REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 49 OF 2014

MULAKI MWASYA …..... APPELLANT

VERSUS

REPUBLIC …..... RESPONDENT

(*From the conviction and sentence in Mwingi SRM Criminal Case No. 356 of 2013 – M.W. Murage Ag. SRM*)

JUDGEMENT

The appellant was charged in the subordinate court with attempted defilement contrary to section 9 (1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that on 21st June 2013 at [particulars withheld] Trading Centre, Mwingi East District of Kitui county intentionally attempted to penetrate his male genital organ namely penis into the female genital organ namely vagina of MM a child aged 12 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 the offence were that on the same day and place he intentionally and unlawfully did an act which caused the contact of his male genital organ namely penis to the female genital organ namely vagina of MM a child aged 12 years. He pleaded not guilty to both counts. After a full trial he was convicted on the main count and sentenced to serve 15 years imprisonment.

Aggrieved by the decision of the trial court, the appellant has appealed to this court against both the conviction and sentence. He filed initial grounds of appeal on 2nd July 2014. However before the hearing of the appeal, he filed amended grounds of appeal which are as follows:-

1. That the learned trial magistrate erred in law and infact to convict him without considering that the trial was unfair contrary to Article 25 of the Constitution.
2. The trial magistrate erred in law and in fact to convict him without considering that there was neither eye witnesses nor positive identification of the assailant.
3. The trial magistrate erred in law and fact to convict him without considering that there was mass contradictions on the date, time, age and the evidence as a whole contrary to section 163 of the Evidence Act.
4. The trial magistrate erred in law to convict him without considering that the P3 report did not give any opinion on attempted defilement.
5. The trial magistrate erred in law and fact by rejecting his defence which was firm enough and unshaken by the prosecution evidence.
6. The trial magistrate erred in law and fact to convict him without considering that the prosecution failed to prove its case beyond reasonable doubt as required under section 109 and 110 of the Evidence Act.

The appellant also filed written submissions to the appeal and relied on the same. I have perused the said

written submissions.

Learned Prosecuting Counsel Mr. Orwa opposed the appeal. With regard to the age of the complainant, counsel maintained that both PW1 and PW2 her mother, maintained that the victim was 11 years of age. The medical age assessment was 10 years. In effect counsel contended the age of the complainant was between 10 and 11 years.

On penetration counsel submitted that the charge was for an attempted defilement and, though the P3 form did not confirm penetration, attempted defilement was proved. On whether the appellant was the culprit counsel argued that the appellant was a neighbour at the house where PW1 and PW2 lived. PW1 infact saw him at 11pm. His clothes were identified by PW3. The case was based on evidence of recognition, and as such there was no possibility of mistaken identity. There was also no proof of an existing grudge.

On crucial witnesse,s counsel submitted that though the witnesses testified in court came from one family, there was nothing wrong with that. Finally counsel submitted that the appellant did not object to the production of the P3 form by a doctor other than the one who filled it. He thus urged the court to dismiss the appeal.

At the trial the prosecution called 5 witnesses. PW1 was the complainant MM. It was her evidence that she was attended [particulars withheld]Primary School and was in class one. She was aged 11 years. She testified that she knew the appellant as a niehgbour and that on 21st June 2013 at about 8pm, the appellant came to their home while they were seated outside. He was a friend of her elder sister. He inquired where the elder sister had gone to. He then went away only to come back later into the house and forcefully have sex with her and then ran away. However, she was unable to identify him as he was wearing a white vest, a black trouser with no shoes. It was her evidence that later reported the incident to her mother and house was taken to hospital and a report was also made to the police. PW2 J K was the mother of PW1. It was her evidence that she worked at [particulars withheld] bar in [particulars withheld] trading centre. That on 27st June 2013 at about 9pm she was at work but was called by a lady called M who told her that someone was raping her daughter. She rushed home and found PW1 crying. She was told that Joel Mulaki Mwasya had raped her daughter. On her examination of her daughter's genitals she found some semen. She took the complainant to hospital and to the police. The appellant was then arrested. It was her evidence that the complainant's birth documents were burnt during intertribal fighting.

PW3 was K M a student in primary class 6 aged 14 years. She was a sister of the complainant. It was her evidence that on 21st June 2013 in the evening, the appellant came to their home and sat on a chair and asked questions about the whereabouts of other people. At about 10pm that night, she heard PW1 screaming and noticed the appellant leaving the room wearing a white vest and a black trouser. They called their mother. In cross examination she insisted that the appellant was wearing a black trouser and a white shirt.

PW4 was Corporal Simon Lubuga the in charge of Nguni Police Post. It was his evidence that on 21st June 2013 at 10pm the complainant was brought to the station by her mother with a report that the appellant a neighbour had defiled the child. The report was entered in the OB. On the following day the victim was taken to Mwingi District Hospital.

PW5 was Duncan Kilonzo a Clinical Officer. It was his evidence that the complainant was brought to hospital on 26th June 2013 with a history of defilement. He conducted examination. According to him the child was aged 12. The genital organs were normal and no sperms were seen. He produced the P3 form. He stated that the doctor assessed the age of the complainant to be 10 years old.

When put on his defence, the appellant gave sworn testimony. He stated that he operated a hardware shop as an employee. He denied defiling the child or any knowledge of her and stated that he merely saw her only in court. He stated that he went to Nguni Police Station after he was told that there was an allegation that he had defiled a child. He stated that he knew the mother of the complainant. In cross examination he stated that he was a neighbour of the complainant's family at [particulars withheld] in N and he knew that

the children sometimes spent the night alone.

Faced with his evidence, the learned trial magistrate found that the prosecution had proved its case against the appellant beyond reasonable doubt. The court thus convicted him and sentenced him to serve 15 years imprisonment.

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 conclusions and inferences. **See the case of *Okeno Vs. Rep [1972] EA 32***.

I have re-evaluated the evidence on record. The appellant complains that the trial was unfair to him. Having perused the record I find nothing unfair about the trial hearing. The language of the court was understood by the appellant. He cross examined witnesses. He also tendered sworn evidence and was cross examined on the same. He thus fully participated in the trial. He cannot say now that he did not understand the charge or the proceedings.

The appellant also complains that there were several contradictions in the prosecution case. I have perused the evidence from prosecution witnesses. I find no contradictions at all. The only mention of a date of 26th January 2013 was in the evidence of PW2 which was certainly a mistake. The report to the police was made on 21st June when the incident occurred.

The variation of age of the complainant only meant that the age was an estimate. It could be between 10 an 12 years. In any of those situations, the complainant would still be a child. Therefore I find that the complainant was a child as found by the learned trial magistrate.

On identity of the appellant as the culprit, I observe that the incident occurred at night. Nobody mentioned the existence of any light in the room or house. None of the witnesses at the scene also stated that she talked to the appellant and recognized him by voice. The identification of the appellant is by clothes which are said to have been a white t-shirt and a black trouser. The appellant had gone to the same house earlier at about 7 or 8pm. This incident occurred at around 10pm which was just two hours thereafter.

The appellant gave a defence initially saying he did not know any of the relatives of the complainant. He later changed and in cross examination admitted that he was a neighbour and knew them well. The evidence of the prosecution and the defence put side by side creates strong suspicion against the appellant as the culprit. However in criminal cases suspicion however strong cannot be the basis of sustaining a conviction. **See the case of *Sawe Vs. Republic [2003] KLR 364*.**

In my view the prosecution should have elaborated on the mode of identifying or recognizing the appellant rather than just relying on the evidence on record which was merely about the white shirt and black trousers. The burden is always on the prosecution to prove a case against an accused person beyond reasonable doubt. In the present case the prosecution failed to bring evidence which would positively identify the appellant as the culprit. I thus find that the conviction is unsafe and cannot be sustained. The sentence will also have to be set aside.

In the result, I find merits in the appeal. I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant is set at liberty forthwith unless otherwise lawfully held.

Dated and delivered this 20th day of May, 2015

GEORGE DULU

JUDGE