REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 142 OF 2013

JOSEPH NDUATI GIKENE……..……APPELLANT

-VERSUS-

REPUBLIC…….……..RESPONDENT

(Being an appeal against conviction and sentence in Murang'a Senior Principal Magistrate's Court Criminal Case No. 1263 of 2008 (Hon. E.K. Usui) on 20th July, 2010)

JUDGMENT

The conviction and sentence against which the appellant appealed arose out of a retrial of a case in which had been charged and convicted on his own plea of guilty of the offence of defilement of a girl contrary to **section 8(3) of the Sexual Offences Act, No. 3 of 2006**. His appeal was allowed on the ground that the language used during his trial was not indicated, hence the retrial.

The particulars upon which the principal count was based were that on the 11th day of March, 2007 in Murang'a district within central province, the appellant intentionally and unlawfully had carnal knowledge of MWK, a girl of 13 years.

The appellant also faced the alternative charge of indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act, No. 3 of 2006;** here, it was alleged that on the 11th day of March, 2007 in Murang'a district within central province, the appellant intentionally and unlawfully did indecent act to MWK by touching her private parts.

In the retrial the appellant denied the charges levelled against him and after taking evidence from the prosecution witnesses and the appellant, the learned magistrate's verdict was that the prosecution had proved its case beyond reasonable doubt. The appellant was convicted on the principal count and sentenced to serve twenty-one (21) years in prison.

In the grounds of appeal filed in this court on 27th July, 2010 the appellant took issue with the learned magistrate's judgment on, amongst other grounds, that his rights under **section 72 (3)(b)** of the Constitution had been violated and by failing to consider this violation the learned magistrate erred both in law and in fact. The appellant also contented that he was convicted yet some crucial witnesses did not testify and that the learned magistrate's decision to convict him was contrary to the medical evidence that the complainant had not been defiled. In any event, so the appellant argued, he was not examined, medically, to establish any link between him and the offences with which he was charged. On the sentence, the appellant argued that the learned magistrate erred both in law and in fact for failure to consider the time the appellant had been in custody at the time of sentencing.

Although the appellant appealed against the conviction and sentence, he only urged this court to consider the issue of the sentence when he addressed the court on 15th October, 2013 when his appeal was heard. On this issue, the state represented by Mr Solomon Njeru conceded to the extent that since the appellant had been in custody for three years at the time he was convicted and sentenced, the minimum sentence he would have been subjected to was seventeen years. He asked the court to reduce the sentence to seventeen years from the date of conviction.

This court has considered the submissions of both the state and the appellant; however, over and above these submissions, this court, sitting in its appellate capacity, has a legal obligation to consider and evaluate the evidence afresh and come to its own conclusions. In undertaking this task, this court has to bear in mind that the magistrate's court had the advantage of seeing and hearing the witnesses and therefore was in a better position to appreciate the witnesses' disposition or demeanour.

From the record, it appears that the state called three witnesses the first of whom was the complainant, MW. Being a child of tender years, the learned magistrate correctly took her through a voire dire examination and concluded that she not only understood the duty to tell the truth but that she also understood the nature of an oath; the complainant therefore gave a sworn testimony.

In her evidence, the complainant said that she attended *[particulars withheld]* special school and that she was in class one. She said that she knew the appellant whom she described as "a very bad man who does bad manners". She told the court that a person by the name Njeri told her to go to the appellant's house and while there, the complainant gave a vivid description of how the appellant forcefully inserted his genital organs into her genital organs as a result of which she felt a lot of pain. One Wa Njoroge is said to have found both the appellant and the complainant in the appellant's house; the said Wa Njoroge is said to have taken the complainant to the police who then took her to the hospital.

The complainant told the court that at some point she also told her mother what the appellant had done to her. The mother, B N (PW2) testified and indeed confirmed that the complainant was her daughter. She told the court that a woman called Caro told her that she had found the appellant defiling the complainant. She reported the matter to the police whom she confirmed took the complainant to the hospital. She also said that her daughter had told her that the appellant defiled her.

The clinical officer who examined the complainant was **Ronald Kibet Mutai (PW3)**. In his evidence, he testified that he examined the complainant and filled a P3 form on 20th March, 2007. According to his evidence, the complainant had complained that she had been sexually assaulted by a person known to her. In his estimation, the complainant was fourteen years old and though he did not detect any injury to her private parts or discharge, the complainant's hymen was broken. The clinical officer produced the treatment notes and the P3 form which were duly admitted in evidence as exhibits.

The record shows that on 22nd May 2010, the state applied to have the matter adjourned to enable the investigating officer who was based at Cherangany police station attend court. According to the prosecutor, the witness had been duly bonded to attend court on the material day but he was absent. The court rejected the application for adjournment on the ground that the prosecutor had previously been given the last adjournment; the state then opted to close its case.

When the appellant was put on his defence the appellant opted to give unsworn statement and all he told that court was that he was a casual labourer from Mugoiri and that the he never committed the offence with which he was charged. According to him those charges were strange to him.

Section 8 (1) of the **Sexual Offences Act, No. 3 of 2006** defines the offence of defilement; it says,

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

The complainant testified and gave an explicit account of how the appellant defiled her. The appellant did not cross-examine her and therefore her statement was uncontroverted and unchallenged. Her evidence

was corroborated, at least on the fact of defilement, by the clinical officer who examined the complainant and confirmed that indeed the complainant had been defiled. It is also noted that the appellant did not cross-examine the clinical officer and therefore his testimony was uncontroverted.

I have not found any reason to depart from the learned magistrate's finding that the complainant was a credible and truthful witness. There is nothing on record to suggest there was any grudge between her and the appellant or any other reason for the complainant to complain that the appellant had defiled her when he had not. Without cross-examination, there was no basis to raise doubt, if any, on her evidence. Coupled with the evidence of the clinical officer, I am persuaded that the complainant was not only defiled but that she was defiled by the appellant. The offence of defilement was proved beyond reasonable doubt.

On the question of sentence, it is apparent from the Sexual Offences Act that the severity of the sentence for which a convict of the offence of defilement is liable is defined by the victim's age. The complainant in the case against the appellant was 13 or 14 years and therefore the applicable sentence is found in **Section 8(3) thereof** which states;

8. (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

Twenty years is the minimum sentence. The learned magistrate imposed a sentence of twenty-one years which, in my view was a legal sentence since it was above the minimum provided; it is apparent from the record that, in meting out the sentence, the learned magistrate complied with section 333(2) of the Criminal Procedure Code and took into account, as she should have, the time the appellant had been in custody before he was convicted and sentenced. Section **333(2)** of the **Criminal Procedure Code** provides as follows:

333. (2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this code.

Provided that where the person sentenced under subsection (1) has prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

The sentence against the appellant was therefore lawful and there is no basis for this court to interfere with it; however, if any clarification is needed and for avoidance of any doubt, the twenty one year prison term shall run from 18th March, 2007 when the appellant was put into custody.

For the reasons stated I do not find any merit in any of the grounds upon which the appellant's appeal is based and it is accordingly dismissed.

Signed, dated and delivered in open court this 27th day of January, 2014.

Ngaah Jairus

JUDGE