REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.276 OF 2011

BETWEEN

P M R..…….…….. APPELLANT

AND

REPUBLIC ……..……RESPONDENT

(Being an appeal from original conviction and sentence of the SRM's Court at Kehancha in

Criminal case No.174 of 2011 – by Hon. J.R. Ndururi (SRM) delivered on 1st September, 2011).

JUDGMENT

Introduction

1. The appellant herein P M R was the accused in SRM's Court at Kehancha Criminal case No.174 of 2011. He was charged with Incest contrary to **section 21** as read with **section 20 (1)** of the **Sexual Offences Act No.3 of 2006**. The particulars of the charge were that on the 7th day of April 2011 at about 00.00 hours at ***[particulars withheld]*** village in Kuria District within Migori County caused his penis to penetrate the vagina of J M who was to his knowledge his cousin.
2. In the alternative, he was charged with committing an Indecent Act with a child contrary to **section 11 (1)** of the **Sexual Offences Act No.3 of 2006**. The particulars of the charge were that on the 7th day of April 2011 at about 00.00 hours at ***[particulars withheld]*** village in Kuria District within Migori County, he intentionally touched the buttocks and vagina of J M a child aged 16 years. The appellant pleaded not guilty to both charges.

Facts and Evidence

3. The prosecution called 5 witnesses. PW1(the complainant) J M (a minor in Form 1 at ***[particulars withheld]*** Secondary School) told the court that she was born on 20th October 1995 and produced her birth certificate which was marked as **P. Exhibit 1**. PW1 went on to state as follows: On the night of 6th April 2011, she was asleep in one of the houses within her father's compound when at about midnight she felt someone touching her. The person placed a knife on her throat and warned her that if she screamed, he would kill her. PW1 recognized the voice of the person speaking to her as that of the appellant who was not only her first cousin but was a next-door neighbour. The appellant proceeded and removed her clothes and underpants and had sex with her. She did not scream because of the warning the appellant had issued to her. After he finished the appellant opened the door and left.
4. PW1 got out of the house and went to call her father, M M, PW2. She informed her father of what

the appellant had done to her. PW2 woke up immediately and on hearing the story from PW1, he went and reported the incident to the Assistant Chief of the area, R H M who testified as PW4. PW4 advised PW2 to take the complainant to the nearest hospital and also to report the matter to the police.

5. Following the advice given to him by PW4, PW2 took his daughter to Isebania Sub-District Hospital where she was seen by Josphat Sagwe, a Registered Clinical Officer who testified as PW5. On examination of PW1's genitalia, PW5 found a tear, bruises and lacerations on the labias, vagina and cervix. The hymen was also found not to be intact, suggesting previous sexual intercourse. PW5 also noted discharge from PW1's vagina, which was suggestive of the presence of semen. Laboratory tests ordered by PW5 revealed the presence of spermatozoa in PW1's vagina suggesting recent sexual intercourse. PW5 thus confirmed that PW1 had had recent sexual intercourse.
6. PW5 further told the court that prior to PW1 being taken to Isebania Sub-District Hospital, she had been treated at Nyametaburo Health Centre where she was issued with treatment notes produced in court as **P. Exhibit 2** and **3** respectively.
7. The report of the incident made by Pw2 to Isebania police station was received by Number 45430 PC Josphat Kamara who testified as PW3. After receiving the report which was made in the presence of PW1, PW3 together with PC (W) Whisk Edna escorted PW1 to Isebania Sub District Hospital for examination which was done by PW5 and a P3 Form filled. PW3 together with PC Kimchir visited the scene at Nyametaburo area where he recovered a metal bar that had been used by the appellant to break the window through which he (appellant) accessed the room where the complainant was sleeping.
8. After recording statements from witnesses, and after full investigations of the incident, PW3 issued an arrest order. The appellant was thereafter arrested and charged. The metal bar was produced as **P. Exhibit 4**.
9. During cross examination by the appellant, PW3 stated that he could not have arrested the appellant immediately after the incident because investigations were still ongoing. He also stated that according to the investigations, no one else apart from PW1 witnessed the incident.

10. The appellant also asked PW1 a number of questions during cross examination. PW1 admitted that she did not raise an alarm during the attack but explained that her failure to do so was caused by the appellant who had issued her with death threats and also held her by the throat. PW1 also stated that her home is very near to the home of the appellant and that the appellant climbed over the fence of PW2's compound before gaining access into the house where PW1 was sleeping. PW1 also told the court that she recognized the appellant's voice first because he is her cousin and secondly because he lives close by. PW1 also confirmed that no one else witnessed the incident, but she denied that the case against the appellant was a frame up because of a land dispute.

The Defence case

11. The appellant gave an unsworn statement in which he denied committing the alleged offence. He also told the court that he had no grudge against PW2 but stated that PW2 had framed him because of a boundary dispute between PW2 and appellant's family. The appellant also stated that on a previous occasion, PW2 had accused him of assaulting him (PW2) and that as a result the appellant was charged in court. That the assault dispute was resolved through reconciliation. The appellant also stated that he had refused PW2's request to dig a trench in appellant's land for the purpose of draining water from PW2's land.

Judgment of trial court

12. After carefully analyzing all the evidence adduced by the prosecution, the trial court was satisfied that:-

a. *The complainant and the appellant are first cousins, being the children of brothers;*
b. *The complainant was about $16^{1}/_{2}$ years old at the time of the alleged offence;*
c. *The complainant was defiled on the night of $6^{th}/7^{th}$/04/2011;*

d. *Medical evidence was adduced to confirm allegations that the complainant was defiled.*

13. Upon the above findings, and upon being satisfied that the appellant was clearly recognized as the perpetrator of the alleged offence, the trial court found the appellant guilty as charged, convicted him and sentenced him to the mandatory minimum sentence of 20 years imprisonment.

The Appeal

14. The appellant being dissatisfied with both conviction and sentence preferred an appeal to this court. In his home made petition of appeal dated 2nd December 2011, the appellant appeals against the entire judgment on both conviction and sentence on the following homemade grounds:-

1. *The learned trial magistrate erred in law and facts by convicting the appellant without voice identification parade for PW1 to recognize the appellant among others.*
2. *The learned trial magistrate failed to appreciate that there was existing bad blood between the appellant and PW2 father of PW1 because of an assault case which was not proved therefore their evidence is unsafe to convict the appellant without evidence of an independent witness.*
3. *The trial magistrate totally failed to consider that the complainant was not a credible and honest witness after and also failed to appreciate that the complainant's testimony was not supported by section 124 of the Evidence Act.*
4. *The trial magistrate, in convicting the appellant failed to consider that the metal exhibit and the window at the scene used by the alleged defiler was not dusted by the crime scene officers to determine the truth.*
5. *The trial magistrate gravely erred in law by failing to consider that there was no consistent evidence between PW1 and the P3 form produced regarding age, injury and name of the suspect on the first report.*
6. *The trial magistrate further failed to consider that the P3 was inadequately filled and therefore could not support the prosecution case against the appellant.*
7. *The trial magistrate failed to consider that circumstances of the appellant's arrest after one week were not sound.*
8. *The trial magistrate also failed to consider the appellant's defence and mitigation which was reasonable in all circumstances.*

The Submissions

15. When the appeal came up for hearing on 15th October 2013, Mr. Nyagwencha counsel for the appellant submitted on 6 issues.
16. On the first issue, he submitted that the language used by the trial court on the day of taking plea that is on 18th April 2011 was not indicated and that the only day the language was indicated was 28th June 2011. He further submitted that the language used by PW1 was not indicated although the record shows that 3 clerks were present. Thus he submitted the appellant was not informed of his constitutional rights during trial and it was therefore unsafe to convict appellant in such circumstances.

17. Secondly on evidence adduced in court counsel submitted that evidence of recognition of appellant's voice by PW1 was unsafe because whereas it was alleged the offence took place on 7th April 2011, PW3 says that the alleged offence took place on 7th February 2011 which means that the prosecution witnesses had planned to frame the appellant. He further submitted that the investigating officer did not take photographs of the scene therefore there was no proper investigation into this offence.

18. Counsel further submitted that there was no independent evidence to corroborate the evidence of PW1 and PW2 since there is evidence from the record that there was a boundary dispute between PW2 and the appellant.

19. Thirdly, regarding the judgment of the trial court counsel submitted that the trial court did not state the points for determination in contravention of **section 169** of the **Criminal Procedure Code** and that no reasons were given as to why trial court did not believe the appellant's testimony.
20. Fourthly on the instrument allegedly used to gain entry into the house counsel submitted that it was only PW3 who identified and produced the iron rod but how he came into possession of the same remains unknown.
21. Fifthly on the medical report of the appellant, counsel submitted that during the trial only the P3 form on the victim was produced but no medical examination was done on the appellant.

22. In concluding his submissions, Mr. Nyagwencha submitted that it would be unsafe for this court to uphold the conviction and sentence of the trial court because the prosecution did not prove its case against the appellant beyond any reasonable doubt.
23. The appeal was opposed by M/s Cheruiyot, Prosecution Counsel from the Deputy Public Prosecutor's Office. First, she submitted that the evidence on record clearly shows how, while PW1 was asleep in a house in her father's compound, the appellant broke into the house, undressed her and defiled her. Counsel submitted that PW1 clearly told the court and produced evidence to show that she was aged just over 16 years old. Counsel also submitted that immediately after the appellant had fled from the house, PW1 informed her father of her ordeal and PW2 informed the local administration and the police of the same.
24. M/s Cheruiyot also submitted that the medical evidence clearly shows that Pw1 was certain that it is the appellant who defiled her.
25. On the issue of language, counsel submitted that though the record does not indicate the language used, it is clear that the appellant understood the proceedings of the court because he cross examined the witnesses as shown on pages 6 and 14 of the lower court proceedings. Counsel contended that the appellant could not have cross examined the witnesses if he did not understand what they had said. Counsel submitted further that no prejudice was occasioned to the appellant in this regard.
26. Regarding the voice recognition of the appellant by PW1, counsel for the Respondent submitted that PW1 told the court that she knew the appellant well and that the moment he spoke warning her of dire consequences if she screamed, she recognized him. Counsel maintained that there was no mistaken identity in this case although it is possible that mistakes sometimes occur in cases of recognition even of close relatives. Counsel also submitted that there was no mistake about the date on which the offence was committed.

27. Counsel also submitted that nothing turns on the issue of the Exhibit, namely the metal bar as the same was recovered by PW3 during investigations. Counsel submitted further that PW3, PW4 and PW5 were all independent witnesses and therefore the complaint by the appellant that there were no independent witnesses does not hold water.
28. Counsel also submitted that contrary to the appellant's contention that the trial court did not frame issues for determination, the truth is that the trial court set out the issue for determination namely whether it was the appellant who had defiled the appellant. At page 18 of the proceedings, the trial court said the following after he had made certain findings:-

> **"Thus, the only question that remains to be answered is: Is it the accused person who defiled the complainant?"**

M/s Cheruiyot submitted that after setting out the issue for determination, the trial court proceeded to fully address it and to give reasons for the conclusions reached.

29. On sentence, counsel submitted that the sentence meted out to the appellant was the mandatory minimum sentence under the law. Counsel urged the court to find and hold that the appeal is lacking in merit and to dismiss the same on both conviction and sentence.
30. In reply to the submissions by counsel for the Respondent, Mr. Nyagwencha submitted that once it is admitted that the trial court did not indicate the language in which the proceedings were conducted, then the conviction remains unsafe and ought not to be upheld by this court. Counsel

also urged this court to set aside the sentence as the appellant was charged under the wrong section of the law. Counsel also submitted that PW1 lied when she purported to have recognized the appellant through voice.

31. On points for determination by the trial court, Mr. Nyagwencha maintained that no issues were set out and that the purported issue for determination was only a clear indication that the trial court had already made up its mind on the conclusions to be reached in the case. Counsel pointed out that the trial court failed to appreciate that there was bad blood between appellant and PW1's family.

Duty of First Appellate Court

32. This being a first appeal, I am in law required to re-evaluate the evidence tendered before the trial court so as to come to my own conclusion on the same. I have however to take into account the fact that I do not have the advantage of seeing and hearing the witnesses as did the trial court. See **Okeno –vs- Republic [1972] EA 32** and **Pandya –vs- R[1957] EA 336**.

Findings and Conclusions

33. After carefully reconsidering and evaluating the evidence afresh, the following are issues for determination by this court:-

- *Was the appellant prejudiced during the proceedings when the trial court failed to indicate the language that was used?*
- *What is the effect of disparity in dates on which the alleged offence took place?*
- *Was the evidence of the metal bar produced by PW3 admissible?*
- *Did the trial court set out the issues for determination?*
- *Was the appellant identified by the respondent beyond reasonable doubt?*
- *Was the sentence meted out to the appellant illegal in the circumstances of this case in view of the same having been meted out under **section 21** when he was charged under **section 20(1)**?*

34. Firstly on the issue of language while taking plea before Hon. T.A. Sitati, DMII on 18th April 2011 at page 2 of the proceedings the language used by the court was not indicated. However on 16th May 2011 at page 4, the court upon realizing that the magistrate who took plea lacked jurisdiction, the trial court proceeded to take the plea afresh in Kiswahili. So clearly, the language in which the plea was taken was Kiswahili and it is also indicated that PW1 testified in Kiswahili. Although it is not indicated in what language the appellant cross examined PW1, it would not be wrong to conclude that having taken the plea in Kiswahili, the appellant's language was Kiswahili throughout the proceedings. And indeed which means that the appellant fully followed the proceedings and appreciated the evidence adduced against him. Even PW5, the clinical officer testified in Kiswahili. This therefore means that the appellant's complaint that he was prejudiced because the language of the court was not indicated is not true. The appeal based on this ground therefore fails.

35. The second issue concerns the apparent disparity between the evidence of PW1 and PW2 and that of PW3 concerning the date when the alleged offence took place. According to PW1, PW2 and PW4 and also PW5, the alleged offence was committed on the night of 6th and 7th April 2011, and it is only PW3 who said that the incident took place on 7th February 2011. After carefully perusing the record, I am satisfied that the apparent discrepancy did not prejudice the appellant in any way. This issue is therefore decided in favour of the respondent. This ground of appeal therefore fails.

36. Regarding **P. Exhibit 1** which was the claw bar produced by PW3, it is clear from the record that PW2 made reference to the exhibit when he said during cross examination:-

> **"Jane had told me that Machugu had climbed over the fence and opened a window and entered the house she was sleeping in. The house had two rooms. He had used a claw bar to open the window. Police found the claw bar and carried it away."**

37. According to PW1 the window to her room was broken into. The evidence of PW2 was corroborated by PW3 who attested to the fact that indeed they found a claw bar in PW2's home and they suspected it was the weapon used to break into PW1's bedroom window. The issue here is not whether or not the appellant used a claw bar to open PW1's window but whether indeed the appellant entered PW1's room and defiled her; so that even if the evidence of the claw bar is disregarded, and it is established that the appellant was the one who defiled PW1, there would be no doubt in my mind that the case against the appellant was proved beyond any reasonable doubt.
38. On the fourth issue namely whether or not the trial court complied with **section 169** of the **Criminal Procedure Code** I have no doubt that it did so. At page 18 of the proceedings, the trial court asked itself the question whether or not the appellant was the person who defiled the complainant and answered itself affirmatively. Prior to stating the question, the trial court analyzed the evidence and made certain findings. In this regard, I am satisfied that the trial court complied with the relevant provisions of the law as to the issues to be determined, the determination of the same and the reasons for the determination.
39. The next issue for determination is whether the appellant was identified/recognized by PW1 at the time of the commission of the alleged offence. It is not in dispute that the alleged offence took place in the dead of night. There is no evidence that there was any source of light in the house where the offence took place, and the only available evidence of recognition is that of voice. The appellant has attacked this piece of evidence, contending that PW1 lied when she said that she recognized his voice.
40. The issue of identification/recognition is made more complex in this case because the only available evidence is that of PW1, and thus evidence of recognition is that of a single identifying witness. In **Roria –vs- Republic [1967] EA 583**, in which the appellant was convicted on the evidence of a single identifying witness, the Court, applying the principles set out in the case of **Abdalla Bin Wendo & Another –vs- R.[1953] 20 EACA 166** at page 168 thereof said the following on the

issue of identification by a single witness:-

> **"Subject to certain well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness, but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions following a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."**

41. The above statements mean that this court must test with the greatest care the testimony of PW1 and other surrounding circumstances and satisfy itself as to the veracity of PW1's testimony. The appellant has contended that Pw1 was a liar and has joined her father, PW2 in framing him because of an existing boundary dispute between PW2 and the appellant. The court has carefully considered this contention by the appellant but has reached the conclusion that the same is baseless.
42. In his evidence in chief, which was not given under oath, the appellant stated, *inter alia*,

> **"I have no grudge against her father. Our lands neighbour and he framed me because of the land boundary dispute. He had previously accused me of assaulting him and I was charged in court. We reconciled."**

43. PW4 told the appellant during cross examination that after the incident, the appellant disappeared from the village for 3 days. PW4 also stated that he was not aware of any case between the appellant and PW2 as no report was ever made to him (PW4).

44. When the appellant got the chance to cross examine PW2, he did

not raise any issue about the alleged boundary dispute nor did he suggest to PW2 that PW2 had previously accused him of assaulting him nor that he (appellant) had declined to dig a trench in his (appellant's) land to help drain water from PW2's land.

45. In a nutshell the appellant's contention that this case was a frame-up or that there was a boundary dispute between the two families is in my view, a mere afterthought with no legs to stand on. The same is rejected.
46. The final for determination is whether the evidence of voice recognition can stand. PW1, in her examination in chief stated, *inter alia*;

> **"When he said, "if you raise an alarm, I shall slaughter you; I recognized his voice."**

During cross examination, PW1 stated:-

> **"You live nearby. You have brothers and cousins. No, your voice is different."**

47. On voice recognition the case of **Choge –vs- Republic [1985] KLR 1 – High Court at Nakuru Criminal Appeal No.69 of 1984** is relevant. At holding number 9, the Court of Appeal held that:-

> **"Evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, that the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it."**

48. Similar views were expressed by the Court in **Karani –vs- Republic – Court of Appeal at Kisumu Criminal Appeal No.181 of 1984** where the

court held:-

> **"Identification by voice recognition in admissible, however care must be taken to ensure that the voice is that of the appellant?**

The Court went further to hold that:

> **"As the appellant had worked for the complainant for about a period of 2 months the court is satisfied that in all circumstances of the matter the complainant did identify the voice as that of the appellant."**

49. It is instructive to note that in the instant case, the appellant was not a stranger to the complainant but was her first cousin, they lived near each other meaning that there was constant interaction between them. PW1 stated that though the appellant had brothers and cousins, his voice was different. Her identification of the appellant was actually recognition since she said she could differentiate the appellant's voice from that of his siblings and cousins. In addition, according to PW1's evidence, only one person touched her, undressed her, warned her of the dire consequences of raising an alarm and then proceeded to defile her. That person was the appellant.
50. In the case of **Peter Musau Mwanzia –vs- Republic [2008] e KLR** the Court of Appeal comprising Tunoi, Bosire and Onyango Otieno JJA held:-

"We do not agree that for evidence of recognition to be relied upon, the witness claiming recognition of a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show for example that the suspect has been close to him for sometime or is a relative ……."

51. In light of all the above, I am persuaded that the voice recognition evidence given by PW1 is good evidence and unmistakably points at the appellant as the one who defiled the complainant. The evidence by PW4 confirms that PW1 was defiled.
52. There is one other issue that calls for comment. During the early stages of the proceedings in the lower court, the appellant requested for production of the OB NO.13 of 07/04/2011. The OB was produced on 25th May 2011 and read to the appellant. The OB showed that a report of defilement was made by M M (PW2) who was with his daughter, PW1, a form one student at Nyametaburo secondary school, 17 years old. PW1 alleged to have been defiled by M R while she was asleep in her room repeatedly during the night of 6th and 7th April 2011 and that the appellant had threatened to harm her with a knife which he had.
53. It thus follows that the first report to the police gave the appellant's name as the person who had defiled PW1. This piece of evidence goes a long way in corroborating the evidence by PW1 that she recognized the appellant on the night of the attack by his voice and she proceeded to give his name to the police with the first report she made during the morning on 7th April 2011. This evidence coupled with the fact that the appellant disappeared from home for 3 days after the event confirms that the appellant indeed committed the deed.
54. The last issue for determination is whether the sentence meted out to the appellant was illegal. The argument by counsel for the appellant is that since **section 20** of the **Sexual Offences Act** does not include cousins in the group of persons against whom the incest can be committed, then the sentence is illegal. This is the true position because the class of persons given under **Section 20** of the **Sexual Offences Act** includes daughter, granddaughter, sister, mother, niece, aunt or grandmother.

55. While the above is indeed true, the record shows that there is

evidence that PW1, who was under the age of 18 years was defiled. In exercise of the powers conferred upon this court by the provisions of **section 354 (3) (a)** of the **Criminal Procedure Code**, I can do any of the following on appeal:-

i. *reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction;*
ii. *alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence;*
iii. *with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence.*

56. In the instant case, I have no reason to alter the finding of guilty because there is evidence that the offence of defilement was committed against PW1 who was, at the time of the offence, under 18 years old. In this regard **section 8 (1)** as read with **section 8 (4)** of the **Sexual Offences Act** comes into focus. The minimum sentence under section 8 (4) is 15 years. R/A explained.
57. In the premises, the appellant's appeal on both conviction and sentence is dismissed. I do not think that it serves the interests of justice to enhance the sentence from 10 years to 15 years.
58. It is so ordered.

Dated and delivered at Kisii this 16th day of January, 2014

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Nyagwencha (present) for the Appellant

Mr. Wainaina (present) for the Respondent

Mr. Bibu - Court Clerk