REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 51 OF 2014

JOSEPH GATIMU MURIITHI……...…….APPELLANT

-VERSUS-

REPUBLIC……..…….....……...RESPONDENT

(Being an appeal from the original conviction and sentence of the Chief Magistrate's Court at Kerugoya (J.A. Kasam) Criminal case Number 98 of 2014 delivered on 24th September, 2014)

JUDGMENT

1. **JOSEPH GATIMU MURIITHI**, the appellant herein was charged with defilement contrary to ***Section 8(1)*** as read with ***Section 8 (3)*** of the **Sexual Offences Act No. 3 of 2006** through Kerugoya Chief Magistrate's Criminal Case No. 3 of 2014 – where he was found guilty of the offence and upon conviction sentenced to serve 30 years imprisonment. Being dissatisfied with the conviction and sentence he filed this appeal raising the following grounds:-
2. ***(i) That the learned magistrate erred in law and fact by upholding the evidence of the complainant despite confusing him with one Sammy.***

   (ii) That the learned magistrate erred in law and fact by failing

   to consider that the evidence by the medical officer was not sufficient proof that there was penetration and so his evidence could not warrant a conviction.

   (iii) That the learned magistrate erred both in law and fact by failing to consider that the complainant was taken to hospital for examination after six (6) days and no explanation was given for the delay.

   (iv) That the learned magistrate erred in law and fact by convicting the appellant despite the fact that there was no eye witness.

   (v) That the learned magistrate erred in law and fact by relying on the evidence of a single witness and failing to warn herself of using such evidence.

   (vi) That the learned magistrate erred by relying on evidence of one Caroline in her judgment who never testified in court.

   (vii) That the learned magistrate erred in law by imposing a harsh sentence against the appellant.

3. The Appellant at the hearing of this appeal relied on his written submissions. The Appellant

faulted P.W.3, a teacher to the complainant for the evidence tendered in Court which evidence in his view was inconsistent with what the complainant told the Court. The Appellant pointed out in his submissions that P.W.3 told the court that the complainant reported to him that they took drinks in a house while the complainant (P.W.1) told the Court that they took drinks at a club, a fact that was supported by P.W.4. According to the Appellant, P.W.3 pressurized the complainant to implicate him in the offence.

4. The Appellant also contended that being a boyfriend to one **C** who was said to have been in the company of the complainant on the material day, it could not have been possible for him to be with C and at the same time defile the complainant. He supported this contention with the evidence of P.W.4 who told the Court that he saw the said C and complainant in the club together after the complainant had left. The Appellant submitted that the complainant may have been waylaid by unknown persons and he could have been implicated on account of having been in the company of both C and the complainant on the material date.
5. On identification, the Appellant submitted that the complainant failed to positively identify him and that the prosecution failed to connect him with the house where the complainant was sodomized saying that the evidence on identification was based on speculation and conjecture. He faulted the prosecution for not calling a crucial witness known as C who should have shed light on what took place. He urged this Court to find that, in line with the decision in the case of **JUMA NGONDIA -VS- -R-**, the evidence of the said C was or would be unfavourable to the prosecution case. He submitted that the prosecution wanted to conceal material facts and that is why they left out the evidence of **C**.
6. The Appellant further opined in his submissions that the said **C** was a suspect due to the evidence tendered and should have been arrested as an accomplice to the offence committed against the complainant.
7. The Appellant in his submissions further raised a new ground by stating that the Charge Sheet was defective as it showed that he was arrested on 17th February, 2014 while he was arrested on 16th February, 2014 as per the Occurrence Book. This ground was however, raised without leave of Court pursuant to ***Section 350 (2)*** of the **Criminal Procedure Code**. The ground is as such irrelevant in so far as the determination of this appeal is concerned.
8. The Appellant has further pointed out that the trial magistrate erred by relying on evidence of the complainant when it was doubtful if he was conscious at the time of the offence owing to his state of mind. According to him the complainant may have been too intoxicated to recognize the assailant.
9. Finally the Appellant pointed out an inconsistency on the evidence adduced by investigating officer (P.W.6) who told the trial court that he issued a P3 to the victim on 15th February, 2014 while the P3 produced as P. Exhibit 3 showed that the P3 was issued on 13th February, 2014. He therefore wondered if there were two P3 forms issued to the same complainant and if so whether the exhibit produced was filled before the complainant was sent to hospital.
10. The office of Deputy Public Prosecutor through Mr. Sitati offered no opposition to the appeal. Mr. Sitati conceded the appeal on one main ground and that is the fact that the Appellant was not positively identified. The Deputy Public Prosecutor opined that the evidence adduced at the trial court showed that the offender was known as Sammy but the Appellant herein was known by his name and did not have alias. He also conceded that the prosecution was unable to establish who the owner of the house where the complainant was sodomized which was key in connecting the Appellant with the offence committed. In his view, the evidence of defilement was sufficient but the identity of the Appellant fell short and did not meet the legal threshold.

11. I have considered this appeal, the grounds relied on the petition and the submissions made. The determination of this appeal in my view rests on one ground and that is identification. The question that begged for answers at the trial court was whether identification of the Appellant as the person who sodomized the complainant was beyond reasonable doubt.

12. I have evaluated the evidence tendered by the complainant cautious of the fact that I did not see the witness first hand testifying in Court. What is of concern to this Court is the chronology of events as given by the complainant (P.W.1) as opposed to the version given by P.W.4. According to the complainant, he had accompanied his relative named C to Kagumo after a church service

and on reaching Kagumo went into a bar in the company of the Appellant. He told the trial court that while the others took alcohol (Vienna) he took a soda but got drank and became unconscious while at the bar and only came to on Monday the 10th February, 2014 inside a house with both C and the Appellant missing. According to him, the Appellant at night had sodomized him and thereafter left. The following day he also came at night and repeated the offence and left. On Wednesday, he cried for help when he saw someone passing by and was rescued. P.W.4 however, gave a different version saying that he was at the bar at 8.00 p.m. on 9th February, 2014 with the Appellant drinking in the company of one C when the complainant entered the bar and drank C's beer and left. P.W.4 told the trial court that he left C and the Appellant in the bar and could not tell where the complainant had gone.

13. In addition to the above inconsistency a look at the evidence tendered by P.W.3, said to be a teacher to the complainant showed that the complainant on being interrogated by the teachers on why he was absent from school reportedly told them that he had been locked in a house and sodomized by a person called Sammy and according to him the named Sammy was well known to C. The Appellant of course is not known as Sammy but even if he was referred to as Sammy by C, I do not see the clear connection in the absence of evidence from the said C. The State should have called Caroline whom I found to be central to the prosecution case but for unknown reasons they chose not to call her as a witness. The same C was said to be girlfriend to the Appellant but that notwithstanding gaps were created in the prosecution case as a result of not calling her as a witness.

14. In the first place, the complainant told the Court that C is a relative and had requested him to accompany her to Kagumo. The Court was not told how old C was but it should have been material considering that she took the complainant (a minor) to a bar at Kagumo and proceeded to drink with him in the company of the Appellant. The trial court was not told where C was when the complainant was left locked in a room where he was sodomized. If she was not a witness to the incident surely she should have been an accomplice as submitted by the Appellant in his submissions. This is even more glaring considering the evidence given by P.W.3 who told the trial court that Carol referred to the person who sodomized the complainant as "Sammy". If that was so the question is **was it deliberate to confuse the complainant** and if so is she not an accomplice to the crime committed against the complainant? On the other hand, if it is true that the person who committed the offence was known as Sammy, why did the Police arrest the Appellant herein when he is not Sammy?

15. I do find that the investigation carried out by the Police was shoddy as is conceded by the Office of the Deputy Director of Prosecutions. It was crucial for the Police to establish ownership or the person who was occupying the house used for kidnapping of complainant and attendant defilement. The complainant told the trial court that he was locked in the house for three(3) days. It could not be hard to locate the house in my view considering that the complainant told the court that he was rescued during the day.

16. I also find that the person who rescued the complainant was not traced neither is the motorcyclist who took the complainant home. The complainant told the trial court that the motorcyclist is a neighbour and is known to him and therefore I believe the Police should have found the witness a useful lead to nailing the culprit in the crime committed against the minor. I note from the evidence of P.W.2, the father to the complainant that he decided to drop some charges but the nature of charges and against whom is not explained. The record only indicates that some charges were dropped after some inquiries were made by the Police. It is therefore not difficult to understand the submissions by the Appellant that the evidence against him was speculative.

17. This Court finds that the offence under which the Appellant is charged is serious as the sentence prescribed in law is quite punitive. It was imperative therefore for the prosecution to take the case seriously and seal all loopholes in order to prove the case beyond reasonable doubt. It is true that the offence was proved but the identity of the offender left a lot to be desired. I do find as pointed out above that the issue of identification was not proved beyond reasonable doubt. The learned

magistrate addressed the issue but with due respect misdirected herself because the complainant in the first place was unfamiliar with the Appellant. The person familiar with the Appellant was **C** and **C** was not called to testify. The evidence of P.W.4 actually casted doubts on the identity of the Appellant as the person who committed the offence. He told the trial court that after taking the beer on the table belonging to C, the complainant went out of the bar to unknown destination. In my view this should have created a doubt in the mind of the learned trial magistrate especially given the fact that he told the court that he passed out after consuming what he thought at the time to be soda.

18. It is also important to note that in his defence, the Appellant clearly denied the offence saying that the same was a fabrication. The trial court fell into error in my view to hold that the Appellant never denied the offence. In any case the burden of proof is normally on the prosecution and in this case I do find that the burden particularly on the issue of identification was not established and proved to the required standard in criminal law. The state was correct to concede the appeal but should have done better by complying with ***Section 352A i***n order to save time. The upshot of the above is that I find merit in this appeal. The same is allowed, the conviction against the Appellant is quashed. The Sentence is set aside.

He shall be set free forthwith unless otherwise lawfully held.

Dated and delivered at Kerugoya this 28th day of May, 2015.

R. K. LIMO

JUDGE

28.5.2015

Before Hon. Justice R. Limo

Court Assistant Willy Mwangi

Appellant present in person

Sitati for State present

COURT: Judgment signed, dated and delivered in the open Court in the presence of the Appellant and Sitati for Deputy Director of Prosecutions.

R. K. LIMO

JUDGE

28.5.2015