217/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 168 OF 2012

SAMWEL MWANZIA .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from the original conviction and sentence in Mutomo Resident Magistrate's Court Criminal Case No. 188 of 2012 by Hon. S.A Ogot, RM on 16/10/2012)

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to **Section 8(1(3)** of the **Sexual Offences Act No. 3** of **2006.** The particulars of the offence being that on the **28th August, 2012** at about 2.00pm at ***[particulars withheld]*** **village, Kyatune Location** in **Mutomo District** within **Kitui County,** intentionally caused his penis to penetrate the vagina of **N N** a child aged **12 years.**

In the alternative count the appellant was charged with committing an act of indecency with a child contrary to **Section** 11(1) of the **Sexual Offence Act No. 3** of **2006.** The particulars of the offence being that on the **28th August, 2012** at about **2.00pm** at ***[particulars withheld]*** **village, Kyatune Location** in **Mutomo District** within **Kitui County** intentionally touched the vagina of **N N** a child aged **12 years** with his penis.

2. He was tried, found guilty, convicted on the main count and sentenced to **serve 20 years** imprisonment. Being aggrieved by the conviction and sentence in his amended grounds of appeal he states thus:

i. **That** the trial magistrate erred in law by failing to consider that the language used at the trial was doubtful as it was not reflected on record which was in contravention of **Article 50 (2) (7)** of the C**onstitution** and **Section 198 (1)(4)** of the **Criminal Procedure Code.**
ii. That the trial magistrate erred in both law and fact when he convicted him having relied on the evidence of PW1, PW2 and PW3 that was doubtful.
iii. **That** the magistrate erred in law and fact by convicting on charges that were not proved as required by **Article 50 (2) (b) (c)** of the **Constitution.**
iv. The magistrate erred it both law and fact by rejecting his defence without giving any cohesive reasons which was in contravention of **Section 169(1)** of the **Criminal Procedure Code.**

3. To prove the case the prosecution called **six (6)** witnesses. **PW1, N N** aged **12 years** in standard 4

having been subjected to *voire dire* examination and the court having found that she understood the nature of taking an oath stated that she was coming from the river carrying a 20 litres container when the appellant called her. She left the water on the ground and went to pick fruits as told by the appellant. He held her hand and led her to some hole. She screamed but he covered her mouth and dragged her. He removed her clothes, inner wear (pant). He covered her mouth and threatened to cover her with soil if she screamed. He wore a condom and lay on her and committed the act which made her feel pain. He released her. She wore her clothes and went in search of her mother. She found her next to the water container. She narrated her ordeal to her.

4. PW2, **M N** the mother to PW1 said she was coming from church when she saw her water container at the appellant's gate. She went into his farm (shamba) and saw him emanating from a hole. She asked him whether he had seen her child and he said she had been there eating fruits but had since left. She left the compound only to find her daughter by the roadside where the water container was. She asked PW1 where she had been. She started crying and said that the appellant had assaulted her. She, (PW2) called **L M** who asked the appellant about the incident but he denied. She therefore called the police. They arrested the appellant. They took PW1 to hospital for examination.

5. PW3, **L M** stated that she was told by PW2 that the appellant had assaulted her child. She went to ask the appellant if indeed he did it but he denied. PW1 led them to the alleged place of the incident. The appellant said he was digging a toilet.
6. PW4, **No. 2007116585 APC James Mwiti** on receiving the report from PW2 went to arrest the appellant. He found him bathing. He arrested him and took him and the complainant to hospital for examination. PW5, **Daniel Mulwa,** a registered clinical officer examined PW1. He estimated her age as 12 years old. She had no hymen and there was laceration on the labia minora which was hyperaemic. A high vagina swab done revealed the presence of pus cells. He formed an opinion that there had been defilement.
7. PW6, **No. 92291 P.C. Grace Gichohi investigated** the case and charged the appellant.
8. When put on his defence the appellant stated that he was on the farm when he saw PW2 who asked her if she had seen her child. He denied having seen her. She left. Two and a half hours later he saw PW2, PW1 and other people. One of the persons told him that she heard PW1 screaming being beaten by PW2. She forced PW1 to say that she had been with him. Later he was arrested.
9. The appellant filed written submissions. **Mrs Abuga** the learned State Counsel opposed the appeal. She argued that there was evidence to prove that the appellant defiled the complainant but used a condom. Her age was confirmed by her mother. The clinical officer on examining her concluded that defilement had occurred. It was her submission that even if the appellant denied having defiled PW1, medical evidence corroborated her evidence. She called upon the court to find that the conviction was proper and the sentence was within the law. She prayed for the dismissal of the appeal. In response thereto the appellant stated that he had a land dispute with the complainant's family.
10. This is a first appeal. It is my duty to re-evaluate the evidence adduced before the trial court and came up with my own conclusions and findings bearing in mind that I neither saw nor heard witnesses who testified. (***see Okeno versus Republic [1972]E.A. 32).***
11. It has been stated that the language used was not noted hence the trial contravened **article 50(2) (b)(m)** of the **Constitution.** The stated section provides as follows:-
12. ***2) Every accused person has the right to a fair trial, which includes the right—***

b. ***to be informed of the charge, with sufficient detail to answer it;***

m. ***to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial".***

Section 198(1) and **(2)** of the **Criminal Procedure Code** provides thus:-

1. ***Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands.***

2. ***If he appears by advocate and the evidence is given in a language other than English and not understood by the advocate, it shall be interpreted to the advocate in English.***

12. It is a requirement for proceedings to be conducted in a language that the accused person understands. During the trial of the appellant as seen on record, on the date the charge was read to the appellant, an interpreter one **Janet** was present in court. The language used was **English** and **Kikamba** and **Kiswahili** in some instances. The original handwritten record shows that the interpreter **Janet** was present throughout the proceedings. Similarly the typed copy also confirms the position.
13. In the case of ***Said Hassan Nuno Criminal Appeal No. 322 of 2006,*** the Court of Appeal stated that;-

> "*... **at each stage of the proceedings a Court clerk was in attendance and we take judicial notice that one of the core duties of a clerk is to offer interpretation services to accused or even to the court where it does not understand the language of the accused; or a witness to the case."***

14. The appellant having been accorded services of an interpreter participated in the trial, cross-examined witnesses appropriately and gave evidence in his defence. Prior to pleading not guilty, the charge and its ingredients as stated in the particulars of the offence were read to him. The plea was taken on the **29th August 2012.** On the **5th September, 2012** an order was made for the appellant to be furnished with copies of witnesses' statements to enable him prepare for his defence. Eventually the case was heard from **13th September, 2012.** The appellant was infact accorded adequate time and facilities to prepare for his defence. **Ground 1** and **3** can therefore not stand.

This brings in ground 2 –whether evidence adduced by PW1, PW2 and PW3 was doubtful.

15. Evidence was adduced that the complainant was **12 years** old. The appellant faults the trial magistrate to have accepted such evidence without evidence of a birth certificate. In the case of ***Omuroni Francis versus Uganda, Court of Appeal Criminal Appeal No. 2*** of ***2000.*** It was held *interalia* that-

> "***In defilement cases, medical evidence is paramount in determining the age of the victim and that the doctor is the only person who could professionally determine the age in the absence of any other evidence like a birth certificate. Apart from medical evidence age may also be proved by the victim's parents or guardian and by observation and common-sense."***

16. This is a case where no birth certificate of the victim was produced. However, PW2 the mother of the victim (PW1) testified that she was her second born child aged **12 years.** This was evidence of a parent who was better placed to tell the age of the complainant. In addition to her evidence, the victim was examined by a clinical officer who prepared a medical examination report (PW3). He estimated the age of the complainant as 12 years. Without any other evidence to disapprove the evidence adduced there is no doubt that the complainant was a child aged **12 years.**
17. Evidence adduced by the complainant that she was penetrated and as a result of the act she bled was confirmed by medical evidence. On examination she had no hymen. There was laceration on the labia minora. The clinical officer found that indeed she had been defiled.

The issue to be addressed is whether she was defiled by the appellant

18. The evidence as to who defiled the complainant was of a single witness. Prior to being dragged into the hole which the appellant said was for a pit latrine, she had fetched some water in a container which she left at the homestead of the appellant. The act was done in broad daylight. There was no question of mistaken identity considering the fact that the appellant was well known to the complainant. She was subjected to cross examination. The appellant sought to establish

what he stated in his defence that the complainant had been beaten by her mother until she bled from her hands. Contrary to his allegations the complainant did not sustain any injuries on her hands.

19. The trial magistrate in convicting the appellant stated thus;-

> ***"... Based on this I find that I believe PW1 absolutely. She did not seem to be lying... I believed that she was telling the truth".***

It is the law that where a victim of sexual offence convinces the court that she is truthful, the court having recorded reasons to that effect in the proceedings is justified in convicting the accused (see ***the proviso to Section 124 of the Evidence Act, Cap 80 Laws of Kenya).***

20. The trial magistrate having directed himself properly by believing the complainant in reaching his finding did not make any error as alleged. Further it is clear that he gave reasons for his decision therefore he complied with **Section 169 (1)** of the **Criminal Procedure Code.** The sentence imposed was **20 years.** The law provides for a sentence of not less than **20 years** for such an offence.
21. From the foregoing I have no reasons to interfere with the findings of the Lower Court as the conviction and sentence were properly done. Accordingly, the appeal is dismissed in its entirety.

DATED, DELIVERED and **SIGNED** this **25TH** day of **MARCH,** 2014**.**

L.N. MUTENDE

JUDGE