REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 67 OF 2013

(CONSOLIDATED WITH HCRA NO. 68 OF 2013)

(An appeal from the judgment of the Chief Magistrate, Embu in CMCR. Case No. 967 of 2009 dated 17/10/2013)

BOB MUTUGI..... 1ST APPELLANT

JACKSON MUCHANGI…....……2ND APPELLANT

VERSUS

PROSECUTION…….....RESPONDENT

J U D G M E N T

This is an appeal against the conviction and sentence in Embu Criminal case No. 967 of 2009. The appellants were jointly and separately charged with three offences. Count I was of defilement contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act and was against the appellants jointly. Each of the appellants separately faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the same Act. Count II was of the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code against both appellants jointly.

The 1st appellant was convicted of the offence of assault and sentenced to 2 years imprisonment while the 2nd appellant was convicted of defilement and sentenced to life imprisonment.

The appeal is based on the grounds that the magistrate erred in finding that the prosecution had proved its case beyond any reasonable doubt; that the magistrate erred in finding that the 1st appellant was properly identified; that the magistrate ignored his defence and that the sentence was excessive.

The counsel for the appellant Ms. Fatuma submitted that the charge for defilement was defective in that the wrong provisions of the law were used. The complainant was aged 7 years which is not covered by Section 8(3) of the Sexual Offences Act as was cited by the prosecution. The counsel submitted that the appellants should be acquitted of the offences. The counsel further argued that the magistrate erred in finding that the charges were proved beyond any reasonable doubt.

Ms. Fatuma further submitted that there was no proper identification as the complainant did not identify her assailants. PW1 the complainant's mother stated that on 22/5/2009 the complainant saw three young men and she pointed at the 1st appellant as one of the people who defiled her. PW1 said that she did not

know the man before the incident and that she did not witness the incident. Five days later, the 1st appellant went to a shop at Kamiu and PW1 asked the kiosk owner whether she knew the 1st appellant. The answer was in the affirmative and the person also described the place where the 1st appellant lived. He was arrested after one month in the absence of PW1 after the complainant's father accompanied the police to arrest him. It is not clear how the complainant's father identified the suspect.

It was further argued that the complainant said that she did not know whether the two appellants were brothers. She denied having seen the 1st appellant before the incident but in cross examination confirmed that she knew him well as her mother had been accused of stealing the 1st appellant's mobile phone. The investigating officer confirmed that the complainant and appellants were neighbours. The appellants were not identified through recognition as the case ought to be. The doctor who testified is not the one who examined the complainant. The appellant's defence was not properly considered as the appellants told court that there was an existing grudge between the two families because of the phone.

The 2nd appellant was arrested on 23/06/2009 when he wnt to see 1st appellant in the police cells a day after the 1st appellant was arrested.

Ms. Nandwa for respondent submitted that the defect in the charge sheet is curable under Section 382 of the Criminal Procedure Code and that the appellants did not raise the issue of defective charge sheet during trial. No prejudice was caused to the appellant since all the ingredients were included. It was argued that the trial court had a chance to observe the demeanor of the witnesses and noted that PW1 and PW2 were credible. The court also said the evidence of PW1 was consistent. Under Section 124 of the Evidence Act, corroboration was not required if the court was satisfied that the child is telling the truth. Both appellants were positively identified by the victim. PW1 said the appellants removed their masks which helped her to identify them.

The state further argued that the incident occurred during the day and there was sufficient light to identify them. Penetration was proved by medical evidence. On the issue that PW4 is not the one who prepared the P3 form which he produced, the State contended that Section 77(2) of the evidence act allows production of a document by another person other than the one who made it. According to the State, the defence was considered by the trial magistrate. The ingredients of the offences were proved to the standards required. The following authorities were relied on by the respondent:-

WANGOMBE VS REPUBLIC [1976-1980] 1 KLR which was cited in the case of ***JOHN ODERO OMENDA VS REPUBLIC Criminal Appeal No. 75 of 2014*** where the court held that where the accused person does not call a witness to prove an alibi, the court has a duty to weigh that evidence in totality.

Ms. Fatuma replied that Section 77 of the Evidence Act requires that a basis should be laid before the production of a document by another expert. In this case, PW4 did not know the doctor who filled the P3 form. The court shifted the burden of proof to the appellants saying that they did not call a witness.

The duty of the first appellate court was explained in the case of ***NJOROGE VS REPUBLIC [1987] KLR 19***:-

> *"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570*

The prosecution called five witnesses with PW1 testifying that the complainant was her daughter and that she was aged 8 years and 3 months at the time of the offence. On 22/5/2009 the complainant was late to arrive home from school. When she arrived, she said that some people had taken her into a maize plantation. The other children who were playing with the complainant informed PW1 that people wearing

masks had taken the complainant into the maize plantation. The children waited for the complainant a few yards away. When the complainant emerged from the plantation, one of the children carried her to her mother's gate. The complainant informed PW1 that her underpants had been removed before she was sexually assaulted. The matter was reported to the police and complainant referred to the hospital.

PW1 further testified that on 25/5/2009 as she was walking home, with PW2 they saw 3 young men walking. The complainant informed PW1 that one of the men was the one who had defiled her. After 5 days the boy came to a shop at Kamiu. The owner of the kiosk told PW1 that she knew where the boy lived. The suspect was arrested on 22/6/2010 and she was called to go to the police station with the complainant. When they reached near the office of the OCPD, the complainant showed PW1 the 2nd appellant alleging that he was one of her assailants. The 2nd appellant was arrested at the police station.

PW2 stated that she was coming from school with W, E and A PW3 when two boys got hold of her and took her to a maize plantation. One carried her while the other followed. They found four other boys in the plantation. She was made to lie down facing up. One of them removed her pant as the others sat there watching. He removed his trouser and lay on her and did bad things to her. She felt pain in her private parts. Another man was beating her and told her that he would kill her if she told anyone about what had happened. PW2 identified the 2nd appellant as the one who removed her pant and did bad things to her. PW1 said that she had never seen him before the incident. As for 1st appellant, PW2 said he was the one who was whipping her and pushing her to the tree. PW2 was later released and she joined the other children. PW3 carried the complainant to the gate of her home as she could not walk. The complainant reported to her mother what had happened. A few days later PW2 saw the 1st appellant walking towards them and showed her mother telling her that he is the one who pushed her to the tree.

At the police station she saw the 2nd appellant and showed her mother who alerted police and he was arrested. PW2 was able to recognize 1st appellant when she met him a few days later because he removed his mask during the incident and wore the same clothes he had (striped shirt and jeans). In cross examination she stated that she remembered that 1st appellant had accused her mother of stealing his phone before the incident. This therefore means that the complainant knew the 1st appellant before the incident although she had given evidence to the contrary.

PW3 a minor testified that on 22/5/2009 at around 1.30 p.m. she was walking home from school with other children among them PW2. She saw two people emerge from a maize plantation. One of them held PW2's hand and pulled her into the maize plantation and asked her the names of her parents. PW3 said she went to the PCEA church and waited for PW2 there. When PW1 was released, she joined PW3 and said that she was injured on the foot. In cross examination PW3 stated that she did not identify the two men. She said that PW2 told PW3 that she was crying because she was whipped with a belt and her leg was injured.

PW4 testified that she is a medical doctor and that the P3 form was filled by one Dr. Waithaka whose whereabouts were unknown for she had left the Civil Service. PW4 said she was familiar with Dr. Waithaka's signature and handwriting. The doctor (Dr. Waithaka) 22/5/2009 examined PW2 who had a history of defilement. The patient was in a state of panic and had tenderness on the left thigh and left arm with a perforated hymen.

PW5 a police officer stated that on 22/5/2009 at 17.00 hrs the complainant was brought by her parents at Embu police station and it was reported that she was defiled. The report was booked in the OB. She later accompanied the parents and PW2 to hospital. On 22/6/2009 the complainant's father accompanied PW5 arrested the 1st appellant. The 2nd appellant was arrested on 23/6/2009 at the police station.

The 1st appellant in his statement of defence stated that on 22/5/2009 he spent the day with his brother 2nd appellant. They were assisting one Oscar to move houses to Kiambuthi. They returned to Embu town at around 5.00 p.m. He denied seeing the complainant on that day. He said that the complainant's parents were his neighbours.

The 1st appellant stated that three months prior to the incident while working for a yoghurt company, the

complainant's mother stole his phone. He later saw somebody using the said phone and upon inquiring, that person informed him that the phone was sold to him by the complainant's mother. When he confronted the complainant's mother, she admitted that the phone belonged to the 1st appellant. From that time, their relationship became strained. The 1st appellant stated that the complainant knew him too well prior to the incident and used to call him "Bob".

The 2nd appellant testified that on 27/5/2009 he assisted his neighbour to move houses to Kiambuthi. On 22/6/2009 1st accused was arrested by police. He went to see the 1st appellant at the police station and was also arrested.

DW3 testified that the accused persons are his sons. The complainant is her neighbour's daughter. They were friends with the complainant's parents until after the complainant's mother stole the 1st appellant's mobile phone. The complainant's mother had threatened to revenge and embarrass the family. This happened when her sons were framed in this case.

The 1st appellant was convicted and sentenced of the offence of assault causing actual bodily harm

Section 251 of the penal code p rovides that;

> *Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanor and is liable to imprisonment for five years.*

The Ingredients of the offence of assault under Section 251 were discussed in the Court of Appeal case of ***NDAA VS REPUBLIC [1985] eKLR*** where it was held that causing actual bodily harm consisted of assaulting the complainant or victim and occasioning actual bodily harm.

The 2nd appellant was convicted and sentenced for the offence of defilement of a child contrary to section 8(1) read with 8(3) of the Sexual Offences Act.

The law applicable is Section 8 which states:-

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

8(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.

The complainant's mother produced a birth certificate showing that the complainant was born on 17/2/2002. According to the charge the incident took place on 22/5/2009.The complainant was therefore aged seven years and a few months.

In her testimony, stated that she was coming from school with W, E and A. They met two boys who got hold of her and took her to a maize plantation where she was defiled.

In the case of ***MARK LUVEMBE & ANOTHER VS REOUBLIC [2012] eKLR*** the Court of Appeal held as follows:-

> *The offence was committed in broad daylight and PW2, PW3 and PW4 who implicated the appellant are people who knew him well as they come from the same village.*

It was argued that the defilement charge was brought under the wrong provisions in that Section 8(3) of the Sexual Offences Act was not applicable as the complainant was aged 7 years. The particulars of the offence were clear that the 1st appellant was charged with defiling a child aged 7 years. The correct Section for the sentence would have been Section 8(2) and not Section 8(3).

This error may be cured under Section 382 of the Criminal Procedure Code which provides:-

Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

In the case of ***ROBERT MUTUNGI MUUMBI VS REPUBLIC [2015] eKLR*** (supra) the appellant alleged that the charge was defective as it had not made reference to Section 8(2) of the Sexual Offences Act which is the punishment section. The Court of Appeal held that it was important to draw the charge sheet with care and precision so that the accused person can understand without ambiguity the offence which he is charged with so that he can plead and effectively prepare his defence. The court however held that the charge in that case was clear that the appellant was charged with defilement of a girl contrary to Section 8(1). The particulars of the offence were also included in the charge.

The facts in this decision are similar to those in this case and the same principles apply. The appellants were represented by a counsel in the trial court and no objection on the competence of the charge was raised. The particulars of the offence were also clear that the 1st appellant was charged with defiling a child aged 7 years. I reach the conclusion that the charges were well understood during the trial and no prejudice was caused to the 1st appellant.

The counsel for the appellants raised the issue of lack of positive identification. The evidence of PW1 was that her daughter came late from school on the 22/5/2009 and reported to her that she had been sexually assaulted by some boys. PW1 reported the matter to the police. On 25/5/2009 PW1 and her daughter were walking home from the hospital when they saw three young men walking from the opposite direction. The complainant identified one of them the 1st appellant as one of her assailants.

PW1 testified that the owner of a certain kiosk at Kamiu gave her information regarding where the 1st appellant lived. There is no evidence that PW1 gave this information to the police so that they could arrest the 1st appellant without delay. The 1st appellant was arrested on 22/6/2009 while the 2nd one was arrested on 23/6/2009. The delay in arresting the appellants was not explained by the police considering that there was sufficient information to arrest the suspect.

The appellants raised the issue of contradictions on the evidence of identification tendered by PW1 and PW2. The evidence of PW1 was that she did not know the appellants until her daughter pointed them out to her on the 25/5/2009 and on 23/06/2009 respectively. PW2's evidence was that she was in the company of three other children when she met two boys on her way home from school. One of them carried her to a maize plantation where they found four other boys. The 2nd appellant is the one who sexually assaulted her. She further testified that she had not seen the first two boys before.

During cross-examination, PW2 identified the appellants by way of dock identification. When pressed further, she said that the 1st appellant had earlier alleged that her mother had stolen his phone but her mother had explained to her (PW1) that she had bought the phone in question. According to PW2, the phone saga had taken place before the incident. This casts a lot of doubt on whether PW2 was a credible witness. It was therefore, true that PW2 did not know the 1st appellant considering that there was already an encounter between him and her mother and that all these matters were within her knowledge.

In her testimony PW1 did not disclose that she knew the appellants before the incident. During cross-examination said that she did not know that the two accused persons were brothers. She further stated that 1st appellant had never accused her of stealing his phone. This contradicts the evidence of her daughter PW2 who said it was PW1 who told her that the 1st appellant had accused her of stealing. The investigating officer PW5 told the court that PW1 and the appellants were neighbours. PW1 admitted in cross examination that the appellants do not live far from her home. This puts in question the credibility

of PW1 and her daughter the complainant.

It was also stated by PW1 that on the material day around 7.00 a.m., PW2 had been attacked by two men on her way to school and that her tea and snacks were stolen. PW1 said that she did not report this incident to the police which contradicted the evidence of the investigating officer who said that it had been reported that the matter had been reported to her. As she reported, PW1 said that her daughter was defiled by one of the men in the evening. The totality of PW1's evidence shows that she was not a truthful witness. All considered, it would not be further from the truth to say that PW1 may have coached her 7 year old daughter to give false evidence. She was not a credible witness as demonstrated by the foregoing analysis of the evidence.

The medical evidence was challenged by the appellants on grounds that it was tendered unprocedurally. The P3 form was produced by Dr. Linda Koremo PW4 from Embu Provincial General Hospital (PGH) on behalf of one Dr. Waithaka who was said to have left Government service. The doctor told the court that she was familiar with the handwriting and signature of Dr. Waithaka.

In cross-examination, PW4 said that she had never known Dr. Waithaka personally and that she had never seen the doctor write or sign physically. She admitted that she could not tell who filled or signed the P3 form. The law requires that the prosecution lays a basis before evidence of an expert can be produced on his behalf. The prosecution did not tell the court that they had made any efforts to trace Dr. Waithaka. As such no basis was laid to justify PW4 produce the P3 form on behalf of the doctor who examined the complainant. Furthermore, an expert who was familiar with Dr. Waithaka's hand writing and signature ought to have been called to produce the P3 form. The medical evidence was therefore not admissible.

The issues raised by the appellants on the burden of proof and more specifically on identification were discussed in the case of ***KARANJA VS REPUBLIC [2004] 2 KLR 140*** where the Court of Appeal held:-

1. *Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.*
2. *Whenever the case against an accused person depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the accused in reliance on the correctness of the identification.*
3. …
4. …
5. …
6. …
7. *Furthermore, as general rule, the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence raised is an alibi or something else.*

In regard to the contention that the sentences were excessive, the court will look at the sentences provided for by the law. The 1st appellant was sentenced to two years imprisonment for the offence of causing actual bodily harm contrary to Section 251 of the penal code. The maximum sentence for the offence of assault is 5 years imprisonment.

The 2nd appellant was convicted to life imprisonment which is the mandatory sentence provided for under Section 8(2) of the Sexual Offences Act. The only sentence provided by the law is life imprisonment.

The principles upon which a court can interfere with sentence meted out by a trial court were explained in the case of ***ROBERT MUTUNGI MUUMBI VS REPUBLIC [2015] eKLR*** where the court cited the case of ***BERNARD KIMANI GACHERU VS REPUBLIC, CR APP. NO. 188 OF 2000 (NAKURU),*** the Court reaffirmed the principle thus:

> *"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend*

on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

In the instant case, it has not been demonstrated that the sentence was manifestly excessive or that the trial court overlooked some material factor or took into account some immaterial factor or acted on the wrong principle. The sentences imposed for the offences against each appellant were within the law.

It is not in doubt that the prosecution's evidence contained major contradictions and that identification or recognition was not positive. The medical evidence was not admissible due to the procedural flaw. I find that the prosecution failed to discharge the burden of proof as required by the law thus rendering the convictions unsafe.

The convictions for the offences of assault and defilement in respect of the appellants respectively are hereby quashed and the sentences set aside. The appellants are hereby set at liberty unless otherwise lawfully held.

The appeal is hereby allowed.

DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF NOVEMBER, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Both appellants

Ms. Fatuma for the appellants

Ms. Nandwa for the respondents