REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 61 OF 2012

ROBERT WANJAU MAINA ……...PROSECUTOR

VERSUS

REPUBLIC ……...RESPONDENT

Being an appeal from the original Conviction and sentence in Kajiado Senior resident Magistrate's Court Criminal Case No. 1207 of 2010 by Hon. S.O. Temu, SRM on 27/2/2012)

R U L I N G

1. The Appellant, **Robert Wanjau Maina** was charged with the offence of defilement in violation of **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No. 3, 2006.** Particulars thereof being that on the 12th day of August, 2010 in **Kajiado District** within **Rift Valley Province** did cause his penis to penetrate the vagina of **TG** a child aged 6 years.
2. In the alternative the appellant was charged with committing an **indecent act** with a child contrary to **Section 11(1)** of the **Sexual Offences Act** No. **3** of **2006**. Particulars thereof being that on the 12th day of August, 2010 in **Kajiado District** within **Rift Valley Province** did intentionally and unlawfully caused his penis to come into contact with the vagina of **TG** a girl aged 6 years.
3. Having denied the charges he was convicted of the main charge and sentenced to life imprisonment.
4. Being aggrieved by the conviction and sentence thereof, The appellant appealed on grounds that:-

i. The learned trial magistrate erred in law and fact in convicting the appellant on the basis of a single and unreliable witness;
ii. The learned trial magistrate erred in law and fact in convicting the appellant on the basis of unsatisfactory identification evidence;
iii. The learned trial magistrate erred in law and fact in convicting the appellant on contradictory evidence;
iv. The learned trial magistrate erred in failing to warn himself that the evidence of identification raised doubts as to the person who defiled the complainant ;
v. The learned trial magistrate erred in law and fact in failing to appreciate that no medical evidence connected the appellants to the offence;
vi. The learned trial magistrate erred in law and fact in failing to appreciate that the prosecution did not proof its case beyond reasonable doubt and failed to appreciate the appellant's defence.

5. The facts of the case were that on the 12th day of July, 2010 **PW1, GTO** was from school when she encountered the appellant who took her to his house. He took her to bed, caused her to remove her clothes as he removed his. He penetrated her genital organ using his penis. On

accomplishing his mission he gave her money to buy sweets and told her to go home. She went home, took a bath but did not tell anyone what had befallen her.

6. On the 13th July, 2010, **PW3, Evans Ochage Moindi** the Head teacher at **[Particulars Withheld],** a School that PW1 attended received a report and summoned PW1` who seemed to be in pain. She could not talk, she only cried. He notified her parents. He sought audience with PW2, **VOM** PW1's father. He sought to know if he was aware that the child had been defiled.
7. On the 16th July, 2010 PW1 was taken to **Kitengela Health Centre.** She was examined by **Judith Rono** a Clinical Officer. She found PW1 having an inflammation on the vagina. The labia majora and minora were however intact. She formed an opinion that there was defilement. **PW5, PC (w) Mary Wandiri** investigated the case and charged the appellant.
8. In his defence the appellant stated that on the 12th July, 2010 he was working at **Baba Mwaura's** home some 1 ½ km away from the school. He worked from 8.00am to 6.00pm.
9. At the hearing of the appeal **Mr. Gatumuta** learned counsel for the appellant submitted that the trial magistrate erred on relying on the evidence of a single witness without corroborating evidence. Relying on the case of ***Abadalla Wendo and Another versus Republic – Criminal Appeal No. 44 & 45/1952 EACA 166*** he stated that there was necessity for the magistrate to warn herself of the danger of relying on evidence of the complainant.
10. No identification parade was held after the appellant was arrested three days later. The magistrate relied on dock identification which has very little evidential value. Identification was not proper as the child did not identify the appellant prior to his arrest. No medical evidence was adduced to connect the appellant with the crime and the evidence adduced was contradictory.
11. **Mr. Mwangi,** learned counsel for the State opposed the appeal. He stated that the identification of the appellant was cogent. The act constituting the offence was present. Further, he stated that there was no requirement for corroboration, the magistrate having found the complainant a credible witness; medical evidence confirmed that the minor was defiled. He called upon the court to affirm the conviction.
12. This being the first appeal, my duty as a court is to re-evaluate the evidence, draw my own inferences and come to a logical conclusion knowing that I did not have an opportunity of seeing or hearing witnesses who testified at the trial cou*rt.* ***(See Okeno versus Republic (1972) E.A. 32).***
13. I have considered evidence on record and rival submissions by both the defence and state counsels. It is trite that in sexual offences there is no need of corroboration. A single witness evidence can suffice. In the case of ***Mohammed versus Republic[2006] 2 KLR 138*** it was stated that:-

    "***It is now settled that courts shall no-longer be humstrung by requirement of corroboration where the victim of a sexual offence is a child of tender years if it is satisified that the child is truthful."***

    (Also see **Section 124** of the **Evidence Act**).

14. It has been argued that identification of the appellant herein was not cogent. The complainant was a child of tender years. She was born on the 11/2/2005 per evidence of the Birth Certificate adduced. At the time of commission of the offence the complainant was 5 years old. This child of tender age did not know the appellant previously. Per her testimony she encountered a man along the road who took her to his house and defiled her. She identified the appellant as the person who had defiled her. The court made an observation in the course of proceedings. It was of the opinion that the child was consistent as to what took place.
15. The child took bath on the stated date. She did not tell anyone what happened. The following day "***she explained to teacher Catherine what happened".***
16. Catherine was not a witness. Whatever information she had is a matter not disclosed. Teachers who went to see PW2 were **Evans** and **Ngethe.** The two (2) teachers told PW2 that the complainant had been defiled. Evans, PW3 stated that when he summoned PW1, she could not talk. She seemed to be in pain and was crying. On cross-examination he said he did not know the person who defiled the complainant.
17. PW5 the arresting officer stated that the father of the complainant assisted him to arrest the appellant three days after the incident. She did not give details of what made her form an opinion

that it was the appellant who committed the offence. PW2 on the other hand stated that :-

> "***The child led us to know the house where she had been taken. We were able to identify the accused because the child had stated that the man had rasters and we investigated and we found the man who had rasters. The accused was arrested by the police and the child was able to identify him."***

18. On cross-examination he stated that they found him at the house where he used to stay although he had vacated it.
19. The police officer was silent on what made her believe the appellant was the person who had perpetrated the offence. No evidence was led to establish that the appellant owned or occupied the house in which the child said she was defiled. In the case of ***Roria versus Republic [1967]E..A. 583 at page 484 -Sir Clement De Lesting V.P.*** observed that;-

> ***"A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner said recently in the House of Lords in the course of a debate on Section 4 of the Criminal appeal Act 1966 of the United Kingdom which is designed to widen the power of the Court to interfere with verdicts;***
>
> *"**there may be a case in which identity is in question and if any innocent people are convicted today I should think that in nine cases out of ten – if there are as many as ten – it is in question of identity".***

20. The child's evidence was silent on whether or not the assailant had rasta(rusters) the police officer's evidence was equally silent on the alleged fact.

The question is how PW2 came up with such an allegation? There could be evidence that the child's vagina was interfered with such that it was perforated. This could suggest partial penetration. A crime could have been committed, but, was it the appellant who committed it? The fact that the appellant had rasta could not be conclusive proof that he was the one who violated the complainant. In the premises the identification of the appellant was questionable.

21. From the foregoing the appeal succeeds, the conviction is quashed and sentence imposed set aside. The appellant shall be set free unless otherwise lawfully held.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **15th** day of **JANUARY, 2015.**

L.N. MUTENDE

JUDGE