REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 163 OF 2012

F M W ……..…….....…….. ……APPELLANT

-VERSUS-

REPUBLIC ……..RESPONDENT

(From the original conviction and sentence in Criminal Case Number 358 of 2010 in the Senior Resident Magistrate's court at Baricho – HON. J.N. Mwaniki (SRM)

JUDGEMENT

The appellant **F M W** was tried and convicted on a charge of attempted defilement of a girl contrary to **Section 9(1)** of the **Sexual Offences Act (**the **Act)** in that on the 25th April 2010 in Kirinyaga District of the Central Province, he unlawfully and intentionally attempted to defile ***BNN*** a girl aged 5 years.

Upon conviction, the appellant was sentenced to twenty years imprisonment.

Aggrieved by the conviction and sentence, he filed this appeal raising seven grounds which can be summarized as follows;

1. That the learned trial magistrate erred in law and in facts by not considering that his rights were violated as he was kept in police custody for more than 24 hours having been arrested on 25th April, 2010 and taken to court on 28th April, 2010.
2. That the learned trial magistrate erred in law and in facts by relying on evidence adduced by members of one family and failed to consider that there was a longstanding grudge between him and the complainant's mother.
3. That the learned trial magistrate was biased; that he was convicted on the basis of insufficient evidence.
4. That the trial magistrate erred in law and in fact by not considering his defence.

When the appeal came up for hearing, the appellant chose to make both oral and written submissions.

In his submissions, he reiterated his view that he had been convicted on the basis of insufficient evidence mainly from members of one family. He also contended that he was wrongly convicted because the prosecution did not produce evidence to prove the age of the complainant.

On his appeal against sentence, he submitted that he was sentenced to twenty years imprisonment although he was only 17 years old at the time of conviction.

The state represented by learned state counsel Mr Sitati opposed the appeal on grounds that the

prosecution had adduced water tight evidence against the appellant in the lower court and that the appellant was correctly convicted.

He further submitted that the appellant's claim that he had been held in police custody for more than24 hours and that therefore his constitutional rights were violated ought to be disregarded as the same was not raised in the trial court at the earliest opportunity. He urged the court to dismiss the appeal for lack of merit.

In support of its case, the prosecution called a total of six witnesses. The complainant after a brief voire dire examination testified as PW1 and narrated how M, the appellant herein found her in her grandmother's home playing with other children and led her to some bushes together with her brother. Once in the bushes, the appellant removed her under pants as well as his trousers, lay on top of her and did 'bad things to her". Her other brother P (PW2) found them and on noticing him, the appellant left her lying on the ground and left. PW2 then escorted her from the scene and together they reported the incident to their mother (PW4).

PW2 and PW3 young boys aged 14 and 10 years respectively recalled that on the material day, they were playing with the complainant in their grandmothers home when the appellant, a person they knew before approached them and asked them to accompany him to his house to collect some money. The money was an account of some tobacco which had been sold to him by PW4 on credit.

PW2 agreed to accompany the appellant to his home together with the complainant and a young boy but PW2 refused. While at his home, PW3 claimed that the appellant led the complainant and the young boy to some bushes. Together with PW2 he followed them and this is when they found the appellant without his trousers lying on top of the complainant who did not also have her trousers and under pants. PW2 shouted saying he had witnessed everything. The appellant noted their presence, stood up, wore his trousers and left.

PW2 assisted the complainant to dress up and led her to their mother to who they reported what had happened. On receiving their report, PW4 examined PW1's private parts and found that she had not been defiled. The matter was reported to the police and PW1 was issued with a P3 form and referred to hospital for examination. She was examined by Nancy Kuria a clinical officer at Baricho Health Centre. The clinical officer on examining the complainant noted that her under pants were wet and there was redness in her genitalia. There was no penetration but she concluded that there was attempted penetration. The P3 form was produced on her behalf as exhibit 1 by PW5 her colleague since she was unable to attend court at the time as she had been involved in a road accident.

In his defence, the appellant gave an unsworn statement and did not call witnesses.

In his unsworn statement, the appellant admitted that he was a neighbour to the complainant. He narrated how he was arrested and though he did not specifically deny having committed the offence, he alluded to a claim that he had been framed with the offence because of a grudge he allegedly had with the complainant's family.

I have considered the grounds of appeal together with the submissions made by the appellant and the learned state counsel.

I have also re-examined the evidence on record as I was required to do this being a first appeal - **see**

- **OKENO VS REPUBLIC (1972) EA 32**
- **SIMIYU VS REPUBLIC (2005) 1 KLR 192**

My analysis of the evidence on record reveals that it is not disputed that the appellant was a person well known to the complainant and the other prosecution witnesses since in his own admission, he was their neighbour. The complainant whose age was put at 5 years both in the charge sheet and in the P3 form, testified that the appellant led her to a bush at the time in question, undressed her and after removing his

own trousers, he lay on top of her and did "bad things to her".Though the complainant did not describe the bad things the appellant allegedly did to her, given the medical evidence availed to the court, I am prepared to find that the complainant used that language to describe the act of the appellant attempting to penetrate her private parts using his male organ.

Her evidence was collaborated by her brothers PW2 and PW3 who had followed them and found the appellant in the act. They recalled seeing that the appellant was lying on top of PW1 and he had removed his trousers. PW1 did not also have her trousers and under pant since it is PW2 who assisted her to wear them after the appellant left.

From the above evidence, there is no doubt that the appellant was the person who had attempted to defile the complainant and would probably have completed his mission if PW2 and PW3 had not intervened. There is evidence that the offence was committed at around 6.30 p.m. and though the witnesses claimed that they saw and recognized the appellant through moon light, it is possible that there was still day light since darkness my not have fallen at that time of the evening.

It is not correct for the appellant to claim that the trial magistrate relied on the evidence of a single witness since the witnesses came from the same family. Though it is true that the witnesses were from the same family, they were different people who gave their own separate and independent accounts of what they had experienced or witnessed.

I find no merit in the appellant's claim that he was wrongly convicted given that the prosecution failed to prove by production of either a birth certificate or other documentary evidence the complainant's actual age.

In my view, there was no doubt that the complainant's age was as stated in the charge sheet since her claim that she was in nursery school when she gave her evidence in court was not challenged or disputed by the appellant.

The appellant also complained that the trial magistrate did not consider his defence and the fact that there was a grudge between him and the complainant's family. This claim is not true because the record clearly shows that the learned trial magistrate considered his defence and found that there was no evidence produced to prove the existence of a grudge between the complainants family and the appellant that would have motivated the complainant to make up a case against him.

Finally, the appellant claimed that his constitutional rights had been violated as he was held in police custody for more than 24 hours. He alleged that he was arrested on 25th April 2010 and was produced in court on 28th April 2010. I note that the charge sheet indicates that the appellant was arrested on 27th April, 2010 and was arraigned in court on 28th April 2010 contradicting the investigating officers (PW6) claim that he was arrested on 25th April 2010 at around 11 a.m.

This serious claim was not raised before the trial court in order to give the prosecution an opportunity to respond and clarify the date on which the appellant was placed in police custody. This was important because it is possible that he might have been released on police bond subsequent to his arrest on 25th April 2010.

However, whether the appellant was arrested and placed in police custody on 25th or 27th April 2010 is immaterial for purposes of this appeal because the Court of Appeal has held that proof of violation of a constitutional right does not have to result to a trial being declared a nullity. That in such a case, the remedy available to an accused person who feels that his constitutional rights had been violated is a civil claim for damages –see ***JULIUS KAMAU MBUGUA VS REPUBLIC CA CR APPEAL NO. 50 OF 2008.***

In view of the foregoing, I am persuaded to find that there was sufficient credible and cogent evidence before the trial court which proved the charges preferred against the appellant beyond any reasonable

doubt. I am therefore satisfied that the appellant was properly convicted.

On sentence, the appellant in his written submissions claimed that he was 17 years old when he was convicted and sentenced to twenty (20) years imprisonment. This claim was not made before the trial court even in the appellant's plea in mitigation and it was not part of his grounds of appeal. The age of a person at any particular point in time is a matter of evidence. It is a trite legal principle that whoever alleges the existence of certain facts has the onus of proving that such facts exist . And the appellant having alleged that he was 17 years at the time of conviction implying that he ought to have been sentenced in accordance with the provisions of **The Children's Act** and not as an adult against who a custodial sentence can be lawfully imposed, had the duty of proving that he was indeed not an adult at the time sentence was pronounced on him by the trial magistrate .

The appellant did not make any attempt to prove that claim but was instead content to leave it as part of his submissions. But submissions do not amount to evidence. If this claim was true, it is my view that the appellant would have raised it before the trial court soon after he was convicted or make it one of the grounds of his appeal which he failed to do. I am therefore unable to agree with the appellant that he was not an adult at the time he was convicted and sentenced.

Having reached that conclusion, I now turn to consider whether the sentence imposed on the appellant was within the law or whether it was harsh or excessive.

The offence for which the appellant stands convicted attracts a minimum penalty of ten years imprisonment. The record shows that the appellant was a first offender and though the learned trial magistrate considered all other relevant factors before passing sentence on the appellant, he apparently did not address his mind to the fact that he was a first offender. A Sentence of 20 years imprisonment for a first offender appears to me to have been manifestly harsh and excessive.

In the circumstances, I allow the appeal against sentence. I consequently set aside the sentence imposed by the learned trial magistrate and substitute it to a sentence of ten (10) years imprisonment effective from the date of conviction. It is so ordered.

C.W. GITHUA

JUDGE

DATED, SIGNED AND DELIVERED at KERUGOYA THIS 17TH DAY OF JANUARY 2014 in the presence of:-

The appellant

Mr Sitati for the state

Martin Court Clerk