nature of the offence facing the Appellant.

12. The Appellant also faulted the prosecution for not calling one F, a child said to have been playing with the complainant before she was taken into the house and defiled. He submitted that the trial court had the power to invoke **Section 150** of the **Criminal Procedure Code** to summon the said F but after exercising that power, the court concluded that he was too young without stating the basis of that opinion or conclusion.

13. The Appellant also pointed out that the complainant had told different people different version of what had happened to her and pointed out that the complainant had lied to M W (P.W. 5) that she had been injured in her private parts with a stick and told her mother that she had a headache but changed her story and told the grandmother M N N (P.W. 4) that she had been defiled. The Appellant contended that on account of this, the trial court should not have found the Appellant truthful.

14. The Appellant further faulted the prosecution for calling the investigating officer (P.W.3) to testify when it was clear that other witnesses had not yet tendered their statements.

15. The Appellant contended that the trial court ought to have interrogated more the evidence suggesting that a stick could have injured and caused penetration to the minor as the clinical officer testified that a hymen could also be broken by a stick.

16. Mr. Sitati for the Respondent, opposed this appeal and supported the findings of the learned trial magistrate. Mr. Sitati submitted that, contrary to what the Appellant had commented on age of the complainant, the age of the complainant or the victim in his view was proved by the birth certificate produced as Prosecution Exhibit I. It was submitted that the age of the child at the material time was 4 years 8 months.

17. Mr. Sitati pointed out that the P3 form produced also showed that the child was aged 4 years and that the minor appeared in court to testify and in his view fitted that age bracket.

18. On the question of different names appearing on the birth certificate tendered in evidence at the trial, the respondent submitted that the mother of the child knew her child well and also knew when the child was born. He pointed out that the birth certificate gave the name of the mother.

19. The Respondent further in answer to the Appellant's submissions, contended that the error on the dates appearing on the P3 and treatment card as 7th January, 2012 was minor and human given that it was still early in January when most people subconsciously would still write 2012 the previous year instead of the correct year of 2013. He submitted that the rest of the information on the said documents including the approximate age of the injuries were in tandem with the particulars of the offence given in the Charge Sheet.

20. The Respondent denied the Appellant contention that the trial court had no basis to find that Francis was too young to testify. Mr. Sitati submitted that the minor was summoned but was found unable to testify because he was too young.

21. The State pointed out that the Appellant had threatened the minor explaining why she was afraid to initially tell the truth of what had happened to her. It was submitted that the evidence of the minor was positive that she had been defiled and that the doctor corroborated that fact. Mr. Sitati pointed out that the doctor was only giving a possibility of a hymen being broken by a stick during cross-examination but that his evidence was that the minor had been defiled. It was submitted that the complainant knew the Appellant well as he was a close relative living together in the same place which ruled out any doubt that the offence had taken place and the person responsible was the Appellant because the offence took place during the day.

22. I have considered the appeal and submissions by both counsels. This appeal has raised three main issues which in my view will form the appeal herein. These are:

(i) Whether the misdescription of the complainant was fatal to the prosecution case.

(ii)Whether the discrepancy on the dates on the P3 and treatment notes affected the prosecution case.

(iii)Whether the prosecution case was proved beyond reasonable doubt.

23. (a) Misdescription of the Complainant

The facts given under the particulars of the charge facing the Appellant at the trial court and the evidence tendered save for the birth certificate indicated that the name of the Complainant was a minor called R K E. The mother of the Complainant (P.W.1) and the Complainant told the trial court that that is the name by which the Complainant was known. The birth certificate (Exhibit 1) on the other hand bears the name R V K with all the other details including the mother's name and when she was born being positive to the evidence tendered by the prosecution. The only difference between the two sets of names is the middle name and the question posed is whether such anomaly in the description of the Complainant prejudiced the Appellant or affected the weight of the prosecution case. It is my considered finding that the description of the Complainant in the Charge Sheet was sufficient to identify the Complainant in the case and the Appellant knew who the Complainant was both before and during the trial. Besides that he is a close relative of the Complainant so the question of prejudice in my view cannot arise. In addition to that **Section 137 (d)** of the **Criminal Procedure Code** provides as follows:-

> ***"The description or designation in a charge or information of the accused person, or of another person to whom reference is made therein, shall be reasonably sufficient to identify him, without necessarily stating his correct name, or his abode, style, degree or occupation; and if, owing to the name of the person not being known or for any other reason it is impracticable to give such a description or designation shall be given as is reasonably practicable in the circumstances……"***

The evidence tendered before the trial court clearly referred to the Complainant who was summoned to testify and indeed testified at the trial. The question of identity in the circumstances was not changed by the fact that the child's middle name in the birth certificate produced was different from the name reflected in the charge Sheet. Once an offence has been committed against a person it really matters not who the victim is. Can an accused person say that the offence he committed against child X was not an offence because it was said to have been committed against child Y of the same age as X in this context? That cannot arise. This issue also has arisen in the past and courts have been consistent that an anomaly in the description of the name of a complainant is not fatal to the prosecution case. In the case of **M. M. -VS- R [2015] eKLR** the appellant filed an appeal that he could not defend himself properly due to the confusion or variance of evidence in relation to the name of the complainant in that the name of the complainant on the charge sheet were different from that given by the witnesses in their testimony. Hon Justice Muriithi made the following observations which I agree with as they are relevant to this appeal;

> ***"…….no prejudice is shown to have occasioned on the appellant as the record clearly shows that he participated fully in the cross-examination of the complainant who testified that the appellant***

had forced her to stay with him and have sexual intercourse with him over a long period at his house. The appellant clearly knew who his complainant was, even though the name may have been wrongly recorded in the charge sheet or in the proceedings. Indeed, a defect as to the name of a person in the charge sheet is not fatal and is cured by both the provisions of sections 137 and 382 of the Criminal Procedure Code…….It is sufficient that the statement of the offence described the complainant as a girl of 15 years as charged in this case and her correct name is immaterial as an offence of defilement would have been committed on such girl irrespective of her name……..”

(See also **R -Vs- Benson Kibet Chumo & Anor (2014) eKLR** and **Paul Chege Wanyoike -Vs- R [2013] eKLR).**

24. This Court is not persuaded in the light of the above position of the law and authorities cited that the prosecution case was inconsistent because the names appearing on the birth certificate did not tally with the name of the complainant. The trial court and the Appellant had no doubt in their minds as who the complainant was, her age and the fact that the birth certificate tendered in evidence was hers, that ground of appeal therefore cannot hold any water in this appeal.

25. (b) **Discrepancy on the dates appearing on the P3 and treatment notes** *vis a vis* **the date of the offence.**

The date of the offence given on the particulars in the Charge Sheet and evidence given by the complainant and the other witnesses clearly indicated that the offence was committed on the 5th January, 2013. However, the dates appearing on the P3 and Treatment note (Prosecution Exhibit 2 and 3 respectively) show that the minor was taken to Hospital for medical check-up and treatment on 7th January, 2012. The Appellant has submitted that this was fatal to the prosecution case but I disagree because I am persuaded by the respondent's contention that the error was minor and pointed to a normal human error given that it was still very early in the year. It is not uncommon to find people erroneously indicating a previous year upto late March but in this instance it was on the first week of January, 2013. The error in my view was minor and insignificant curable under **Section 214** and **382** of the **Criminal Procedure Code** and the Appellant has not stated that he was deceived or misled by the anomalies of dates appearing on the P3 and treatment notes (See case of **Boniface Khayumba Katumanga -Vs- R [2014] eKLR, Peter Ngure Mwangi -Vs- R [2014] eKLR and Michael Thimani Kaniaru -Vs- R [2009] eKLR).**

It is also clear from the treatment note on the first paragraph that the offence was committed on 5th January, 2013 which means that the date appearing on the top part of the treatment chit 7-1-2012 was a curable minor error. The Appellant cannot say that he was prejudiced in any way neither can he credibly submit that the same error created doubts on the prosecution case. This Court is not convinced that any such errors on dates is sufficient to create a doubt in the mind of a trial court. What is material and important in my view is the contents of the medical documents tendered to prove that an offence had been committed. This is not the case in this appeal.

26. I am also not convinced that the order in which the prosecution called their witnesses prejudiced the Appellant in any way. Although it is always a practice and desirable to call an investigating officer in the end to summarize all the evidence of the witnesses who would have testified, there is no rule regulating the order in which the prosecution should summon their witnesses. The record of proceedings shows that P.W.4 and P.W.5 for some reason at first were reluctant to give evidence but in my view these witnesses considering the evidence they gave were not key witnesses as they simply reported what the child (complainant) had told them. In cases of defilement such as this the critical part of the prosecution case is the complainant's evidence and the medical evidence. Besides the provisions of **Section 124** of the Evidence Act which the learned trial magistrate cited really requires no corroboration in sexual offences so long as the trial court is satisfied that the witness/victim is talking the truth. This brings me to the next issue for determination.

27. (c) Whether the prosecution case was proved beyond reasonable doubt.

In order to consider this issue it is important to note that key ingredients necessary to establish a sexual offence under the Sexual Offences Act are as follows:

(i) Penetration.

(ii) Age of the victim.

(iii) Identity of the offender.

To begin with the question of penetration, the law under **Section 2** defines what penetration entails which is

> ***"partial or complete insertion of a genital organ of a person into the genital organ of another person."***

This was well captured by the learned trial magistrate in her judgment as she assessed evidence to find out if the minor had been defiled.

28. I have re-evaluated the evidence tendered by the prosecution at the trial to prove this key ingredients of the offence. The evidence of the minor (Complainant) was well assessed by the trial court in my view. This is what she observed in the judgment;

> ***"I went out of my way to establish if P.W. 2 who was a child of tender years had knowledge as to what defilement was. I was left with no doubt that P.W.2 was clear on her mind that she was defiled on 5th January, 2013".***

The trial magistrate had the advantage of seeing the physical appearance of the child and I on this score agree with the Respondent's contention that the child fitted the age bracket of 4 years as proved by the birth certificate. The trial court was convinced that the child despite her tender age knew exactly what had happened to her and she formed this opinion on the basis of the fact that the child described where the Appellant's genital organ was placed and she described it in "her own language" showing that the child knew what she was talking about. The learned trial magistrate had no doubt that the Complainant spoke the truth and I having assessed what the Complainant told the trial court which is a vivid description of the ordeal that befell her, the conclusion made by the trial magistrate cannot be faulted. It is true that under **Section 124** of **Evidence Act** as correctly observed by the trial court, a court in such offences such as this can convict on the basis of the evidence of a complainant if that is the only evidence available and if the trial court for reasons to be recorded the trial court has reasons to believe that the witness is speaking the truth.

29. The evidence available against the Appellant at the trial court was however, more but I will only look at the medical evidence tendered because in my view the same was key. Again, I find that the trial court assessed well the medical evidence tendered by the clinical officer (Hezron Macharia Maina P.W.6) who found evidence of defilement as tears of labia minora, laceration and a broken hymen which he noted in his report (P3) that the same were consistent with 3 days as per the medical history which had been given to him. The medical officer concluded that the child had been defiled. When I combine this evidence with the fact that the minor had vividly described what the Appellant had inserted to her private part in her mother tongue, I found the proposition by the Appellant that a stick could have caused penetration to be a little bit preposterous. The learned trial court dismissed the same suggestion and she was right. It is true that the child is said to have initially lied that she had been injured by a stick but when she was pressed like any child would do she told the truth. I do not find anything in that regard that would negate the fact that she had been defiled.

30. On the question of the age of the child, as I have already observed, the age was established by both the mother of the child (P.W.1) who told the trial court that the child was born on 24th May, 2008 so at the time of offence she was aged approximately 4 years 8 months. this fact was corroborated by the medical officer who filled the P3 and the officer who treated the child and indicated the age on the

treatment card. The age in my view was proved beyond reasonable doubt.

31. The question of identity was not seriously contested. The offender was a close relative to the victim and stayed in one homestead as per the evidence tendered by the prosecution witnesses. I also agree that given that the offence took place in broad day light, there was no possibility of a mistaken identity. The Complainant knew the Appellant as "M" and she told the Court how he went home and found her playing with one Francis and how he lured the said F apparently younger than the Complainant with a sweet to go away to afford him the opportunity to commit the heinous act on the minor. The Appellant questioned why the said F could not testify, but I have seen the observation made by the learned trial magistrate after making frantic effort to have the child summoned to testify. She found the child too young to testify and a child aged 3 years cannot be expected to remember events dating months back unless there was something so dramatic and I do not find anything dramatic with a child being given a sweet and being sent away. I find that the evidence tendered in regard to identity was beyond reasonable doubt.

32. In conclusion I find that all the three necessary ingredients of the offence under which the Appellant was charged were established and proved beyond reasonable doubt. In view of the reasons set out above, I find that the trial court was right in arriving at the decision it did that the prosecution had proved their case beyond reasonable doubt. The age of the minor clearly established that the offence committed fell within **Section 8(2)** of the **Sexual Offences Act No. 3 of 2006** which prescribes only one sentence upon conviction – life imprisonment. In the premises, I find no merit in this appeal. The same is dismissed. The conviction and sentence are upheld.

Dated and delivered at Kerugoya this 28th day of July, 2016.

R. K. LIMO

JUDGE