REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 1 OF 2014

(Being an appeal from original Conviction and Sentence in the Chief Magistrate's Court at Naivasha Criminal Case No. 3764 of 2012 by S. Muchungi - RM)

JOSAM MUKUNA NGATIA………………………………...APPELLANT

-VERSUS-

REPUBLIC…………………………………………….....RESPONDENT

J U D G M E N T

1. The Appellant was charged before the Chief Magistrate's Court Naivasha with Defilement Contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act. In that on 6th day of December 2012 in Naivasha within Nakuru County, he intentionally and unlawfully did cause his genital organ namely penis to penetrate the genital organ namely anus of **B.G.W.** a boy aged 9 years old.

2. Following a full trial, the Appellant was found guilty and convicted. He was sentenced to serve 45 years imprisonment. He now appeals to the court against the conviction. His amended grounds of appeal are as follows:-

> **"1. THAT the learned trial magistrate erred both in law and facts when she convicted me in the present case yet failed to find that the sensitive issue of identification/recognition was adequately analyzed as the same was not free from error or mistake.**
>
> **2. THAT the learned trial magistrate erred both in law and facts when she convicted me in the present case yet failed to find that investigations carried out in the present case were shoddy and faulty.**
>
> **3. THAT pundit trial magistrate erred both in law and facts when she connected me in the present case yet failed to find that the trial amounts to a mistrial, vital exhibits were not produced and Section 77 of the Evidence Act Cap 80 Laws of Kenya was not duly complied with.**
>
> **4. THAT the learned trial magistrate erred in law and facts when she dismissed my plausible defence."**

3. He also presented home made submissions in support of the grounds. The first ground challenges the

reliance by the prosecution on the visual identification of the Appellant by the victim. The Appellant takes issue with the description that the victim allegedly attributed to him namely *"chokora"* and *"wa mandazi"* as well as the fact that the victim did not give a physical description of his assailant to his mother **PW2** or in his first report to police. He submitted that the Complainant's evidence on identification was **"merely dock descriptions"** and that the identification was not free from error.

4. Regarding the second ground, the Appellant pointed out that the victim's clothes were not produced in court, and further, that no medical evidence was tendered to connect him with defilement of the Complainant. In his view, the investigations were poorly conducted. Ground three and four were argued together. The Appellant challenged the evidence of **PW3** asserting that after she had been stood down the court did not administer a fresh or remind PW3 of the oath in accordance with Section 151 of the Criminal Procedure Code.

5. Regarding the age assessment forms (Exhibit 3) the Appellant complains that these were produced contrary to the provisions of Section 77 of the Evidence Act by PW4. Further he contended that the prosecution witnesses were unreliable and that his defence was not accorded adequate consideration.

6. The appeal was opposed by the Director of Public Prosecutions through Miss Waweru. She contended that the identification evidence was reliable as the Complainant knew the Appellant whom he described as *"chokora"*. She cited the fact that the minor led his mother and aunt to the Appellant at the time of arrest. She further stated that medical evidence confirmed that there was penetration, while the age assessment report confirmed the minor's age. She therefore urged the court to uphold the conviction.

7. The duty of the first appellate court was spelt out in **Okeno -Vs- Republic [1973] EA 32**, as hereunder:-

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –Vs- R [1957] EA 336) and to the Appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala –Vs- R [1957] EA 570. It is not the function of the first appellate court merely to scrutinize the evidence to see there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters –Vs- Sunday Post [1958] EA 424."**

8. The prosecution called four witnesses. The sum total of their evidence is as follows. The Complainant **B.G.W.** was a boy aged 9 years in 2012. He resided at [particulars withheld] , Naivasha with his mother **R.W.W. (PW2).** On 6/12/2012 he visited an aunt **(N.W.)** at a place called Site (or Cite) estate, Naivasha. In the evening as he was going home he met the Appellant. The Appellant was armed with stones. He chased the minor who soon tripped and fell. Having caught up with him, he told the minor that he would harm him if he screamed.

9. Ordering him to his knees, the Appellant undressed the minor as he lower his own shorts. He then penetrated the minor through the anus before leaving him bleeding from the anal area. Crying the minor went home and reported to PW2. He was first treated at Naivasha District Hospital and the matter subsequently reported to police. He was issued with a P3 form. About a week later the Complainant spotted the Appellant. He alerted his relatives and he was arrested by them and members of the public and escorted to the Police Station.

10. The Appellant made an unsworn statement in his defence. He said he was a casual worker residing at [particulars withheld] . That on 12/12/2012 he rested at home doing personal chores. At 2.00pm he visited a friend call Maina. Two people known to him as O and S, the latter a relative to the Complainant came by and left without speaking to the duo, only to return after a short spell. They lured him away on the pretext that there was a casual job at an undisclosed location. He accompanied them over some time.

A crowd gathered as they eventually led the Appellant to the Administration Police Post, and later to the Naivasha Police Station. There, he met the Complainant and his mother. He denied having defiled the Complainant, when questioned by police.

11. Having considered the trial evidence and the submissions, it is beyond disputing that the Complainant was defiled on 6/12/2012. His own evidence and the medical records allow no doubt in that regard. The question upon which this appeal turns is identity of the defiler. Not surprisingly the Appellant has attacked the identification evidence which he refers to variously as 'dock' identification and 'recognition'. The prosecution case was built upon the identification evidence of the Appellant by the minor. The minor was alone at the time of the defilement.

12. The minor gave sworn evidence after his *voire dire* examination. He stated *interalia* in his evidence in Chief that:-

> **"I was going home alone. On the way I met with accused. We met in Cite (Site). He chased after me. I ran heading home. I slipped, I was trapped by a tree root and fell. After falling accused caught up with me. He told me if I scream he would beat me with stones. He was holding stones in his hands. He told me to kneel…… He told me if I said anything he would hold (violate) me again…… When I went home mum asked me why I was crying. I told her a certain man held me and put his thing in my behind. I told police what had been done to me. They told me if I see him we should call them. One day I saw him while carrying plastics and taking them to a lorry. I went and told aunt who told the husband – Baba P was at the Boarding School at the High way. He came and arrested accused. I used to hear people calling him *Wamandazi*. Before that day accused was unknown."**

13. During cross-examination PW1 told the court that he learned on the day of the Appellant's arrest that his nick name was *"wa mandazi"*. And earlier while reporting to his mother he said he was defiled "by a man who sells plastics." He further testified that:

> **"I told mum a *chokora* – street boy had defiled me. At that time I had not known you. You are the one who defiled me (pointing at accused)…..I did not tell mum how the assailant looked like - I know you have some disability that can be seen and you can be identified with. (One eye is bad). I did not describe you to her because mum did not ask me but at police station when I was asked, I told them I could be able to identify you because of your eyes, your teeth and the back of your head."**

14. The first report to police did not contain any description however. But during re-examination PW1 reasserted:

> **"I could identify the assailant anywhere afterwards because of his eye, his tooth and baldness at back of the head. Even before arrest I used to meet other people. There is no other person I confused for the accused. It is the accused who defiled me – pointing at him. I told mum *chokora* defiled me. Later I was told wa mandazi was his name."**

15. In her evidence in chief PW1's mother confirmed what PW1 told the court to have reported to her on reaching home regarding the identity of the assailant – a *chokora*. And further that he gave the description to police which nonetheless was not recorded in the first report. She stated to the accused during cross-examination that:-

> **"He told me he could identify the person (assailant) on seeing him. He told me it is a '*chokora*' – 'street boy' that had defiled him. We were many when we came to arrest you. We were with minor's uncle, grandmother and many other people. The minor led us to where you were and told us it is you who defiled him, then you were arrested…… If I met you I will say you do not have an eye (One is bad), one tooth is missing and the back of the head is bald."**

16. From the evidence of PW1 and PW2 the offence occurred in the evening. The P3 form indicates that the report was made to police at 23.58 hours as having occurred at 5.00pm on 6/12/2012. The **PRC** form **Exhibit 2** was produced by **Dorcas Andanje Osoro (PW3),** a Clinical Officer Naivasha District Hospital dated 6th December, 2012. At the space provided therein for the Date and Time of Assault, the document indicates that the offence occurred at 5.00pm on 6/12/2012 and that the victim was presented at the hospital on the same date at 7.45pm. It indicates further that the offence was perpetrated by a street boy whom the victim could identify. Complaints that PW3 was not resworn after being stood down are flimsy: the witness returned to the witness box in the afternoon of the same of the same day. The issue leading to the break was raised by the Appellant during cross-examination. He further cross-examined her.

17. It would seem from the testimony of PW1 that he was not known personally to the assailant prior to the material date. However, the incident he described occurred during day time, and the detailed description of the incident leaves no doubt that the minor could see clearly and was alert. First, he identified his assailant as a *chokora* or street boy and marked his features: one bad eye, missing tooth and bald back of head. He told his mother that a "certain" *chokora* had defiled him. Although he reiterated that he told police about these features, the first report did not contain these. But the investigating officer **PC Audrey Cherono (PW4**) verbally confirmed the details in her oral testimony.

18. PW1 was the one who identified the Appellant for arrest, again on an afternoon. This was about six days since the assault. He obviously had been on the look out and when he spotted the Appellant he informed his closest relatives, including his mother and led them to the arrest of the Appellant. Evidence of visual identification must be scrutinized with great care to rule out the possibility of error. **(See Joseph Muchangi Nyaga & Another -Vs- Republic [2013] eKLR).**

19. In this case, the first report to police did not contain a description. However the earliest official record of the offence, the **PRC (Exhibit 2)** clearly indicates that the victim was defiled by a *'chokora'* whom he could identify. The fact that, despite having seen other persons since the assault, the minor specifically pointed out the Appellant when he next saw him gives assurance that he was not mistaken.

20. Indeed according to the Appellant, he was picked out while in the company of a friend or friends, at the time of arrest. This is how the trial court expressed itself on this matter:

> **"Though there was no one who witnessed the incident, I found the minor to be a truthful person. His demeanor portrayed him as an honest person. He narrated the same story to the mother, the police officers and the doctor at the hospital …… On the issue of identification before the act, the minor met the accused who then chased him. On catching up with him he warned him and after the act he again warned him. I believe the minor had sufficient and ample time to master the assailant – how he looked and who he was. He was not known to him personally but from evidence he used to see him within the estate. He described him to his mother a street boy since he used to collect scrap metals and other items from the estate…… The accused bears the marks he (PW1) spoke of i.e. he is dark skinned, he has a bad eye, missing tooth and baldness at the back of his head. It is my holding that identification was without mistake."**

21. While I agree that the minor had sufficient opportunity to observe the assailant during the first encounter and then at a close quarters at the spot where he was finally cornered and threatened before defilement, I did not see any confirmation of prior knowledge by PW1 of the Appellant. The Appellant himself appears to have known the Complainant and his family. This familiarity part of the evidence was contained in the PRC from but in oral evidence it did not come out clearly whether by stating that the Appellant was hitherto unknown to him, the Complainant meant that he did not know his name, or had never seen him before. Perhaps there was an allusion to familiarity but since it was not brought out explicitly by the witness, the trial court erred in asserting it as a fact.

22. That aside, I can find no reason to fault the finding of the trial court that indeed PW1 identified his attacker on the material day, and confirmed by the fact that after six days he singled him out for arrest. It

is not PW1's fault that the police failed to record his initial description of the assailant, and in light of the details in the **PRC Form (Exhibit 2)** that omission does not detract from the credibility of the evidence. A perusal of the testimony of the Complainant at the trial shows consistence and certainty in the identity of the assailant and indeed other aspects of the case. The Appellant's submission that he was not linked to the offence through medical evidence has no basis. Under the proviso to Section 124 of the Evidence Act, the trial court is entitled to act on the sole testimony of the sexual victim so long as the court believes that the witness was truthful and gives reasons. This is what happened in this case.

23. Concerning the Appellant's defence, the onus of proving the charge is always on the prosecution and does not shift. The Appellant had no duty as it were to prove where he was on the date of the offence because he clearly denied the offence. However the trial court correctly noted that there was no possibility that he was falsely implicated, in light of the evidence. It seemed all through that the Appellant's defence was that his was a case of mistaken identity. That defence was displaced by the prosecution evidence and was properly rejected by the trial court.

24. Both the **PRC (Exhibit 2)** and the P3 form indicate that the Complainant was aged 9 years at the time of the offence. This was also confirmed by the testimony of PW1 and PW2. The Appellant's complaint in ground number 3 of appeal that the age assessment report was improperly tendered by PW4 are valid. The report (Exhibit 3) had not been identified by PW1 and PW2 before production.

25. Be that as it may, there is adequate and credible evidence regarding the age of the Complainant at the time of assault, even disregarding the age assessment form. **(See Mwalongo Chichoro Mwanjembe -Vs- Republic, Mombasa Criminal Application No. 24 of 2015 (UR)** The Appellant herein was properly convicted and there is no merit in grounds 1, 2 and 4 of the appeal. I dismiss the entire appeal on conviction.

26. Turning to the sentence, I note that the penalty provided in relation to a conviction under Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act is life imprisonment. The trial court awarded the Appellant 45 years imprisonment. That is an illegal sentence which cannot be allowed to stand. (**Bakari Ndoro -Vs- Republic [2016] eKLR**). To that extent this court will interfere with the sentence by substituting therefor the lawful sentence for the offence, namely life imprisonment. It is so ordered.

Delivered and signed at Naivasha, this **19th** day of **July, 2016.**

In the presence of:-

For the DPP : Mr. Koima

For the Appellant : N/A

Court Assistant : Barasa

Appellant : present

C. MEOLI

JUDGE