REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 21 OF 2014

(An appeal from the Judgment and sentence of the Resident Magistrate, Embu in CMCR. Case No. 626 of 2013 on 14/2/2014)

PAUL MULI KIMATU..... APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

J U D G M E N T

The appellant was charged and convicted by Embu Resident Magistrate of the offence of defilement and sentenced to serve twenty (20) years imprisonment. This is an appeal against the said judgment relying on the following grounds of appeal:-

1. *That the magistrate erred in basing a conviction and failing to consider that the constitutional rights under section 72(3) of the appellant were violated*
2. *That the magistrate erred in not considering that vital witnesses were were not summoned*
3. *That the learned magistrate erred when he relied on evidence which was inconsistent and uncorroborated*
4. *That the magistrate erred both in law and in fact in not considering that the evidence was given by family members making it a single evidence*
5. *That the magistrate rejected my defence with weak reasons without giving sufficient reasons*

Both parties filed submissions to support their arguments.

The appellant in his submissions stated that he did not commit the offence and that the prosecution did not prove the case beyond any reasonable doubt. The magistrate misdirected himself in relying on contradictory, uncorroborated and inconsistent evidence thus violating section 163 of the Evidence Act. The finding of the magistrate that the evidence of PW4 and PW6 corroborated that of PW1 was erroneous. The complainant stated that the offence occurred on 28/6/2013 while her colleague stated that it occurred on 27/6/2013. he said that the evidence of PW1 and PW6 was contradictory and that it lacked corroboration. PW5 stated that he examined PW1 about four hours after the incident. The appellant argues that there was no spermatozoa as shown by the doctor's report. He said that important witnesses were not called specifically PW1's aunt, namely W. The appellant fundamental rights were violated as he was kept in the cells from 28/6/12 to 1/7/13 without being arraigned in court. There was no independent witness in the case and that the magistrate rejected the appellant's evidence on weak reasons.

The respondent's submissions were that the prosecution produced a birth certificate confirming that the complainant was aged 6 years. Section 124 of the evidence act exempts corroboration in sexual offences if the court is satisfied that the minor is telling the truth. It was argued that the court conducted a *voire*

dire and was satisfied that the child understands the nature of the oath. The complainant testified that she knew the appellant as an employee of her grandmother's neighbour. The position was that PW4 and PW7 corroborated the evidence of the complainant. PW4 who was is the sister of the complainant was found by the court to be intelligent and understood the essence of telling the truth. She corroborated the evidence of the complainant. The evidence of PW1 was corroborated by that of PW5 and PW7. The appellant was sentenced to serve 20 years imprisonment for defilement and the alternative charge of indecent assault which was within the law. The charge was proved as per the required standards.

The duty of the 1st appellate court was explained in the case of ***JABANE VS OLENJA [1986] KLR 661*** *as follows:-*

> *"More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi -vs- Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870."*

PW1 after a *voire dire* test was conducted stated that she is 7 years old and that on 28/6/2013 she had visited her grandmother. She had followed her sister one W who had gone to fetch water for her grandmother. PW1 met the appellant who held her by her neck and took her to the shamba. She knows the appellant as Muli and he is employed by M R who is her grandmother's neighbour. The shamba belongs to M R and had a maize plantation with plants taller than herself and the appellant.

The appellant then removed his trouser down to the knee and removed his urinating thing. He then removed PW1's trouser, biker and under pants. PW1 said that the appellant inserted his urinating thing into her urinating thing. He continued for a short time and stopped when PW1 cried in pain. She also bled from her private parts. The appellant dressed PW1 and carried her up to the road and left her there. After a while her sister found her removing black jacks from her clothes and both returned to their grandmother's house.

PW1 told her sister what had happened and her sister told their uncle K. PW1 led K to the scene. When she returned home with her uncle, PW1 found her mother, aunt and one M. The appellant was arrested and taken to Kamuthethe police station by the village ellder and was later taken to Itabua Police station while PW1 was taken to hospital.

PW2 testified that she is the complainant's mother. She knew the appellant as he was a worker in a neighbour's home. On 28/6/2013 she was at her in laws when her younger brother came holding PW1's hand. PW1 explained what the appellant had done to her. The sub area with some other people went for the appellant and arrested him and took him to Kithimu police post. The under pants of PW1 were blood stained. Police kept it as an exhibit.

The complainant was examined at Embu General Hospital and given medication. The appellant was also examined in the same hospital. PW2 had known the appellant for about 3 months. PW2 identified a birth certificate for PW1 which was produced in evidence indicating that she was born on 27/11/2006.

PW3 a village elder testified that on 27/6/2013 at 1.00 p.m. he was coming from work and was passing near PW2's home when he was called and informed by PW2 that PW1 had been defiled at her grandmother's home area. PW2 gave him the name of the suspect and he went for him in a motorbike. PW3 knew the appellant before the incident as he was employed in the neighbourhood.

PW4 aged 11 years testified after *voire dire* test test was conducted. She told the court that she was the sister to PW1. On 27/6/2013 she was in her grandmother's home. She was sent to fetch water for her grandmother. When she returned, she learned from PW7 her uncle that PW1 had left home saying that she was following her. PW4 then went towards the river to look for PW1. When she found her, PW1 was crying and removing black jacks from her clothes. She was wearing a pair of jeans at the material

time. PW1 told PW4 that the appellant had done bad manners to her. PW4 then informed PW7 what PW1 had told her. PW4 said she knew the appellant before the incident.

PW5 a medical doctor testified that she filled two P3 forms on 28/6/2013. The first one was for PW1 who had a history of having been defiled. The trouser she was wearing had mud and her under pants were blood stained. She came to hospital about 4 hours after the incident. There were no visible injuries observed at the time of the clinical assessment. But the hymen was not intact. There were no labia or vaginal injuries. There was no abnormal injuries noted.

In cross examination, PW5 indicated that it was clear that the child had been defiled as the vagina was penetrated and the hymen was not intact. PW5 further stated that the second P3 form was that of the appellant. It was done on 28/6/2013 five hours after the defilement incident. No injuries were observed and no specimen were taken at the time.

PW5 was later recalled to produce a post rape report. She stated that samples were collected after taking an outer genital swab, anal swab and high vaginal swab. A blood sample of the complainant was also taken. The vaginal swab test showed that there was no semen. The report indicated that the blood stains found on the pant matched the DNA profile of the blood sample taken from the complainant.

PW7 testified that PW1 was his niece. On 28/6/2013 at around 1.00 p.m. he was at home with his younger sister, PW1 and PW4. The appellant had been employed by their immediate neighbour. The appellant came to their home on the same day as PW7 was preparing lunch. He borrowed a sharpening file and left after sharpening the panga. PW4 said she was going to fetch water in the homestead where the appellant was employed. PW1 left the homestead saying she was going to join her sister at the river.

The appellant was seen accompanying PW1 as she went towards the river. PW4 came back home without PW1 and said they were not together with PW1. He told PW4 to go and look for her sister. PW1 was brought home and she disclosed that the appellant had defiled her. She led PW7 to the scene where there were signs of weeds being compressed downwards. The appellant was arrested and taken to Itabua police station. The appellant used to visit their home daily.

PW8 stated that he was the investigating officer in the case. On 28/6/14 a suspect was brought to the station by members of the public together with PW1. There were allegations of defilement. PW1 was taken to Embu PGH for examination. PW1 was wearing a blue jeans trouser and a pair of green underpants which was blood stained. At the hospital several medical examinations were done and various samples taken to the Government Chemist for analysis.

The appellant in his defence stated that on 27/6/2013 he went to his employer's neighbour homestead to sharpen a panga. He then went to the farm to identify a spot where he could plant seedlings. It is then that he overhead PW1 being called by her sister PW4. His employer sent him to go and check whether there was a child in the shamba stealing fruits. He decided not to go and stood at the road. When PW1, PW4 and their aunt called K saw him, they ran away. The appellant informed his boss that he didn't know what the three were up to. His boss went to check and found that the fruits were missing from the shamba. Later his boss left for a chama meeting and left the appellant and his daughter at home. A motorcycle carrying four people came to his bosses homestead and ordered the appellant to accompany them to PW2's homestead. They asked what he had done to PW1 but he denied any wrongdoing. He was then taken to Itabua police station and was charged in court later.

PW7 produced a birth certificate for PW1 which he had obtained from her mother PW2. The birth certificate indicates that PW1 was born on 27/11/2006. According to the charge sheet the offence was committed on 27/6/2013. This therefore means that PW1 was aged six years and and about six months. The applicable law is Section 8(1) and (2) of the Sexual Offences Act. It provides as follows;

8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

According to the charge sheet, the appellant was arrested on 28/6/13 and was arraigned in court on 1/7/2013. The proceedings also confirm that the appellant was first arraigned in court on 1/7/2013.

Article 49(1)(h) provides that *an accused has a right to be brought before a court as soon as reasonably possible, but not later than—*

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

The calendar indicates that 28/6/2013 was on a Friday. The appellant was arraigned in court on 1/7/2013 which was on a Monday. The issue of delay does not therefore arise as the appellant was arrested on a Friday and arraigned in court on Monday which was the next court day.

The issue of delay in arraigning an accused person in court was addressed in the following cases.

MUSEMBI KULI VS REPUBLIC [2013] eKLR where the court of appeal held that;

> *"The violation of the right to be brought to court within the constitutional time limits cannot lead to a conclusion that the entire trial becomes a nullity as counsel tried to persuade us.....The violation of the right if proved can only found an action for damages"*

Section 143 of the evidence act provides that ;

> *"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."*

DAVID MUTUNE NZONGO VS REPUBLIC [2014] eKLR the court held that under Section 143 of the Evidence Act, there was no minimum number of witness required to prove a case. The witness who was not called was PW1's aunt (W) who did not witness the incident. The prosecution in my opinion were able to prove the ingredients of the offence through the witnesses availed in court.

The appellant has not pointed out any evidence that was inconsistent. The evidence of PW1 only was sufficient without corroboration if the court was satisfied that she was telling the truth. This is according to Section 124 of the Evidence Act which provides that;

> *"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:*
>
> *Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."*

The court found PW1 to be a credible witness.

The fact that the evidence was given by family members does not occasion any prejudice to the

appellant. The court is required to consider whether the prosecution witnesses were consistent and truthful in their testimonies. There was no evidence that the family members had any reason to frame the appellant. The court found the witnesses credible and relied on their evidence as independent witnesses.

The magistrate in her judgment observed that the evidence by the prosecution was strong against the appellant and proved that he committed the offence against PW1. This was after she stated:-

> *"After reviewing the evidence of both the accused and the prosecution...."*

This statement demonstrates that the magistrate considered the defence of the appellant alongside the prosecution's evidence.

The appellant in his submissions alleged that PW1 and PW4 contradicted each other on the date of offence. PW1 said the incident occurred on 28/06/2013 while PW4 said it was on 27/06/2013. The charges gives the date of offence as 27/06/2013. PW2 and PW7 testified that the date of offence was on 28/06/2013. The matter was reported to the police on the same day which PW6 said was on 28/06/2013. the date of offence was therefore on 28/06/2015 as can be drawn from the evidence of all the witnesses except PW1. PW1 was a child of tender years and may not have been very conversant with dates.

However, such a minor contradiction is not fatal to the prosecution's case and did not prejudice the appellant during the trial.

The defence of the appellant did not discredit the evidence of the prosecution. The trial magistrate found the prosecution's evidence overwhelming in proving the ingredients of the offence against the appellant.

It is my considered opinion that the conviction was based on cogent evidence and was safe.

Section 8(2) of the Act under which the appellant was charged provides for a sentence of life imprisonment where the child is aged below 11 years. The prosecution proved the age of the complainant to be six (6) years which falls under the age bracket under Section 8(2).

The appellant was sentenced to serve twenty (20) years imprisonment contrary to the law which provides for a sentence of life imprisonment. This was a misdirection on the part of the trial magistrate.

This court has power to correct sentence on appeal which I proceed to do. I therefore set aside the sentence of twenty (20) years imprisonment and substitutes it with life imprisonment.

The appeal stands dismissed for lack of merit and the conviction is accordingly upheld.

DELIVERED, DATED AND SIGNED AT EMBU THIS 29TH DAY OF OCTOBER, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Appellant

Ms. Nandwa for Respondent