REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 21 OF 2014

DENIS MUTUKU MWOLOLO…..…….……. APPELLANT

VERSUS

REPUBLIC …….…… RESPONDENT

(Being an appeal from the original conviction and sentence in ***Kangundo Senior Principal Magistrate's Court Criminal Case (S.O.) No. 11 of 2013*** *by* ***Hon. Japhet Bii, RM on 3/12/13)***

JUDGMENT

1. **Denis Mutuku Mwololo**, the Appellant was charged with the offence of **defilement of a girl** contrary to **Section 8(2)** of the **Sexual Offences Act, No. 3** of **2006.** Particulars of the offence being that on the **18th** day of **May, 2013** at [Particulars Withheld] Village in Kalandini Location of Kangundo District within Machakos County, intentionally caused his penis to penetrate the vagina of **P M N** a child aged nine years.

2. In the alternative, the Appellant was charged with **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3** of **2006.** Particulars of the offence being that on the **18th** day of **May, 2013** at [Particulars Withheld] Village, Kalandini Location, Kangundo District within Machakos County, intentionally touched the vagina of **P M N** a girl aged nine years with his penis.

3. Facts of the case were that on the **18th May, 2013** the appellant a neighbour to PW2, **P M N** (Complainant) requested her to fetch for him drinking water. She took to him inside the house where he told her to remove her clothes. He removed them and asked her to lie on his bed. He unzipped his pair of trousers and penetrated her as he had done previously. He threatened to do something bad to her if she told anybody about the incident. She however told PW3 **J M,** her mother. She was subjected to medical treatment.

4. PW4 **Gichui Gatembuko** the Clinical Officer who examined her found her hymen having been broken. She had lacerations and bruises on the genitals. PW5 **No. 62585 Corporal Janet Wafula** investigated the case and charged the Appellant.

5. When put on his defence the Appellant denying having committed the offence stated that he was framed up when he asked to be paid wages for work he did while employed as a farmhand at the home of the Complainant since the year 1991.

6. The trial magistrate evaluated evidence adduced and reached a finding that the Prosecution's case was cogent and reliable. He convicted the Appellant and sentenced him to serve life imprisonment.

7. Being aggrieved by the conviction and sentence thereof the Appellant appealed on grounds that:

- ***The charge was defective.***
- ***He was not accorded a fair trial as enshrined in Article 25(c) of the Constitution as he was denied the right to cross-examine PW2.***
- ***Section 150 of the Criminal Procedure Code was violated.***
- ***Section 169(1) of the Criminal Procedure Code was not complied with.***

8. At the hearing of the appeal the Appellant canvassed the appeal by way of written submissions. In response thereto, the State through learned **State Counsel Mr. Shijenje** submitted orally. He opposed the appeal arguing that medical evidence adduced confirmed that the Complainant's hymen was broken and she had difficulty in walking which was evidence of penetration. The burden of proof on the Prosecution was discharged. He called upon the court to dismiss the appeal.

9. This being the first appeal my duty is to re-evaluate evidence adduced in the lower court as a whole and re-submit it to a fresh and exhaustive examination. I then come up with my own conclusions bearing in mind that I neither saw nor heard witnesses who testified**. (See Okeno V. R (1972) EA 32).**

10. It has been submitted by the Appellant that the particulars of the offence indicate the Complainant's name as **P M N** while in court she introduced herself as **P M N,** which called upon the trial magistrate to order for an amendment of the charge pursuant to **Section 214(1)** of the **Criminal Procedure Code.** The record indicates that the Complainant introduced herself as **P M N.** Her mother PW3 however gave her name as **P.** The **Birth Certificate No. [Particulars Withheld]** indicates her name as **P M** daughter of **N M.** According to the law the charge sheet ought to give the description of persons to whom reference is made in a reasonably sufficient manner as to identify the person without necessarily stating the correct name. The two (2) names that the Complainant gave refer to her – **M N.** Her mother gave the third name included in the charge sheet. The Complainant having given an additional name as hers was not prejudicial to the Prosecution's case since she appeared in court and identified herself as the person who was referred to in the charge sheet.

11. A charge can only be dismissed as being defective if the accused is charged with an offence not known in law or if the offence is stated in ambiguous manner such that the accused is not able to plead to the charge or understand it or to prepare for his defence. **(See Sigilai V Republic (2004) 2 KLR 480).**

12. This was a case where the Appellant knew the Complainant having being their farmhand. He knew her names and having heard the names that were read out in court, did follow proceeds, participated in the trial accordingly and even defended himself. In the premises, no prejudice was occasioned. Consequently the court was not required to act pursuant to the provisions of **Section 214(1)** of the **Criminal Procedure Code.**

13. **Article 25(c)** of the **Constitution** provides:

> ***"25. Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited –***
>
> ***(c) the right to a fair trial;"***

It is alleged that the Appellant was not accorded a fair trial having not been allowed to cross examine the Complainant. The Complainant was subjected to *voire dire* examination by the trial magistrate. The learned trial magistrate remarked that she was fit to testify whereafter she was made to adduce unsworn evidence. The consequence of giving unsworn evidence meant that she could not be subjected to cross examination. In reaching the decision to convict the Appellant the trial magistrate relied on evidence adduced by PW3 her mother and medical evidence that confirmed what she alleged. In the premises the Appellant's right to fair trial was not contravened.

14. It was the contention of the Appellant that **Section 150** of the **Criminal Procedure Code** was not complied with, the Prosecution having not called the Complainant's grandmother and uncle who took her to hospital in company of her mother. **Section 150** of the **Criminal Procedure Code** provides thus:

> ***"A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:***
>
> ***Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness."***

The court may be obligated to call any witness if his/her evidence will assist it reach a just decision. This is a discretion that can be exercised by the court. Failure to do so is not fatal. It is also alleged that the Prosecution failed to call two (2) witnesses who the Appellant believes were crucial.

15. No particular number of witnesses ought to be called to prove a case **(vide Section 143 of the Evidence Act Cap 80, Laws of Kenya).**

It was the evidence of the Complainant that she did not inform her grandmother what had befallen her but informed her mother who examined her genitalia. Her uncle was stated to have taken her to hospital in company of her mother. Evidence that would have been adduced by the two (2) persons was not important as it would not have made a difference to the Prosecution's case. Failure to call them was not fatal to the Prosecution's case. If the Appellant believed it was very important nothing deterred him from calling them as defence witnesses.

16. **Section 169(1)** of the **Criminal Procedure Code** provides thus:

> ***"Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it."***

It is argued that the judgment did not contain points for determination, the defence put up was not considered by the trial magistrate and no reasons were given for the decision.

17. Looking at the judgment, points for determination are not set out as required by the law. However the judgment referred to issues raised. This was in the process of the court analyzing the evidence prior to reaching its verdict. Reasons for the ultimate decision can be discerned from the body of the judgment. **(See PMM V. R Criminal Appeal No. 285 of 2012).** Therefore, failure to adhere to the provision of the Law was not prejudicial to the Appellant.

18. Evidence was adduced of a birth certificate issued to the Complainant. She was born on the **15th May, 2004.** At the time of the incident she was nine (9) years old. After the act, the Complainant was examined by PW3 her mother who noted she had a wound on her genitals. The Complainant was examined by PW4 on **24th May, 2013** some six (6) days after the date the offence was alleged to have been committed. She had difficulty in walking and her hymen was broken. It was PW2's evidence that it was the third time she was engaging in coitus with the Appellant. There was no eye witness to what happened. The Complainant was a child of tender years.

19. The child was subjected to *voire dire* examination. The court was obligated to investigate whether the child witness understood the nature of the oath. If the child understood the nature of the oath she could be sworn. But in an instance where the child did not understand the nature of the oath the court was supposed to investigate if the child was seized of sufficient intelligence for her evidence to be received. The child could then be allowed to testify if it understood the duty of telling the truth and in such an instance the child would testify without taking an oath **(See Ayieyo V. Republic (2008) 1 KLR (G & E) 684).**

20. In the instant case the child stated thus:

> ***"….. I will speak the truth. I understand."***

The court remarked:

> ***"Minor fit to testify."***

The court did not specifically observe if indeed the child possessed sufficient intelligence for her evidence to be received. Had the court recorded the questions posed to the child in an endeavour to obtain desired answers from the child this court would tell whether or not the child was intelligent enough as envisaged by the law.

21. According to the proviso to **Section 124** of the **Evidence Act, Cap 80 (Laws of Kenya),** the court can only convict on evidence of a child of tender age if it records reasons in the proceedings that it is satisfied that the witness is telling the truth.

22. In his conclusion the trial magistrate stated thus:

> ***"….The act on 18/5/2013 was the third time the accused defiled her. The accused worked as a farm help for PW3 and had been given a house within the compound. The child told her mother what had happened when she was in pain from the wound in her genitalia. Medical examination done on the child about a week later showed a torn hymen, bruises and lacerations. I find the prosecution's evidence very cogent and liable …….***"

At no point did he state that he believed what the Complainant stated that the Appellant was her assailant was the truth. He also failed to reduce the believe into writing in the proceedings or judgment as required by the law.

23. In the premises it was erroneous on the part of the learned magistrate to convict the Appellant. Therefore, the appeal has merit. The conviction is quashed and sentence imposed set aside. The Appellant shall be released forthwith unless otherwise lawfully held.

24. It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **23rd** day of **JUNE,** 20**15.**

L. N. MUTENDE

JUDGE