IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 55 OF 2013

(Being an appeal from original conviction and sentence in criminal case No.1890 of 2011 by Hon. D.K. Mikoyan SPM, Nyahururu Law Courts dated 11th April, 2013)

FRANCIS KARANJA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with the offence of defilement of a child under the age of eleven years contrary to **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual Offences Act, No. 3 of 2006.** The appellant also faced an alternative charge of committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act, No.3 of 2006**.

After trial, the appellant was convicted of the main charge and sentenced to life imprisonment.

Aggrieved by both the conviction and sentence the appellant appealed to this court citing eleven (8) grounds. They are as follows:-

1. **The complainant's age was not proved;**

2. **The prosecution evidence was contradictory and inconsistent;**

3. **A key prosecution witness was not called to testify;**

4. **His defence was not considered;**

5. **His legal rights were violated as, the treatment card from Geta Bush Health Centre (PEX 2) was produced by P.W.2 who was not its maker without his consent; and that he was not given an opportunity to submit at the close of both the prosecution and his case;**

6. **That the judgment of the learned trial magistrate does not meet the legal requirements of writing a judgment;**

7. **That the charge was defective; and**

8. **That the ruling delivered by the learned trial magistrate at the close of the prosecution case did not conform with the law.**

The appellant therefore prays that the conviction be quashed, sentence set aside and he be set free.

The appellant was represented by Mr. Waichungo while the State was represented by Mr. Chirchir.

PN a child aged about 9 years (PW1), recalled that on 29/6/2011, the appellant called him to his house as he came from school, he was given food. The appellant asked PW1 to remove his pant, held the bed and bound, the appellant then removed his ***'Kanyunyu'*** (penis) and inserted into his anus. Although he felt a lot of pain, he was told not to scream and was asked to leave through the window and that if asked by the mother where he had been, he should say he was in the farm. That the appellant repeated the same act while PW1 was at his house on a Monday. He said that Mama G saw him enter the appellant's house and it is her who told the mother.

PW2, Peter Nginyo, a Clinical Officer at Olkalou District Hospital testified that he examined PW1 on 27/9/2011. The boy had been treated as the local dispensary on 26/9/2011. He found the anal region to have abrasions, there was tenderness of the anal region, which was evidence of penetration. He produced in evidence the treatment notes from Geta Bush Health Centre and the P3 Form.

The complainant's mother, MWN (PW3), told the court that on 26/9/2011, she could not get the complainant. She asked S W to check for the complainant in appellant's house. Though the appellant denied that the complainant was in his house, S checked and found him there. The complainant then informed the mother that he was in bed with the appellant. That is when PW3 took the complainant to Geta Bush Health Centre, and then to Kipipiri Police Station.

PW4, Cpl Joseph Kimani, of Geta Administration Police Post was on duty on 26/9/2011 when PW3 reported to him that one Karanja had defiled her son and he arrested the suspect next day and took him to Kipipiri Police Post.

PW5, PC Gelard Njongesa was assigned to investigate this case on 27/9/2011. He identified in evidence the treatment notes from Geta Bush Health Centre and P3 Form filled by PW2.

The appellant made an unsworn statement in his defence where he generally denied committing the offence. He said he was away at Baba B who is now deceased; that he went to Geta Bush Health Centre at 4.00 p.m. and was called to go to the police station when he was informed of the charges.

As respects the first ground, Mr. Waichungo, the appellant's counsel argued that PW2 did not confirm assessing the complainant's age but relied on treatment notes from Geta Bush Health Centre whose author was not called to testify and that neither PW1 nor PW3 gave the age of the complaint to corroborate the information in the charge sheet and P3 Form. Counsel relied on the decision in **Kaingu Elias Kasomo v Rep** CRA 504/2010 (Malindi), to demonstrate the weight given by the courts on proof of age of the complainant in sexual assault cases. In the above cited case, the court observed as follows:-

"Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved in the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim."

In reply to the above ground, Mr. Chrichir urged that PW2 testified that the complainant was 9 years old. It is true that neither PW1 nor the mother, PW3 told the court what the age of the complainant was. It is the court which recorded that he was 9 years old. However, PW2, the clinical Officer told the court that he examined the complainant who was 9 years old. He did not tell the court that he had assessed the complaint's age. As observed in the **Kaingu** case (supra) this is a criminal case and the standard of proof is beyond any reasonable doubt. It was the duty of the prosecution to prove the age of the complainant beyond any doubt because under the **Sexual Offences Act**, the age of the complainant determines the sentence to be meted in the event the accused is convicted. In this case, there was not even an attempt to prove the age of the complainant and I do agree with the appellant that the age of the complaint was not proved.

Whether the date of the offence was confirmed in evidence: PW1 talked of having been defiled on 29/6/2011. He was again defiled on a Monday, the date which he could not recall. PW3 stated that the complainant was found in the appellant's house on 26/9/2011 and it is the time the complainant told her what had happened to him and she took steps to take him to the Health Centre and Police Station. It is on the same day that a report was made to PW4 at about 8.45 p.m. PW2 then examined the complainant on the next day, the 27/9/2011. There is no contradiction as to when the offence was committed. The evidence supports the charge.

As to whether there were contradictions in the prosecution case:

The appellant contended that whereas the complainant talked of having been defiled by the appellant and he told PW3, PW3 claimed to have sent S W to look for the complainant. I find that there was no contradiction. PW1 talked of two incidents. It is on the second incident that Susan was sent to look for the complainant. It was also submitted that the allegation that S found the complainant in the appellant's house was not supported by the complainant's testimony or that the complainant narrated to the mother what had happened to him. Although PW1 denied telling anybody what had happened to him, PW3 said that he did tell her on the day he took her to the health centre. PW3 said she took the complainant to a Health Centre where it was confirmed that he had been defiled. The minor contradictions in the evidence as to whether or not the complainant told the mother about the incident or not do not go to weaken the prosecution case.

The appellant also faulted the prosecution evidence for failure to call crucial witnesses i.e. Mama G and S W. It was not disclosed how old S W is or why she was not called because she is the one who allegedly called the complainant from the appellant's house and her evidence was material as regards the finding of the complainant in the appellant's house. PW5 told the court that Mama G who was the appellant's employer refused to record a statement or come to court. It is indeed trite law that it is the duty of the prosecution to avail all the necessary witnesses to establish the truth even if their evidence may be inconsistent or adverse to the prosecution evidence. The evidence of S W or Mama G would only go to show that the complainant was in appellant's house. However, it would not go to prove that the offence was committed on the complainant.

The complainant was well known to the appellant, because they lived in the same neighbourhood. That fact was not denied. The complainant vividly and graphically explained what happened to him, something a child of his age would not ordinarily have known. I am satisfied that PW1's evidence corroborated by the medical evidence of PW2 was sufficient to prove the offence of defilement.

It was contended by the appellant that the medical evidence did not conclusively prove that the offence was committed. PW1 vividly explained what happened to him. He said infact he felt pain but was warned by the appellant not to scream or tell anyone. Upon examination of PW1, PW2 found a tear on the anal orifice and tenderness on the area and was of the view that there was penetration. The examination was done after one day and there is no reason to doubt the evidence of PW2 based on his findings and evidence of PW1 which the court believed.

As regards the report from the Health Centre, I do agree with the finding in **Juma Kalio v Rep CRA 71/2000** where the court held that the author of the medical report (PW3) should be called to produce it failing which the prosecution should make an application to the court and if allowed, the appellant be allowed to respond to the application as to whether or not he has any objection to the production of the treatment notes. In this case, even without the treatment notes from the hospital, I am satisfied that the there was ample evidence from PW2's findings that the complainant was defiled.

Did the judgment of the trial court meet the legal requirements of judgment writing? As to whether the trial court should have written a reasoned ruling at the end of the prosecution case before putting the accused on his defence, I do find that was unnecessary. Reasons for the ruling at that stage will normally be contained in the judgment unless the court intends to request. Writing a reasoned ruling after close of prosecution case may not be in the best interest because there is the risk of contradiction in the judgment and in any event, reasons are given in the judgment. It is unnecessary to write the reasoning twice. I

have read the judgment of the trial court, and I am satisfied that the court only partially complied with provisions of **Section 169** of the **Criminal Procedure Code** in that the court summarized the evidence and went ahead to analyse it before arriving at the decision. The appellant's defence was not fully considered. However, I find that the defence was a mere denial which was only raised when called upon to defend himself. The appellant mentioned Baba B for the first time in his defence. He had not raised any alibi that he was with Ben then, or that he went away at Geta Bush at 4.00 p.m. The appellant had an opportunity to cross examine the witnesses but never raised such a defence. The prosecution would therefore had no notice an opportunity to call evidence to rebut the said alibi. What is an alibi? The Court of Appeal considered what an alibi is. In **Karanja v Rep** CRA 651/1983, the Court of Appeal said as follows on an alibi:-

"1. The word 'alibi' is a Latin verb meaning "elsewhere" or "at another place". Therefore where an accused person alleged he was at a place other than where the offence was committed at the time when the offence was committed and hence cannot be guilty,, then it can be said that the accused has set up an alibi. The appellant's story in this case did not amount to an alibi as it was mentioned in passing when giving evidence and furthermore, it was not raised at the earliest convenience i.e. when he was initially charged.

2. In a proper case, the court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the case and so that it can be tested by those responsible for investigation and prevent any suggestion that the defence was an afterthought."

There had been no mention of the alilbi therebefore. If anything, the appellant only alleged the existence of a grudge which he abandoned in his defence. What he told the court in his defence did not amount to an alibi.

As the first appellate court, I am required to evaluate and analyse the evidence adduced in the lower court afresh and arrive at my own independent conclusion. Having considered all the grounds of appeal, I do find that although there is ample evidence on record that the appellant defiled the complainant, yet a key ingredient of the charge was not proved, that is, the age of the complainant. It is the duty of the prosecution to prove all ingredients of the charge which they failed to do. For that reason alone, the appeal succeeds as regards the main charge. I hereby quash the conviction, set aside the sentence.

However, the trial court did not make any finding on the alternative charge of committing an indecent act on a child and this court has a right to consider it. Indecent act is defined in **Section 2** of the **Sexual Offences Act** as:-

"Indecent Act" means an unlawful intentional act which causes-

(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.

(b) exposure or display of any pornographic material to any person against his or her will."

In this case, all the ingredients of an offence of indecent act were committed in that the appellant made his genital organ come into contact with anus of the complainant. There is no doubt that the complainant is a child. I will find the appellant guilty of the offence of indecent act contrary to **Section 11(1)** of the **Sexual Offences Act No.3 of 2006**. He is convicted accordingly and sentenced to 15 years imprisonment.

DATED and DELIVERED this 24th day of June, 2014.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Kahinga holding brief for Mr. Waichungo for the appellant

Mr. Omari for the State

Kennedy – Court Assistant