REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 133 OF 2013

J K M..... APPELLANT

V E R S U S

REPUBLIC..... STATE

(From the original conviction and sentence by P.M's Court at Kyuso Case No. 49 of 2012).

J U D G M E N T

The appellant was charged in the subordinate court with 2 main counts of defilement Contrary to Section 8 (1) as read with (2) of the Sexual Offences Act No. 3 of 2006. The particulars of count 1 were that between 18th February and 20th March 2012 at [particulars withheld] village Tseikuru District Kitui County intentionally committed an act which caused penetration of his penis into the vagina of MMM a child aged 8 years. In count 2, the particulars were that on the same dates and place he intentionally committed an act which caused penetration of his penis into the vagina of FMM a child aged 6 years.

In the alternate to count one he was charged with committing an indecent act with a child contrary to Section 11 (b) of the Sexual Offences Act 2006. The particulars of the offence were that between 18th February and 20th March 2012 at [particulars withheld] village Tseikulu district within Kitui County intentionally and unlawfully committed an indecent act by causing his male genital organ contact the female genital organ of MMM a child aged 8 years. In the alternative to count 2 he was also charged with committing an indecent act with a child. The particulars of the offence were that between the same dates and at the same place he intentionally and unlawfully committed an indecent act by causing his male genital organ contact female genital organ of FMN a child aged 6 years.

He denied all the charges.

After a full trial, he was convicted on the two main counts. He was sentenced to life imprisonment on each count. The sentences were ordered to run concurrently.

Aggrieved by the decision of the trial court, the appellant has come to this court on appeal.

He filed his grounds of appeal through his counsel Nyamu and Nyamu Advocates. His grounds of appeal are as follows:-

1. The learned trial magistrate erred in law and facts by failing to appreciate that the charge against the accused person was based on evidence of minors whose capacity to testify was not properly ascertained.
2. The learned magistrate erred in law and facts by failing to appreciate that the accused person was a minor at the time of hearing of the case.

3. The learned magistrate erred in law and facts when he convicted the accused person on the basis of allegations of infection of sexually transmitted disease of the victim of crime by the accused person, without examination on the accused person.
4. The learned magistrate erred in law and in facts when in his judgment he failed to consider that the accused was a minor when passing judgment.
5. The learned magistrate erred in law and in facts when passing the sentence that is too harsh in the circumstances.
6. The learned magistrate erred in law and facts by failing to consider that the expert evidence was not reliable and reasonable considering the age of the minor.
7. The learned magistrate erred in law and facts by failing to appreciate that motive and intention to commit the offence the accused person is charged with is a key ingredient of any offence described under the law.
8. The learned magistrate erred in law and facts by failing to consider the fact that no medical examination of the accused person was done.

The appellant's counsel also filed written submissions and relied on two court cases.

At the hearing of the appeal Mr. Mwalimu for the appellant highlighted written submissions. Counsel submitted that the magistrate did not conduct voire dire examination of the minors as required under Section 19(1) of the Oaths and Statutory Declaration Act to determine their capacity to testify before they tendered evidence. Counsel submitted that such examination was mandatory and the court should also have recorded that such examination was conducted. Counsel relied on the case of Kivevelo Mboloi -vs- Republic (2013) eKLR. Counsel also relied on the Judiciary Magistrates Bench Book on the importance of examining the intelligence and understanding of minors before allowing them to testify. Counsel also relied on the case of ***Mark Mose –vs- Republic (2013) Eklr.***

Counsel also submitted that the court failed to appreciate that the appellant was a minor. Counsel emphasized that though there was an indication for age assessment, no age assessment was done on the appellant which was wrong. Counsel stated that the court was wrong in relying on the age of the appellant appearing in the probation report. Counsel submitted that the age of the appellant would have to be considered in sentencing if it was established that he was a minor.

Counsel also submitted that the magistrate wrongly convicted on the basis of mere infection on the complainants with venereal disease while the prosecution did not prove that such infection came from the appellant. Counsel emphasized that there was no evidence either direct or circumstantial that would lead to the conclusion that the appellant was the culprit.

Counsel also submitted that the testimony of PW2 and PW5 was contradictory. In counsel's view the evidence of the minors should have been disregarded. Counsel submitted further that there was motive to implicate the appellant because the complainants mother owed him Kshs 15,000/=.

Lastly counsel submitted that the sentence of life imprisonment was harsh and excessive for a minor, the appellant.

The learned prosecuting counsel Mr. Orwa opposed the appeal. Counsel emphasized that corroboration of the evidence of victims of sexual offences and women was not required under the law. Counsel added that the court was alive to the fact that there was an allegation that the appellant was not an adult. Counsel submitted however that the source of information on the age of the appellant contained in the probation report came from the mother of the appellant who stated that he was born in 1992, and as such the incident occurred about 19 years after he was born. Counsel submitted that the prosecution merely said that they did not have the appellant's previous records. They did not say that he was a first offender.

Counsel submitted further that the evidence on record confirmed sexual activity. The P3 forms produced confirmed that the hymen of both complainants had been perforated. As such, it could not be said that the appellant was convicted merely because of transmission of a sexual disease. Counsel

emphasized that there was no mandatory requirement for an examination of an accused person in sexual offences.

Counsel submitted further that the appellant was an uncle of the complainants. He also gave the ages of the two complainants. The ages of the two complainants could not thus be challenged. Counsel submitted that the life sentence was mandatory and was thus lawful. As for motive counsel submitted that it was only required in capital offences.

Counsel further argued that there was no evidence of a grudge on record. Counsel submitted further that the case of ***Mose –vs- Republic (supra)*** relied upon by counsel for the appellant was not applicable. He stated that the gist of the decision in that case was that the complainant was not cross examined. In the case of ***Kivevelo –vs- Republic (supra)***, the court defined penetration and found that there was no penetration established in that case. Counsel emphasized the section 8(7) of the Sexual Offences Act did not apply to this case.

At the trial the prosecution called 5 witnesses. PWI was the complainant in count 1. She stated that she was a Standard 2 girl aged 8 years attending [particulars withheld] Primary School. It was her evidence that their mother had left them with K the appellant who used to open the door to their room at night and defile them by force. In the process he used to gag them by inserting his torch into their mouths and threaten that he would throw them out of the house to be eaten by lions. She knew the appellant as an uncle and he did so several times. She was cross examined.

PW2 was the complainant in count 2. She stated that she was a girl aged 6 years and attending Primary School. That between February and March her mother had gone to Mombasa and the appellant K used to open their door at night and forcefully defile them. That when their mother came back from Mombasa they informed her and she informed their father and they were taken to hospital for treatment. She was also cross examined.

PW3 was M M the mother of the two complainants. It was her evidence that she travelled on the 18th February 2012 and left the two girls and the appellant at home and spent a month. On return, she found PWI unwell and crying. She enquired and was informed that the appellant had defiled her. She called their father and took them to hospital at Tseikulu. The doctor told them to make a report to the police. It was her evidence that the appellant was an uncle to the children, i.e. a brother of her husband. She was also cross examined.

PW4 was Ruben Muriithi a Clinical Officer at Tseikulu District Hospital. It was his evidence that on 27th of March 2012 he examined two female children. PW2 complained that she was assaulted sexually. Examination revealed that the hymen was broken and she had bruises on the labia majora. PWI also had healing bruises in her genital organ. The hymen was also broken. He produced the two P3 forms which he had filled. It was his conclusion that both children had been defiled. He was cross examined.

PW5 was Corprol Felix Nyango Mitamisyi. It was his evidence that a report was made to the police station by the mother of the two complainants. It was recorded in the OB. He escorted the two children to Tseikulu District Hospital where they were examined and P3 forms filled. He visited the scene of the alleged incident and arrested the appellant. He was also cross examined.

When put on his defence the appellant tendered sworn evidence and called 2 witnesses. He stated that he was in class 5 Primary School. That on 29th March 2012 he went to his brother's house where he found his wife PW3. He had gone there to ask for his money. He met his mother and Sub Chief at a canteen and were about to take tea when police came and arrested him without telling him the reason. He was later told that it was because of his brothers children. In his view he was

implicated because of his debt which his brother and sister in law had refused to pay him from 2011 at the rate of Ksh 2,000/= per month. He was cross examined.

DW2 was K M a farmer and conductor. It was his evidence that the appellant was his brother. That

the appellant had been discontinued from school in 2011 by the elder brother who is the father of the complainants to do his house hold work of taking care of animals. That the wife of the elder brother travelled to Mombasa and stayed for one year leaving the appellant with young children. He later learnt that the appellant had been arrested. According to him the charge was malicious. He was cross examined.

DW3 was M M a farmer and nephew of the appellant. It was his evidence that the charges were fabrication. He stated that the father of the complainants discontinued the appellant from school and put him in his house. When the appellant asked for his money, he was arrested. He was also cross examined.

From the above evidence, the trial court found that the prosecution had proved its case against the appellant beyond reasonable doubt. The appellant was thus convicted and sentenced. Therefrom arose the present appeal.

This being a first appeal, I am duty bound to re-examine all the evidence on record and come to my own conclusions and inferences taking into account that I did

not have the opportunity to see witnesses testify and determine their demeanor see the case of ***Okeno –vs-Republic (1972) EA 32.***

I have reevaluated the evidence on record. The appellant has come on appeal on various complains.

First of all he complains that voire dire examination of the two complainants PW1 and PW2 was not done. I note that one of the complainants is said to be aged 8 years and the other to be aged 6 years. Both of them are fairly young persons. They are children of tender years, their age being below 10 years. They were sworn and cross examined. I observe that they were asked a few questions before being allowed to tender their evidence. The learned trial magistrate however did not make any conclusion as to whether any of them understood the nature of an oath and the importance of saying the truth. Each of the 2 minors was however recorded as having stated that she would tell the truth. It is thus important to find independent evidence to support the charge other than the testimony of the two minor complainant.

Is there any independent evidence that can support their story that they were defiled by the appellant? All the evidence on record shows that the appellant was left in the house together with the 2 complainants. He was an uncle. They knew him before. He was not a stranger. The witnesses of the appellant also stated that it was the father of the complainant who discontinued the schooling of the appellant and took him to his own house. The evidence is that the complainants informed their mother about the incident. The Clinical Officer found signs of sexual penetration and the hymen of both victims was broken.

In my view even if the evidence of the two minors was discredited because of failure to carry out proper voire dire examination, there is independent evidence that connects the appellant with the offence. He had the opportunity as well as ability to commit the offence. I dismiss that ground of appeal.

The appellant has also complained that his age was below 18 years, at the time he was tried. The offence occurred in February 2012. The trial was conducted in 2012 and 2013 and judgment was delivered on 20th July 2013. Before sentencing a probation report was filed stating that the appellant was aged 19 years. There is no record that the appellant asked for age assessment at the trial. There has been no request on appeal for the age of the appellant to be assessed. In my view the appellant would not be treated as a minor at the time of sentencing because his age was above 18 years as at the time the offence was allegedly committed.

I appreciate the case authorities cited by counsel for the appellant. I am however of the view that they are not applicable to the present case. There were no contradictions and inconsistences in the present case. Though the appellant raised the defence of failure to pay him for services rendered, he did not raise that in cross examination to PW3 the mother of the complainants. He was arrested by police and charged. There is no information that he ever mentioned the existence of a debt to the police. In my view the defence of the appellant together with the evidence of his witnesses on existence of a grudge was an

afterthought. In my view the appellant took advantage of being left alone with the two young girls to commit these serious offences against them. I find that the prosecution proved their case against the appellant beyond any reasonable doubt.

The life sentence is indeed a severe sentence. However that is the prescribed sentence imposed by law. Sexual offences especially on minors are viewed by the laws in this country as very serious offences deserving severe penalties. The ages of the complainants were proved to be below 10 years. There is no other sentence provided by the law. I cannot thus interfere with the sentence of the trial court.

In view of my above findings, the appeal of the appellant is not merited. I dismiss the appeal and uphold both the convictions and sentences of the trial court.

Delivered and signed at Garissa this 30th day of June 2015.

GEORGE DULU

JUDGE