



NO.96

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 61 OF 2012

FREDRICK ANASA MAOSAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant, **Fredrick Anasi Maosa** was charged with committing offence of attempted defilement in violation to section 9(1) as read with section 9(2) of the sexual offences act No.3 of 2006. The particulars thereof were that on the 16th July, 2011 at *[particulars withheld]* Estate Kilgoris Township of Transmara West District within Narok County did intentionally and unlawfully attempted to cause his penis to penetrate the vagina of A N a child aged 14 years in violation of section 9(1) as read with section 9(2) of the sexual offence Act No. 3 of 2006.

2. The appellant also faced the alternative count of indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars thereof are that on the 6th July, 2011 at *[particulars withheld]* Estate Kilgoris township Transmara West District within Narok County did unlawfully and intentionally caused his penis to come into contact with the vagina of A N a girl child aged 14 years contrary to section 11(1) of the Sexually Offences Act No. 3 of 2006.

3. The trial commenced at Kilgoris and the appellant was convicted under section 9(1) as read with section 9(2) of Sexual Offences Act. No. 3 of 2006. He was sentenced to serve 10 years imprisonment.

4. He now appears against the conviction and sentence. The grounds of his appeal are as set out in his petition of appeal dated 15th March, 2012. There are:

1. *That the learned trial magistrate erred n law and fact in convicting the appellant on the basis of insufficient medical evidence.*
2. *That the learned trial magistrate erred in law and fact in failing to afford the appellant a fair trial.*
3. *That the trial magistrate erred in law and fact in convicting the appellant when the circumstances obtaining at the time of the commission of the offence were not conducive for a positive identification and one free from error.*
4. *That the learned trial magistrate erred in law and fact in convicting the appellant without warning himself on the danger of convicting the appellant on the basis of a single identifying witness.*
5. *That the learned trial magistrate erred in law and fact by not find that the prosecution had not*

proved its case beyond reasonable doubt.

6. *That the trial magistrate erred in law and fact by convicting the appellant on insufficient evidence.*
7. *That the trial magistrate erred in law and fact by failing to consider the defence by the appellant and failing to give reasons for doing so.*
8. *That the trial magistrate erred in law by giving a sentence which was harsh and excessive in the circumstances.*
9. *That the conviction and sentence by the learned trial magistrate was unfair and unjust to the appellant.*

5. It is important to note that on 17/12/2014 at the prompting of the respondent counsel, Mr. Otieno, the court made an order in which the state ere to file their written submissions within two weeks, the same to be in court file, to be considered when the judgment, to be delivered on 13th February, 2015, is being delivered. Unfortunately as at 6th February, 2015, the court has not had sight of the written submissions by then respondent. As a consequence, the court will write its judgment on the basis of the appellant's written submissions only.

6. The appellant's submissions

1. *That because the trial court did not take into account how the complainant identified the appellant, we submit that this was a miscarriage of justice.*
2. *We submit that the learned trial magistrate did not afford the appellant a fair trial when he remarked. " I went through the Defence, I was not impressed with the same" The burden of proof subject to S.111 of the Evidence Act vests with the prosecution thought. It is the duty of the prosecution to prove a criminal charge beyond reasonable doubt.*
3. *The trial magistrate also failed to conduct an examination(voire dire) on the complainant to confirm whether the child was possessed with sufficient intelligence and understood the duty of speaking the truth. The court did not conduct any examination (voire dire) but only assumed that the child was above tender years. This presumption by the trial magistrate that the child was above the tender years was wrong and led to miscarriage of justice.*
4. *It is our submission that the conviction and sentence of the accused person was not safe since the age of the complainant/child was not explicitly known.*
5. *It is our further submission that the prosecution did not prove their case beyond any reasonable doubt. The evidence on record supporting the charge is that of PW1 only.*
6. *The trial magistrate did not even consider the evidence of the appellant and the caused dismissal of evidence a submitted earlier led to the miscarriage of justice and we urge the court o allow the appellant and set aside the conviction and sentence and released the appellant forthwith.*

7. Court duty.

The court has a legal duty to re-evaluate evidence tendered and come to own conclusion and findings, (see **Okeno vs. Republic [1972] E.A. 32**) bearing in mind that it neither heard nor saw the witnesses testify. That duty helps the court to employ an impartial and unblased laws in looking at the case once again. It also assists the court to dispel any misrepresentations by the parties or their counsel on the evidence tendered before the trial court.

8. Evidence.

The identification relied on by the court was not reliable as the offence occurred in the dark. There needed an identification be made under identification parade. This did not happen. The voice dire examination was not conducted on PW1 as by law required. Additionally, the age of the complainant was not specifically made as a finding.

9. Findings and order.

The court after re-evaluation of evidence finds that the prosecution did not prove its case beyond any

reasonable doubt. The trial court did not conduct voire dire examination of the complainant. The issue of identify is shrouded in a mist and not clearly conducted considering the alleged offence took place in the dark. For those reasons the court will quash the conviction and set aside the sentence. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at KISII this 13th day of February, 2015.

C.B. NAGILLAH,

JUDGE.

In the presence of:

Ogari for the appellant.

Majale for the respondent

Edwin Mongare court clerk.