REPUBLIC OF KENYA

IN THE HIGH CCOURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO 139 OF 2012

(CORAM: F. GIKONYO J)

S K O.....................................APPELLANT

Versus

REPUBLIC...RESPONDENT

(Appeal arising from the original conviction and sentence by P.N. ARERI, SRM in BGM CMCCRC NO 754 OF 2011 on 3.8.2012)

JUDGMENT

The Charge he faced

[1] The Appellant, **S K O** was charged with defilement of a child contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act. He was also charged with an alternative offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. According to the charge sheet, on the 23rd day of April, 2011 at about 10.30pm at [particulars withheld] in Bungoma County, he intentionally and unlawfully caused his penis to penetrate the vagina of **N N L**, a girl aged 17 years.

[2] He was tried for the offence of defilement, convicted and sentenced to serve ten (10) years imprisonment.

He preferred an appeal

[3] Being dissatisfied with the conviction and sentence, he filed this appeal. The significant grounds are summarized as below:

> ***1) That the trial magistrate erred in law and fact by failing to consider that his constitutional rights had been violated when the police held him in custody beyond the time allowed by the Constitution;***
>
> ***2) That the trial magistrate erred in law and fact by convicting him on evidence that was doubtful and did not satisfy the required standard of proof;***
>
> ***3) That the trial magistrate erred in law and fact by failing to appreciate that the charge against him was not proved as the exhibit was not produced; and***

4) That the sentence meted out was harsh and excessive.

[4] He filed written submissions and made very brief oral submissions. In his oral submissions, he contended that P3 only told the trial court that he saw the suspect run away without giving much detail as to the direction the suspect took, the light or source of light he used to identify the Appellant. Although PW3 claimed he had a torch, he did not specifically say that he used the torch to illuminate the scene of the crime as to be able to identify the Appellant.

[5] His written submissions treated each ground of appeal under separate sub-heading. It also introduced other grounds which were not in the memorandum of appeal. The arguments presented therein are as below;

Defective charge sheet

[6] He submitted that he was produced in court after three days of his arrest in violation of the Constitution. The Constitution requires suspects to be produced within 24 hours of arrest. He relied on the cases of **DOMINIC MUTIE V R [2008] KLR** and **R V WILLIAM CHESIRE KIPKORE** to support his argument. On the basis of the two cases, he urged the court to hold that the charge sheet was defective and quash the conviction and sentence.

Contradictions in evidence

[7] He submitted that PW1 and PW2 gave contradictory evidence; PW1 said PW2 raised alarm whereas PW2 denied she raised any alarm. Further, the evidence of PW3 was contradictory in itself for at one point he said he saw the Appellant properly presumably using the torch he had, and at another point he said there was moonlight and he could see the Appellant properly. According to him, the trial magistrate did not evaluate these contradictions, for if he had done so, he would not have convicted him.

Identification

[8] He put forward two points in support of this ground: 1) That PW1 claimed to have identified the Appellant through his voice without indicating the words used, the language used, the nature and length of the conversation; and 2) That PW3 did not describe; the intensity of the light from the torch and the moon; the source of the light he used to identify the Appellant; and the clothes the Appellant was wearing. The identification was not sufficient to warrant a conviction.

Language

[9] The Appellant argued that PW4 and PW5 used a language he did not understand; a ploy by the prosecution to win this case which had been fabricated against him. He, however, proceeded with the case despite that violation of Article 50(2) of the Constitution because he was eager to finalize the case.

Failure to consider defence

[10] The Appellant accuses the trial court of ignoring his defence without giving it any consideration. He cited the holding in the case of **OKITHI OKALE v REPUBLIC [1965] EA 55**:

> ***‘’... that failure by a judge to consider the case of defence constitute a breach of law and rules of natural justice and therefore sufficient to unsettle the judgment’’.***

Medical evidence

[11] The Appellant discredited the medical evidence for not ascertaining penetration. For those

reasons he prays for his appeal to be allowed.

The State conceded the appeal

[12] Mr Kibelion, the learned state counsel conceded the appeal. His major reasons were that:

> ***a) That although the age of the minor victim was assessed to be approximately 17, the P3 Form and the treatment chits recorded a different age, i.e. 16 years; thus raising a sort of conflict which needed further investigation to ascertain age. Further, the age of the minor victim was what he called 'border-line age' and the prosecution should have produced birth certificate and or baptismal card, which they did not.***
>
> ***b) That there was no proper identification of the Appellant as the person who sexually assaulted PW1. The offence took place at 10pm and was a dark night. PW1 only recognized the Appellant through his voice without giving details on the exact words used, the nature and length of the conversation. PW3 did not also describe the intensity of the light or the source of the light he purported to have used to identify the Appellant. For those reason the conviction was not safe.***

COURT'S RENDITION

Duty of court

[13] This being the first appeal, the court will surely discharge its duty; evaluate the evidence recorded by the trial court afresh and come to its own findings and conclusions except it should give allowance for the fact that it neither saw nor heard the witnesses. See **OKENO v REPUBLIC [1973] EA 32** where it was held:

> *"**An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [**Pandya vs. Republic (1957) EA 336]* ***and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion*** *(Shantilal M. Ruwala v. Republic [1957] EA 570.)* ***It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See*** *Peters v. Sunday Post, [1958] EA 424.)"*

ANALYSIS: EVIDENCE AND SUBMISSIONS

[14] Given the nature of the issues raised herein, I propose to go straight away to the issues and determine them. The three constituent elements in a case for defilement are;

> ***a) Whether the complainant was a child;***
>
> ***b) Whether there was penetration; and***
>
> ***c) Whether the penetration was by the Appellant.***

Before I deal with the substantive issues, there are some grounds of appeal which bear preliminary connotation and I should deal with them first; 1) the question of violation of constitutional right to be produced in court within 24 hours; and 2) use of a language he did not understand in violation of Article 50(2) of the Constitution.

Violation of right to be produced in court

[15] The Appellant proposes as a ground of appeal that the police violated his constitutional right by failing to produce him before a court of law within 24 hours of arrest as enshrined in Article 49(1) (f) of the Constitution. Instead they produced him after three days. He was vigilant enough and raised the issue on 28.4.2011 when he was first arraigned in court. The trial magistrate resolved the matter and accepted the explanation given by the prosecution that the Appellant was arrested in the afternoon of 25.4.2011 which was a holiday and courts were not sitting. The prosecution explained further that the offence of defilement needed the complainant to be medically examined which was done on 27.4.2011. That resolution by the trial court was sufficient and was done within the law. Subject to strict proof in law, should the Appellant feel aggrieved or keen on pursuing that aspect, he has his right in damages but the argument cannot offer relief in this appeal.

Failure to record language used

[16] The Appellant argued that the trial magistrate, in violation of Article 50(2) of the Constitution, allowed PW4 and PW5 to testify in a language he did not understand. Initially, courts strictly interpreted the need for the trial court to categorically record the language used in the proceeding. But as the law is not intransigent and static, there has been a complete departure from the earlier strict interpretation of that need, whereof, the question on whether the Appellant understood the language used in a proceeding is now considered as a matter of fact which should be determined by looking at the record and what really took place. The departure in my view serves substantive public justice in criminal sphere, and is recognition of the need to protect the rights of the accused; a vindication of the plight of the victim; and a safeguard to public interest that offenders are brought to book. This departure by the Court of Appeal is found in a number of cases including 1) **JACKSON LELEI V REPUBLIC CR. APPEAL NO 313 OF 2005; 2) ANTHONY KIBATHA v REPUBLIC CR. APPEAAL NO 109 OF 2005;** and 3) **GEORGE MBUGUA THIONG'O v REPUBLIC CR. APPEAL NO 302 OF 2007.** In the latter case, the court of Appeal stated that;

> ***''... for a court to nullify proceedings on account of language used during the trial, it should be clear from the record that the accused did not at all understand what went on during his trial''.***

[17] Looking at the record, the trial magistrate recorded at the time of taking the plea- **INTERPRETATION: Kiswahili/English.** And the Appellant responded in Kiswahili which was the language he understood. Although the trial court did not indicate the language PW4 and PW5 used in their testimonies, it is clear from the record that the Appellant fully participated in the proceedings. He asked PW4 a single question which was quite relevant and consistent with the evidence by PW4. He took PW5 through extensive cross-examination and the questions he asked were consistent with the evidence of PW5. He understood the proceedings and all that happened. Therefore, failure by the trial magistrate to record the language used on the day the two witnesses testified does not in itself violate the right of the Appellant under Article 50(2) of the Constitution. That ground fails.

Whether the complainant was a child

[18] Mr Kibelion argued:

> ***a) That although the age of the minor victim was assessed to be approximately 17, the P3 Form and the treatment chits recorded a different age, i.e. 16 years; thus raising a sort of conflict which needed further investigation to ascertain age. Further, the age of the minor victim was what he called 'border-line age' and the prosecution should have produced birth certificate and or baptismal card, which they did not.***

I wish to repeat: Courts have said time and again that age assessment does not mean certificate of

birth as age could be assessed using other evidence, including evidence of the victim, parents or guardians. See the decision by Prof Ngugi J in **MACHAKOS HC CR APPEAL NO 296 OF 2010 FAPPYTON MUTUKU NGUI V REPUBLIC:**

> ***"…that "conclusive" proof of age in cases under Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases".***

In the present case, age assessment was properly conducted by a medical expert, and is sufficient for purposes of Sexual Offences Act. Thus, the fact that the P3 Form and treatment chits indicated a different age does not matter since; 1) the indicated age in the two documents was not really age assessment in the sense of the Sexual Offences Act; and 2) the question of age had already been settled by the formal assessment carried out by a professional. The evidence of PW6 proved the victim was a child aged approximately 17 years to whom section 8(4) of the Sexual Offences Act applies. The question of age was not, therefore, in issue. Thus, there was not any kind of conflict that could possibly have arisen which needed reconciliation. Accordingly, the argument by Mr Kibelion cannot be a basis for conceding to the appeal. Perhaps the other ground on identification would be a more plausible one to concede to the appeal, but that will depend on the analysis of the court which will come presently. I now move to the second element.

Whether there was penetration

[19] Section 2 of the Sexual Offences Act defines penetration as:-

> ***"....the partial or complete insertion of the genital organs of a person into the genital organs of another person"***

PW1 gave evidence that the person who assaulted her during the fateful night had sex with her. PW6, **DR. RAYMOND DAMBA** confirmed that the hymen of PW1 was perforated and there was a whitish foul smelling vaginal discharge which was consistent with defilement. Accordingly, there was penetration of the genital of PW1. The big question is; was the penetration by the Appellant?

Whether the penetration was by the Appellant

[20] The last element is whether the penetration was by the Appellant. The puzzle is resolved by determining whether there was proper identification of the Appellant as the person who caused the penetration. Two witnesses adduced evidence on identification of the Appellant as the person who sexually assaulted PW1. The witnesses are PW1 and PW3. PW1 in her testimony stated that she identified the Appellant through his voice. PW3 stated that he identified the Appellant through some light from a torch and or moon. The offence took place at 10pm in the night and it was dark. It is easily discernible from the evidence on record that the conditions of identification were difficult and were not conducive to easy identification. It was, therefore, absolutely necessary for the trial court to have exercised extreme caution before convicting on such evidence of identification. Identification by voice is one of the intractable legal issues, for there is a high possibility of making a mistake, a factor that should impel the court to exercise extreme caution before it convicts on the evidence of identification by voice. The law has recognized that fact and in the case of **MBELLE V REPUBLIC [1984] KLR 627** the standards were set which the prosecution must establish, that:

a) ***The voice was that of the accused;***

b) ***The witness was familiar with the voice and recognized it;***

c) ***The conditions obtaining at the time it was made were such that there was no mistake in testifying to what was said and who had said it.***

[21] Applying the above test, I agree with the Appellant and the Respondent that PW1 did not state that she was familiar with the voice of the Appellant and that the voice she heard on the fateful day was the Appellant's. She only said that she knew the Appellant as the cousin of her father. I note a curious thing though which she told the trial court during cross-examination; that she had informed her parents that the Appellant had earlier on approached her with the request that she be his girlfriend, a request she turned down. Knowing the Appellant was one thing. Being familiar with the voice of the Appellant and identifying a voice to be that of the Appellant is another thing altogether. Given the circumstances of this case, there was need for PW1 to have adduced water-tight evidence to obviate any mistaken belief that the voice she heard was that of the Appellant by stating the exact words the assailant uttered, the nature and length of the conversation between PW1 and the assailant, which made her recognize the voice to be that of the Appellant. In the absence of such details, a conviction on the evidence of PW1 is not safe.

[22] But could the evidence of PW3 offer any positive identification? It is not clear whether PW3 identified the assailant under the light from the torch which he had at the time or from the moon or both. But even if it is assumed that the light was from either the torch or the moon, or both he did not describe the intensity of the light to have been such that he could identify a person positively. He said he met the assailant at the door and he tried to hold him but he was overpowered by the assailant. The fact that it was at night and there was some sort of wrestling, it was necessary for PW3 to have adduced evidence, at least, that he shone the torch light on or saw the face of the assailant before the wrestling. These were difficult conditions. Where identification is being made in circumstances or conditions which are difficult, even if it is of a close relative, mistakes are sometimes made, and, therefore, there is need for the court to take extreme care in analysing the evidence in order to eliminate any possibility of mistaken identity. On this, see **R V TURNBULL [1976] 3 All ER 549.** PW3 did not provide water-tight evidence positively identifying the Appellant as the assailant. The possibility of mistaken belief that the Appellant was the assailant cannot be ruled out especially due to the fact that PW1 and PW3 had the information that the Appellant had earlier on approached PW1 with the request that she becomes his girlfriend.

[23] After carefully considering the circumstances under which the Appellant was identified, I find and hold that there was no proper identification of the Appellant as the person who defiled PW1. For those reasons, I allow the appeal, quash the conviction and set aside the sentence. The Appellant shall be set to liberty forthwith unless he is lawfully held in custody.

Dated and signed at Nairobi this 20th day of January, 2014

F.GIKONYO

JUDGE

Delivered and signed in open court at Bungoma the 20th day of January, 2014

A MABEYA

JUDGE