



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 254 OF 2013

SIMON MWANGI MAINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the Conviction and Sentence by Hon. E.Boke, Snr. Resident Magistrate in Naivasha S.R.M.CR.C.NO.2887 of 2011 dated 4th October, 2013]

JUDGMENT

1. The Appellant was charged in the lower court with the offence of **Defilement** contrary to **Section 8(1)** as read together with **Section 8(2)** of the **Sexual Offences Act**. The particulars of this offence were that on 16th September 2011 in Nyandarua County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of **M.N.R.** a girl aged 9 years.
2. In the alternative he was charged with committing an **Indecent Act** on a female contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of this Charge were that on 16th September 2011 in Nyandarua County, the Appellant unlawfully and wilfully indecently assaulted **M.N.R.** by causing his penis to come into contact with her vagina.
3. He was, on the evidence, convicted of the main count and sentenced to 20 years imprisonment.
4. This appeal is against the conviction and sentence. The Appellant's Grounds of Appeal may be summarized as follows:
 - a. **That the plea was not undertaken in a language that the Appellant could understand;**
 - b. **That the trial court erred in convicting the Appellant against the weight of the evidence;**
 - c. **The trial court erred in failing to find that the identification parade was not properly conducted;**
 - d. **The age of the complainant was not proved;**
5. For the above reasons, he has asked the court to quash his conviction and set aside the sentence.
6. The Appellant was arraigned in court on 26th September 2011 to answer to the charges of Defilement and an alternate count of Indecent Act.
7. The complainant was a minor aged 9 years old. After conducting a *voire dire* examination the trial court found that she was competent to give unsworn testimony. She testified that on the 16th September 2011 at around 3.00pm, she was returning home from school when she encountered the Appellant. He held her by the hand and took her to a bush where he proceeded to remove his trouser, lay on her and did bad manners to her. When he was done he applied a mucous like substance around her private parts and told her not to tell anyone about what he had done to her.

8. When she returned home she gave her soiled clothes to her care giver at Rehema Children's Home and retired to bed. However, she continued to feel pain between her legs and was forced to inform her caregiver what had transpired. She was later taken to hospital and thereafter reported the matter at the Police Station.
9. When cross examined she testified that she knew the Appellant whom she had seen severally grazing his sheep in a nearby field and identified him by his beard. This is the description she gave to her caregiver and B, her uncle. Despite not being present during the Appellant's arrest, the complainant testified that she identified him at the Chief's Office where he had been detained. She maintained that it was the accused person who defiled her on the material day.
10. **PW2** is the matron at Rehema Children's Home where the complainant resides. She recalled that on 16th September 2011, the complainant home from school at 3.15 pm. When offered food, the complainant refused to eat and instead went to sleep. When she woke up, **PW2** noted that the complainant looked sick and unhappy. She did not respond when asked why she was late from school on that day. While washing her clothes the following day, **PW2** noticed that her dress and petticoat had blood stains at the buttocks. Although suspicious that something may have happened to the complainant, **PW2** did not inquire and remained silent.
11. The following Monday, the complainant returned home from school again. When asked by the **PW2** why she was late, the complainant told her that she was hiding from "*a tall man with beards who grazes goats the grazing field*". The complainant then disclosed that this man had defiled her.
12. **PW2** did not immediately recognize the man to whom the complainant was referring. Later accompanied by the complainant they went to the Chief's office after receiving information that the Appellant had been arrested. The complainant identified the Appellant from a group of men. At that point **PW2** recognised him as the man who used to graze his goats in the field near the children's home.
13. During cross-examination, **PW2** testified that she examined the complainant and confirmed that the blood stains on her clothes were not from her menstrual period.
14. **PW3** is a Children's Officer. He is the one who led the Administration Police to where the Appellant was arrested. He told the court that he identified the Appellant from the description given by the complainant. The Appellant who was a resident of that area was well known to him. He confirmed that he did not have a grudge against the Appellant and had never been involved in any dispute with him.
15. The complainant was examined on 22nd September 2011 by **PW4** who works at Lucy Kibaki Hospital in Nairobi. She observed that the complainant's hymen was broken and her *labia minora* and *majora* were normal. From her broken hymen, **PW4** concluded that the complainant had been defiled. She filled the P3 Form which she produced as "**Pexh.1**", the Post Rape Care Form was produced as exhibit 2.
16. **PW5** was the Investigating Officer. He recorded the witnesses' statements and charged the Appellant with the offence on the strength of the evidence of the complainant.
17. **PW6** was the arresting officer. He testified that the complainant pointed the Appellant to them from a lineout. However, the Appellant was arrested at his home in the presence of **PW3**. The witness was adamant they did not conduct an identification parade.
18. When put on his defence, the Appellant gave sworn testimony that he did not know the complainant and had not seen her before. That on that day he was in Kahuru Scheme Mwendandu where he had gone to solve a dispute involving his deceased brother's three wives. He was there from about 9.00 am to 6.00 pm. On that day, it was his thirteen year old daughter who was grazing sheep.
19. After his arrest, the Appellant testified that he was placed in an identification parade and was placed amidst other police officers. She told the officers that it was the man who had beards who had defiled her. However he was the only man with a beard in that parade.
20. **DW2** was the Appellant's nephew. He told the court that he resides in [particulars withheld] Area where the offence was allegedly committed. On the day when the offence was committed he was at his home area but he alleges that the Appellant was in Kahuru although he could not tell why the Appellant had gone there. When re-examined he stated that he was with the Appellant at Kahuru. It is material to note that the trial court observed that the witness appeared confused.

SUBMISSIONS

21. At the hearing of the appeal, the Appellant submitted on the sentence. He urged the court to give him a non-custodial sentence because he is seventy six years old and under constant medication. He is also the breadwinner of his twenty children.
22. In response, the Prosecution Counsel for the State argued that the sentence meted out to the Appellant is as prescribed under **Section 8(1)** as read together with **Section 8(2)** of the **Sexual Offences Act**.

ISSUES FOR DETERMINATION

23. Upon hearing oral submissions of Prosecuting Counsel for the State and reading the appellants written submissions, the issues for determination in this appeal are as follows:
 - a. whether the Appellant's plea was properly taken;
 - b. whether the Appellant was properly identified as the person who defiled the complainant;
 - c. whether the prosecution proved its case to the desired threshold
 - d. whether the court considered the appellants defence of *alibi*
 - e. whether the sentence meted out to the Appellant was proper.

ANALYSIS

24. This being the first appellate court it is incumbent upon it to re-evaluate the evidence on record and arrive at its own independent conclusion. Refer to **Okeno V. Republic**, (1972) EA 32.
25. On the first ground of appeal the appellant submitted that on the day of his arraignment the substance of the charge was read out to him in a language he understood nor were the words he used properly recorded. He contends that he was only conversant in Kiswahili and Kikuyu.
26. Upon perusal of the court record it reads as follows;

"COURT

The substance of the charge(s) and every element thereof has been stated by the Court to the accused persons in English/Kiswahili that they understands, who being asked whether they admits or denies the truth of the charge(s) replies;-

ACCUSED

It is not true.

ALTERNATIVE CHARGE

It is not true"

27. The above excerpt of the court record clearly indicates the language in which the charges were read out to the appellant as being English/Kiswahili. The Appellant in his submissions admits that he understands Kiswahili.
28. Reference is made to the Court of Appeal decision of **Adan V. Republic**, [1973] 1 E.A. 445 (CAN) which sets out the process of taking plea and I am guided by the said decision which states as follows:

"It should be explained to the accused in his language or in a language he understands;

The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;"

29. This court is of the view that had the plea been that of guilty then this court would then proceed to

- interrogate the exact words used by the appellant, which should have been recorded by the trial court. In this instance, the Appellant did not admit the charge and the matter proceeded to full hearing in the same language (English/Kiswahili) and again after lengthy perusal of the court record I have noted that at no time did the appellant request the trial court that he needed an interpreter as he did not understand the proceedings, nor the language, nor the case against him.
30. I find no merit on this ground of appeal and disallow it.
 31. On the issue of identification, the appellant contends that the Identification Parade held at the AP's camp was flawed as he was the only bearded old man in the lineout which enabled the complainant to easily pick him out.
 32. Having perused the court record I find no production as evidence into court of any duly filled Identification Parade Form in accordance with the Police Standing Orders. Also it is noted that **PW6 APC Kipkorir Tere** one of the arresting officers was adamant that no Identification Parade was conducted.
 33. The court record shows that the incident occurred at 3.00pm which was in broad daylight and the conditions can be said to be favourable and conducive to identification.
 34. The evidence of the Complainant on record shows that she gave a description of the appellant to the police before his arrest, that he was a tall bearded man and that he always grazed sheep in a field that was in the proximity of [particulars withheld] Children's Home.
 35. From the evidence gleaned from the court record the trial court made a finding that there was no Identification Parade carried out and that identification was by way of recognition and I concur with the trial magistrate's findings.
 36. This ground of appeal is disallowed.
 37. The appellant testified that he had gone to Kahuru on the material date and was in the company of the witness **DW2**. When called upon to testify on his behalf this witness was unable to corroborate the evidence of the appellant on the material date. In fact he stated under cross-examination that he was not with the appellant and that he did not know what the appellant had gone to do at Kahuru.
 38. Therefore this court is satisfied that the defence of alibi was correctly disregarded by the trial court as it did not raise any reasonable doubt in the prosecution's case.
 39. The Appellant raised the issue that the age of the complainant was not proved by the prosecution therefore making the sentence improper.
 40. When the Complainant testified she stated that she was in Class Three (3) and was aged ten (10) years. The charge sheet reads nine (9) years and the P3 Form also indicates that she was aged nine years. I note that the date she testified was on 18th October, 2012 and the offence was committed on the 16th September, 2011 exactly one year thereafter. I therefore find no inconsistencies as submitted by the appellant on the age of the complainant.
 41. It is this court's considered view that the evidence of the Complainant on defilement and evidence of her age is corroborated by the evidence of **PW4 Dr Lilian Nyamera**, the doctor who examined her and tendered the P3 Form into evidence.
 42. The trial court passed sentence and meted out a Twenty (20) year sentence as per the provisions of **Section 8(3)** of the **Sexual Offences Act** despite the evidence adduced by the prosecution having proved the age of the complainant as nine (9) years and even the correct provision **Section 8(2)** was clearly set out in the charge sheet which section provides for a mandatory life sentence. This court is mandated to interfere with the sentence where it is found that the trial court erred in applying wrong principles of law. Refer to the case **Wanjema V. Republic**, [1971], E.A. 493.
 43. In this instance I shall not interfere with the sentence as the appellant was not cautioned or given notice by the Prosecuting Counsel for the State before commencement of the hearing of the appeal of the possibility of enhancement of sentence. It is also my considered view that a term of twenty (20) years for a person of the appellant's age is equivalent to a life sentence.

FINDINGS

44. For the reasons stated above I make the following findings:
45. The plea is found to have been properly taken and in a language that the appellant understood.
46. The appellant is found to have been positively identified by the Complainant.
47. This court finds that the appellant's defence of *alibi* was uncorroborated and raised no doubt in the

- prosecution's case and finds that the trial court did not err in disregarding it.
48. This court finds that the offence of defilement was proved by the prosecution to the desired threshold.
49. The age of the Complainant was proved but on the issue of sentence passed this court shall leave it as it is and shall not interfere it.

DETERMINATION

50. The appeal is found lacking in merit and is hereby dismissed.
51. The conviction and sentence is upheld.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 29th day of May, 2015.

A. MSHILA

JUDGE