REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 44 OF 2013

(From original conviction and sentence in Criminal Case No.1698 of 2011 of the Chief Magistrate's at Naivasha, E. Boke, P. M.)

HIRAM MWANGI GATHONJIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act 2006 *(No. 3 of 2006)*. He was also charged with an alternative charge of indecent act with a child contrary to Section11(1) of the said Sexual Offences Act. The Appellant was on the evidence found guilty, and convicted on the principal charge and was sentenced to life imprisonment. Aggrieved with both his conviction, and sentence, he has come to this court by way of an appeal and has raised three grounds of appeal -

1. *that the learned trial magistrate erred in law and fact in convicting the appellant without noting that the Respondent's allegations were not verily proved,*

2. *that the learned trial magistrate erred in law and fact in convicting and sentencing the appellant while ignoring the fact that the quality of evidence was poor in the absence of medical evidence and failure by the prosecution to avail the complainant,*

3. *that the trial court erred in law and fact in failing to evaluate the defence case alongside the prosecution's case contrary to Section 169(f) of the Criminal Procedure Code (Cap. 75, Laws of Kenya).*

2. In addition to the Grounds in the Petition of Appeal the appellant also filed written submissions on 30th November 2013 upon which Mr. Chege relied when the appeal came up for hearing on 13.02.2014.

3. The Grounds of Appeal in my view raise two but related issues, **firstly** that there was no evidence to convict the appellant, and **secondly** that if there was such evidence, the trial court failed to consider it in terms of Section 169 of the Criminal Procedure Code, as to its contents, points for determination, the decision and the reasons for the decision specifying the offence for which the appellant was convicted and the punishment to which the appellant was sentenced.

4. The Appellant singled out the fact that there was no direct oral evidence contrary to Section 63 of the Evidence Act, *(Cap. 80, Laws of Kenya)*, that the four (4) year old victim did not testify, and that

the evidence of PW1 the mother of the victim was hearsay, and counted for nought. Counsel relied on the case of **JAMES OLESILANGA VS. REPUBLIC [2006] eKLR,** where the court held that hearsay evidence should not be the basis of conviction of an accused person.

5. The Appellant also contended that without the evidence of the victim there was no evidence of identification before the court and therefore the prosecution did not eliminate the possibility of mistaken identity. The Appellant relied on the case of **WARSAME ADEN YALLOW VS. REPUBLIC [2009] eKLR.**

6. The counsel for the Appellant also contended that medical evidence was irregularly admitted, and relied on the decisions of this court, and the Court of Appeal on production of P3 forms, that medical evidence if sought to be adduced ought to be so done with propriety – *"that with regard to the production of evidence in court, Police Officers must not be the people to play that role"*.

7. In the circumstances, counsel for the Appellant contended, the prosecution did not prove its case beyond reasonable doubt, because the evidence to convict the Appellant was either inadmissible or wrongly adduced before court, and therefore amenable to be disregarded, and that the effect of the doubtful evidence far outweighed its probative value. Counsel therefore urged the court to disregard the said evidence while evaluating whether the evidence available is of sufficient cogency to support and/or sustain the conviction and the sentence imposed by the trial court.

8. For those reasons, counsel for the appellant finally contended that the prosecution had not discharged its burden of proof to the required standard, that evidence expressly disallowed by law was admitted, and that in the circumstances, the Appellant was not accorded a fair hearing as envisaged under Article 50 of the Constitution. Counsel therefore urged the court to quash the conviction and set aside the sentence imposed on the accused, and set him free.

9. On his part counsel for the Republic/Respondent opposed the Appeal and submitted that the guardian as envisaged under Section 2 of the Sexual Offences Act testified on behalf of the victim, a child of $4^1/_2$ years and that the prosecution evidence proved beyond reasonable doubt that it is the Appellant who defiled the child and that the conviction was safe and the court should uphold it together with the sentence.

10. I have considered the rival submissions, and the issue raised by the appeal is **firstly** whether any of the evidence was wrongly admitted, and **secondly** if that evidence is excluded whether the appellant's conviction, and therefore sentence would stand.

11. It is admitted that the victim of the offence was a child of four and half years, and therefore a child of tender years, that is a child of less than ten years, within the definition of that term under Section 2 of the Children Act, 2001 *(No. 8 of 2001)*. Again, it is not disputed that PW1 was not merely the mother of the child, but also its *"guardian"* a person, who in the opinion of the court has charge of the child.

12. It was the Appellant's counsel's contention that the victim, that is the child of tender years ($4^1/_2$) years did not testify, that the evidence of PW1 the mother had no probative value, under Section 60 of the Evidence Act *(Cap. 80, Laws of Kenya).*

13. In my view, the trial court properly excluded the victim of the offence from giving evidence. The child was a vulnerable witness within the provisions of Section 31(11) of the Sexual Offences Act. In this case the child was even one of tender years. PW1 *(mother of the child)* testified that she noticed that the child had difficulty squatting, and looked to be in pain. This prompted her to make the child lie on the coach and examined her private parts. She discovered they were reddish with some discharge like sperms on the face of the vagina.

14. To confirm what she had seen, she summoned a neighbour J W W, who was a fellow IDP at Kikopey but she moved on to an unknown place in Western Kenya, and did not testify. Other neighbours

mostly all women witnessed the child's condition before PW1 reported the matter to Gilgil Police Station, where they were directed to take the child to Gilgil Hospital where it was treated.

15. PW1 later led the Police to arrest the Appellant, who was in turn taken to hospital for treatment.

16. PW2, the Investigating Officer corroborated the evidence of PW1 on the condition of the child, PW2 too examined the child's private parts and noticed some redness and discharge. PW2 also testified that the child told her it was *"Mwangi"* who had *"hit her on the private parts"*. She took the child to hospital where the Doctor on examination found that the child had been defiled. PW2 was led to ***[particulars withheld]*** IDP camp where the child pointed out the house of Mwangi, who was then arrested.

17. This is the same Mwangi whom PW1 had testified was the friend of *"Ndirangu"* PW1's brother, and lived about 50 metres away from them.

18. From that evidence the identity of the appellant is quite clear. It is the evidence of surrounding circumstances as envisaged under Section 33 of the Sexual Offences Act, and the victim being a child of tender years, the offence was committed intentionally as the child was incapable of appreciating the nature of an act which caused the offence, again as envisaged under Section 43 of the Sexual Offences Act -

> ***"43(1) an act is intentional and unlawful if it is committed -***
>
> ***(a) in any coercive circumstance,***
>
> ***(b)***
>
> ***(c) in respect of a person who is incapable of appreciating the nature of an act which causes the offence."***

19. The circumstances in which a person is incapable in law of appreciating the nature of an act – include circumstances where such person is, at the time of the commission of the such act, is among others, a child.

20. It was the appellant's contention that expert evidence which ought to have been adduced by the expert was admitted under the evidence of an investigating officer who was not qualified as a medical doctor.

21. I entirely agree with the Appellant's contention that P3 Form was produced by PW3, the Investigating Officer. PW3 also produced the age assessment report showing the child to have been about or 4 years of age together PRC *(Post Rape Care Form)* all admitted without objection by the Appellant.

22. Even though the P3 Form, the PRC Form and Age Assessment *(which the appellant seeks to be excluded from the evidence)* were tendered by PW3, the Police Investigating Officer, and not the makers thereof *(that is to say, the medical officer who examined the child and filled the forms)* contrary to the Appellants contention otherwise the said documents were properly admitted in evidence, under Sections 33 and 77(1) & (2) of the Evidence Act.

23. **Firstly,** these were forms which were filled by a medical officer in the course and discharge of his professional duty (S. 33(a)). **Secondly,** the reports were made by a Medical Practitioner (77(1)), and under Section 77(2) the court is called upon to presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it. **Thirdly** the court has the discretion to summon such medical practitioner and examine him as to the subject matter.

24. Again it is clear to me unless the court deems it necessary *(although it is always good practice to do so)*, failure to call and examine such medical practitioner as to his report is not fatal to the prosecution's case as suggested by some authorities, and the appellant. That is the effect of the proviso to Section 124 of the Evidence Act.

25. But even if the medical evidence were excluded, *(and there is no legitimate reason to do so)*, the evidence adduced by the prosecution of the circumstances of the offence are clear that it was committed by the Appellant. He was identified as *"Mwangi"* who associated with Ndirangu, the brother of PW1, *(the victim's mother)*. The child pointed out to his house to the Investigating Officer, that the child said nothing when she saw the Appellant does not disprove the prosecution evidence, that his own medical examination found him negative of sexually transmitted disease does not disprove the prosecution evidence of his having committed the offence of defilement.

26. In the premises, I agree with the learned trial magistrate's findings, and conviction of the Appellant. The child was below eleven years of age. The sentence of life imprisonment was as prescribed by the law.

I find the appeal has no merit and I dismiss the same.

It is so ordered.

Dated, signed and delivered at Nakuru this 16th day of May, 2014

M. J. ANYARA EMUKULE

JUDGE