REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 48 OF 2013

MARTIN MATI SYUKI.......................... APPELLANT

VERSUS

REPUBLIC................................RESPONDENT

Appeal from the conviction and sentence in Mwingi SRM criminal case no. 758 of 2011 dated 2/04/2013 V. A. Otieno Ag. (SRM)

JUDGMENT

The appellant was charged in the subordinate court with defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that 17/11/2011 at [particulars withheld] Location Mwingi Central District, within Kitui County intentionally did an act which caused the penetration of his male genital organ namely penis into a female genital organ namely the vagina of B. M. a girl aged 3 ½ years. In the alternative, he was charged with indecent act with a child contrary to Section 11(1) of the same Act. The particulars of offence were that on the same day and place, committed an indecent act which caused the contact of his male genital organ namely penis with the female genital organ namely vagina of B. M. a child aged 3 ½ years.

According to the record, he initially pleaded guilty. Later however, pleaded not guilty. He was tried for the offences. At the conclusion of evidence for the prosecution and defence, the trial court delivered judgment convicting him of the main count. He was sentenced to serve life imprisonment.

Aggrieved by the decision of the trial court, the appellant filed his appeal to this court on 18/04/2013. On 9/04/2014, he filed amended grounds of appeal which he relied on. He also filed written submissions.

His grounds of appeal are firstly, that he did not understand the language used in the proceedings. Secondly, that PW2 fabricated evidence against him. Thirdly, that the complainant was not taken voire dire examination by the court to find out whether she understood the nature of an oath and the importance of saying the truth. Fourthly, that there were contradictions and inconsistencies in the evidence of the prosecution witnesses. Fifthly, that PW5 testified in his absence and as such the appellant was not able to cross examine him. Sixthly, that no proper investigations were done in the case. Seventhly, that medical evidence was improperly produced. He also complained that Section 211 of the Criminal Procedure Code was not explained to him at the close of prosecution case. Lastly, it was a ground of appeal that his mode of arrest was not explained to the court.

In his written submissions, the appellant stated that initially the plea was not taken in Kikamba language which he understood, and that was why he was recorded as having pleaded guilty. He submitted

also that two important witnesses including the grandmother of the child victim were not called to testify. He also complained that no examination of the child victim was conducted by the court to determine her intelligence and that the child infact initially refused to testify. He submitted further that PW5 testified in his absence and as such he did not cross examine her. In addition, the appellant submitted, the corum in the court was indicated, which amounted to a violation of his fundamental rights. He also submitted that there were contradictions in the prosecution evidence and proper investigations was not done. In addition the doctor who produced the P3 form did not state how long he had worked with his predecessor. Lastly, the appellant complained that Section 211 of the Criminal Procedure Code (Cap. 75) was not explained to him and that his mode of arrest was not explained to the court.

The learned Prosecution Counsel Mr. Orwa opposed the appeal. Counsel explained that the proceedings were interpreted to the appellant in Kikamba language which he was using in this appeal. According to counsel that was the reason why the appellant was able to cross examine witnesses at the trial. In any case, he did not raise the issue of language at the trial. It was late to bring the said issue of language on appeal.

With respect to the appellant's alleged existence of a grudge, counsel submitted that it was an afterthought. The appellant had not demonstrated how such a grudge had arisen. Counsel also submitted that courts had held that the mere failure to examine a child witness to establish whether she knows the importance of an oath and the need to tell the truth was not fatal to a criminal conviction if there was other supporting evidence to prove the offence. Counsel further submitted that under Section 124 of the Evidence Act (Cap 80)there was no requirement that evidence of a child victim in sexual offences be corroborated, so long as the evidence was believable and was actually believed by the trial court. Counsel emphasized that in the present case, there was corroboration of the child victims evidence in the evidence of PW 4 regarding injuries suffered by the victim

Counsel submitted further that since the appellant actually cross examined PW 3, he could not now claim to have been absent when the said witness testified in court. Counsel submitted that ground 6 and 7 of appeal had no basis and should be dismissed. With regard to production of documents, counsel relied on Section 77 of the Evidence Act. Counsel submitted that the doctor who produced the testimony. Counsel further submitted that the record clearly shows how the appellant was arrested. There were no violations of his fundamental rights, counsel emphasized that the prosecution had proved all the P3 form knew the handwriting of his predecessor. Counsel also submitted that Section 211 of criminal Procedure Code case was explained to the appellant before tendering his defence and the sworn testimony. Counsel submitted further that the record clearly showed how the appellant was arrested. There were evidence of violations of his fundamental rights during arrest. Counsel emphasized that the prosecution had proved all the three ingredients of the offence beyond any reasonable doubt.

In response to the Prosecuting Counsel's submissions, the appellant stated he relied on his written submission and did not wish to add anything. These were the submissions on both sides.

The prosecution called 4 witnesses at the trial PW1 C M K was the mother of the complainant. It was her testimony that on the date in question, she left home for her usual business. She left the complainant her daughter of about 3 ½, with her grandmother. She came back at around 1.00pm and went out again, and came back in the evening. When she tried to bath the complainant, she became sensitive and started crying on touching her private parts. The complainant then mention to her that the appellant had assaulted her and warned her not to tell anybody. PW1 then slept with the child till next morning when she reported the incident to A N. She then took the child and reported the incident to the police and headed to hospital. From the information given by the complainant the appellant was arrested. According to this witness, the appellant initially admitted committing the offence and wanted to settle the matter.

Pw 2 B. M. was the victim. She was a child of about 3 ½ years. On the first day, she was not able to testify in court. She was stood down. When she came to testify another day, no examination was done by the court to ascertain whether she knew the nature of an oath and the importance of saying the truth. She gave brief evidence which was not on oath.

It was her evidence that the appellant had sexual intercourse with her and warned her not to tell anybody. She however, disclosed the incident to her mother PW1. She was asked one question in cross examination by the appellant.

PW 3 was PC Waithera the Investigating Officer. It was her evidence that she saw a report in the OB regarding the defilement. She interrogated the complainant and confirmed the allegation. She testified that on 20/11/2011 she arrested the appellant who was later charged with the offences. In cross examination, she stated that she took the child victim to the hospital. She denied that the appellant informed her that there was a vandetta existing between the mother of the complainant and the appellant.

PW4 was Doctor Philemon Ogetto. He produced a P3 form on the complainant filled by Dr. Indumwa. The observations were the existence of bruises on the labia minora of the complainant the hymen was also broken. That was the prosecution evidence

after the prosecution case, the appellant gave his defence statement.

There is no record that the appellant was explained by the court the three options were available to him in his evidence. He gave sworn testimony. It was his defence that, he was arrested by two people on 20/11/2011. With regard to the date of the incidence which was 27/11/2011, he stated that he attended his normal work. He denied committing the offence. In cross examination, he stated that he did not meet the child victim on the material day. He stated that he worked as a herds man in the home stead of the mother of the complainant. He stated that the mother of the complainant had a grudge against him.

This is a first appeal. As a first appellate court, I am duty bound to re-evaluate all the evidence on record and come to my own conclusion and inferences **– see the case of Oken vs. Republic(1972)EA32**

I have re-examined all the record. The first complaint of the appellant is with regard to the language used at the trial. Though the language used by the witnesses was not specifically indicated on the record of the trial court, the appellant cross examined, all prosecution witnesses, including the minor complainant PW 2 who did not testify on oath. It is therefore my view that the appellant understood the language used by witnesses in court. Otherwise he would not have been able to cross examine witnesses. There is no record that he complained about the language used. I thus conclude that he understood the language used in court. I dismiss that complaint.

The appellant has complained that PW1 the mother of the complainant had a grudge against him. There is no doubt in my mind that the two knew each other. The appellant stated in his defence that he was employed as herdsman in the homestead of PW 2. There could thus have been a reason for existence of a grudge in the employment relationship. However, in the present case the appellant did not raise such issue of the existence of a grudge in his cross examination to all the four prosecution witnesses, nor did he even raise that issue in his evidence in chief during his defence testimony. He merely mentioned the existence of grudge when he was cross examined. He did not give any details and the reason for the grudge and how and when it arose. In my view therefore, the allegation of a grudge was an afterthought prompted by the prosecution questioning. It was otherwise not part of the defence of the appellant. I am sure that if the appellant was aware of the existence of a grudge, he would have raised it either in cross examination to PW1 the complainants mother, or in his evidence in chief during his defence testimony. I dismiss that ground.

The appellant has also complained that PW2 was not examined to find out whether she knew the nature of an oath and the importance of saying the truth. It is clear from the record that such examination was not done by by court as required by law before minor witnesses testify it is also true as stated by the appellants that the complainant initially did not testify.

In the circumstances of the present case, however, the failure of the trial court to carry out voire dire examination did not cause any prejudice to the appellant. From the day of reporting to the police the allegation was that the culprit was the appellant. He admitted he was working in that homestead. Obviously, the child victim must have known him well. There was no possibility of a mistake or

fabrication by the child victim. I dismiss that ground.

The appellant has complained about contradictions and inconsistencies. Having perused the record, I find no contradictions or inconsistencies in the prosecution evidence, I dismiss that ground.

The appellant has also complained that PW3 testified in his absence. According to him that was the reason why he did not cross examine her. Having perused the records, I find that the appellant actually cross examined PW3 at length. It cannot thus be said that the witness testified in the absence of the appellant. Otherwise how was he able to cross examine the witness on her evidence at length?

The appellant further complaints that there was no proper investigations done in the case, and that his mode of arrest was not indicated on the record. I observe that the appellant has not indicated what other investigations needed to be done in this case. He has also not stated what mistake was committed in the manner he was arrested. I find no merits for his complaints. I dismiss the same.

The appellant has complained that the medical evidence was improperly produced. I appreciate that the P3 form on the complainant was produced by a doctor on behalf of his predecessor. I however find no irregularity or illegality in the way the medical evidence was produced. In addition, the appellant did not raise any issue at the trial with regard to the production of the P3 form by a doctor other than the doctor who filled the same. I dismiss that ground.

Lastly, the appellant has complained that section 211 of the Criminal Procedure Code (Cap 75) was not explained to him before he tendered his defence. Indeed, there is no record that the provisions of section 211 of the Criminal Procedure Code were explained to him before he tendered his defence. That should have been done. However, in the circumstances of the present case, I find no prejudice occasioned on the appellant. He gave sworn testimony. His defence was brief and he explained what happened to him on the day of arrest and also what he did on the date of the alleged incident. The defence was neither self-incriminating nor was it irrelevant. I thus dismiss that ground of appeal.

To conclude, I find that the evidence on record tendered by the prosecution proved beyond reasonable doubt that the appellant committed the offence. Sentence is lawful. I thus find no merits in the appeal. I dismiss the appeal and uphold both conviction and sentence of the trial court. Right of appeal explained.

Dated and delivered at Garissa this 19th day of February, 2015.

GEORGE DULU

JUDGE