REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 56 OF 2012

JOEL WANG'ARA ONESMUS……..…APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(An appeal from the conviction and sentence of the Senior

Resident Magistrate (D. A. Ocharo) in Criminal Case Number

861 of 2010 at Wanguru)

JUDGMENT

1. The appellant herein, **JOEL WANG'ARA ONESMUS** was charged with defilement of a girl contrary to *Section 8 (3)* of the Sexual Offences Act No. 3 of 2006. The particulars as per the charge sheet filed in the trial court indicated that the appellant committed the offence on 25th November, 2010 in **KIRINYAGA SOUTH DISTRICT**. After trial he was found guilty of the offence, convicted and sentenced to serve twenty (20) years imprisonment. He was dissatisfied and preferred this appeal raising five grounds as follows:

2. ***(i) That the learned Resident Magistrate erred in law and fact in convicting the appellant.***

(ii) That the learned Resident Magistrate convicted the appellant against the weight of the evidence adduced.

(iii) That the learned magistrate erred in law in not considering the evidence of the appellant.

(iv) That the learned Resident Magistrate erred in law and fact holding that the appellant was guilty when it was clear that the complainant was suffering from a venereal disease when the appellant was not.

(v) That the learned Resident Magistrate erred in law, facts in convicting and sentencing the appellant to twenty years imprisonment when the prosecution's evidence was not water tight.

3. At the hearing of this appeal the appellant in addition, submitted that there was no evidence to show that the complainant was defiled. While maintaing his innocence, he claimed that he had a grudge with the mother (P.W.2) of the complainant about land but gave no details. He however, stated that he is related to her by the fact she is an aunt to her.

4. Mr. Omayo for Director of Public Prosecutions offered no opposition to this appeal. His main ground for not opposing was that the appellant was charged with *Section 8 (3)* of the Sexual Offences Act when it was clear from evidence adduced that the complainant was ten years old. He pointed out the evidence of the Doctor (P.W.3) who filled the P3 and who testified that the complainant was aged ten (10) years at the material time.
5. Mr. Omayo also pointed out the discrepancy in the charge sheet which showed that the appellant was charged with defiling a girl aged 16 years when the evidence adduced showed that the girl was aged ten (10) years old. He admitted that the trial magistrate erred by basing the conviction on a defective charge sheet instead of invoking the provisions of *Section 180* of the Criminal Procedure Code to rectify the defect and convict the appellant under *Section 8 (2)* of the Sexual Offences Act.
6. On sentence, the state submitted that the appellant was handed an illegal sentence stating that they would have prayed for retrial but in view of passage of time it would be difficult to trace the witnesses.
7. I have considered the appeal and thought the State did not oppose it, I am under obligation to evaluate the evidence tendered at that court and determine the same on merit.
8. I have considered the charge sheet presented to court and note that indeed there is discrepancy not only on the evidence tendered but the charge inexplicably is not in tandem with the particulars given on the same charge. The charge sheet states that the appellant was accused of defiling a girl aged sixteen (16) years contrary to *Section 8 (3)* of the Sexual Offences Act but looking at the details given on the particulars, it indicates that the appellant had defiled **JOAN WAKUTHII MURAGE** a child aged ten (10) years old. How the obvious discrepancy escaped the attention of the prosecution is difficult to tell. The trial magistrate also appears to have failed to address his mind on the same. However, for good measure he noticed the discrepancy on the evidence adduced and the charge sheet. He, however, misdirected himself on the question of the age of the complainant when he found that the age of the minor had not been established or proved.

9. I find the same as a misdirection and erroneous because there was sufficient evidence adduced in my view that proved that the minor or complainant was aged ten (10) years at the material time. This is seen from the P3 produced as P. Exhibit 1 by a Doctor (P.W.3) who testified and confirmed the age of the minor to be ten (10) years. The minor herself told the court that she was ten (10) years and in class 3. The mother (P.W.2) also confirmed the same. It is to be noted as it has been held severally by this court that to establish an age of a victim in sexual offences you do not necessarily need a birth certificate or age assessment report. Where a P3 for example clearly indicates the age of a victim in sexual offences and a doctor or medical officer who filled the details comes to testify and confirms the same, the same evidence suffices in so far as establishing the age of the victim is concerned.

NB: This is a position taken in the cases of **WAHOME CHEGE -VS- REPUBLIC [2014] eKLR** and **FAPPYTON MUTUGU –VS- REPUBLIC [2014] eKLR** where the respective courts held *inter alia* that formal documents like birth certificates or an age assessment reports to prove the age of a victim in sexual offences may be necessary in borderline cases but in situations where the child is aged three (3) years as was the case in **FAPPYTON MUTUGU'S** case, the court accepted any evidence showing that the victim was aged 11 years or less. In **WAHOME CHEGE's** case the court held that the evidence adduced by the minor and supported by the P3 produced was sufficient to establish the age of the victim. This is further seen from the observations made by the court in the case of **JOEL SIO MWASI - VS - REPUBLIC [2014] eKLR** the court held that where there is consistency on the age of the minor it was not necessary to call for a birth certificate or an age assessment report. I do find that the appellant in this appeal never contested the age of the minor at the trial. He also did not raise it in this appeal showing that the age of the complainant was established without a doubt that she was indeed ten (10) years old.

The trial court in the court below, erred in my view and in the light of above authorities by finding that the age was not proved and despite that finding, went ahead to convict the appellant under *Section 8 (3)* of the Sexual Offences Act without laying basis for the conviction. The State submitted in this appeal that the learned magistrate should have invoked the provisions of ***Section 180*** of the Criminal Procedure Code to correct or cure the discrepancy between the charge sheet and the evidence tendered. This court considers it prudent to determine that issue later in this judgment.

10. The appellant in his 2nd ground of appeal contended that the trial magistrate made a decision to convict him against the weight of evidence. To determine this ground it is important to note that in offences of the nature that faced the appellant at the trial there are two important ingredients which must be proved and established in order to discharge the burden of proof. These are:

1. Prove of penetration.
2. Positive identification.

11. On the first ingredient, I have evaluated the evidence tendered and the assessment done by the trial court. The learned magistrate relied on the evidence of the doctor (P.W.3) named **Dr. DOUGLAS NJAU CHIRA** who examined the complainant and filled the P3 form. In the opinion of the doctor, there was evidence of penetration which included extensive bruises on the victim's genitalia and on her left thigh on the medial side. He also noticed what he termed "copious white discharge" from the complainant's private parts which was indicative of a venereal infection. The doctor's conclusion that the minor was likely to develop a post-traumatic stress disorder was consistent with a mental state of a child who had been defiled and this fact was well captured by the learned magistrate in his judgment.
12. The trial learned magistrate also observed the demeanour of the complainant during the hearing and this is how he described her:

> ***"I wish to state that I believe the testimony of the child the alleged victim in all respects. She testified on oath so vividly and clearly so that nothing was left to imagination……."***

This finding by the learned magistrate is material in so far as establishing beyond reasonable doubt that the complainant was indeed defiled and that there was penetration. It is to be further noted that the law under *Section 124* of the Evidence Act provides that evidence of victims of sexual offences requires no corroboration where the court has basis to believe that the victim is telling the truth. I do find that the case at the trial court was way beyond this threshold because the mother (P.W.2) tendered evidence before the trial court showing how she noticed her child walking with some difficulty and upon prodding she revealed that she had been defiled by the appellant herein. This evidence was confirmed by the doctor as indicated above. It is therefore clear that the prosecution was able to prove beyond reasonable doubt that the victim of the offence had been defiled.

13. The other important ingredient of the offence is identification. The minor complainant knew the appellant well as she knew him by name and also as a cousin. The appellant did in fact confirm this fact that they are indeed cousins. The trial magistrate observed signs of phobia from the complainant towards the appellant when testifying in court and I find that the learned magistrate's assessments of evidence in regard to positive identification of the appellant as the person who committed the offence cannot be faulted. The mother (P.W.2) told the court that she was away at the material time attending a funeral and the appellant confirmed to court that he was present at the material time and place. I do find that the evidence tendered by the prosecution sufficiently placed the appellant at the scene of crime. The identification was positive and the learned magistrate was correct to make that finding.

14. The appellant raised the issue of venereal disease saying that there was nothing connecting him with the same. Well from the evidence tendered by the doctor, he concluded that from the discharge that emanated from the complainant's private parts the victim was likely infected with a venereal disease. He also observed that from the appellant's medical examination he did not show

any sign of venereal disease. The doctor, however, did not tell the court whether any tests were done on the child apart from HIV tests which results turned out negative. The appellant also appeared not to have been tested as no medical report or laboratory examination results were tendered. In my view evidence of venereal disease was inconclusive either for the prosecution because then, the appellant would have been further charged with *Section 26(1)* of the Sexual Offences Act for deliberately infecting the minor with a sexually transmitted disease. In the same view, the appellant could not conclusively defend himself that he could have passed a sexually transmitted disease which he did not have. I find that ground four of his petition of appeal in that respect does not hold any water.

15. The appellant raised the issue of an existence of a grudge between him and the complainant's mother and that his defence was not well considered by the learned magistrate at the trial court. However, I have evaluated the defence tendered. I find that apart from allegation of an existence of a dispute, the details of the dispute was not given. The appellant decided or opted to give unsworn testimony in his defence and called one witness. I have evaluated the defence put forward and I am not persuaded that the same was sufficient to displace the weight of the prosecution case which I find overwhelming.
16. Having determined the above issues, the only remaining issue in this appeal is the question of discrepancy between the charge that faced the appellant and the particulars given in the same charge and the evidence tendered which clearly showed a glaring disparity. As indicated above, the learned magistrate noted the same but misdirected himself and fell into error by convicting the appellant on an erroneous information given on the charge sheet. The charge erroneously indicated that the child was aged 16 years old. The age of the victim or the complainant was established as per evidence tendered was ten (10) years. The same information is contained in the particulars of the charge and is consistent with the evidence tendered. The trial court ought to have cured the anomaly by invoking the provisions of *Section 186* of Criminal Procedure Code and convict the appellant correctly in accordance with the law under *Section 8 (2)* of the Sexual Offences Act No. 3 of 2006.

17. The upshot of the above is that this court finds no merit in this appeal. In light of the above findings this court shall under *Section 354 (3) (i)* and *(ii)* Criminal Procedure Code reverse the conviction of the accused person under *Section 8 (3)* of the Sexual Offences Act and in its place convict the appellant under *Section 8 (2)* of the Sexual Offences Act No. 3 of 2006 and on sentence, the appellant's earlier sentence of twenty (20) years is set aside and in its place, he shall now serve life imprisonment. It is so ordered.

Dated and delivered at Kerugoya this 27th day of May, 2015.

R. K. LIMO

JUDGE

27.5.2015

Before Hon. Justice R. Limo

Court Assistant Willy Mwangi

Appellant present

Interpretation English/Kikuyu

Omayo for State present

Joel Wang'ara in person

COURT: Judgment signed, dated and delivered in the presence of the appellant in person and Omayo for State.

R. K. LIMO

JUDGE

27.5.2015