IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 269 OF 2011

SANTA KAZUNGU MANGI .....….. APPELLANT

VERSUS

REPUBLIC ……..…….....…RESPONDENT

(From original Conviction and Sentence in Criminal Case No. 326 of 2009 of the Senior Resident Magistrate's Court at Mariakani – Andanyi **- PM**)

JUDGMENT

SANTA KAZUNGU MANGI hereinafter referred to as the Appellant was Convicted and Sentenced to fifteen (15) years imprisonment for the offence of defilement of a child contrary to Section 8(1) as read with Section 8(2) of the Sexual offences Act No. 3 of 2006.

The particulars being that:-

> ***"On the 12th day of December, 2009 in Kaloleni Kilifi County he unlawfully and intentionally committed an act which caused penetration of his male genital organs namely penis into the vagina of G.F. a child aged twelve (12) years".***

The prosecution called seven (7) Witnesses in support of their case whereas the defence had three(3). The matter went to full hearing and determination.

Being dissatisfied with the Conviction and Sentence the Appellant lodged this appeal on the grounds that ***Voire dire*** examination was conducted unprocedurally.

Secondly, that there was no proper age assessment and further that the Conviction was against the weight of the evidence adduced.

As the first appellate court its my duty to evaluate and anaylse the evidence adduced in the lower court so as to arrive at my own conclusion bearing in mind that I did not have the oportunity off hearing and observing the demeanor of the Witnesses. See ***Okeno – Vs- Republic 1972 EALR***.

Voire Dire Examination.

A perusal of the record of proceedings at page 2 line 21 the learned trial magistrate did note that the appearance of the Complainant was that of an adult, but he did not put any questions to her. In her testimony she told the court that she was aged twelve (12) years.

In the Court of Appeal case of ***Johnson Muiruri –Vs- Republic 1983 KLR*** it was held,

> ***"Where in any proceedings before any Court, a child of tender years is called as a Witness the Court is required to form an opinion on a Voire dire examination whether the child understands the nature of an Oath in which even his sworn evidence may be received, if the Court is not so satisfied his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth …...***
>
> ***It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate Court is able to decide whether this important matter was rightly decided.....".***

Section 2 of the children Act defines a child of tender years thus,

> ***" …... child of tender years – manes a child under the age of ten years".***

In the present case the Complainant was said to be twelve (12) years old hence she was not a child of tender years and hence there was no lawful reason to carry out a ***Voire dire*** examination.

Age Assessment.

In his Judgment at page 2 line 13 the learned trial magistrate did observe,

> ***"The Complainant and her mother (PW 5) said they did not know her date of birth but that she was twelve (12) years old at the time they gave evidence in January and March, 2010 respectively. The clinical officer Mwangolo Chigulu PW 6 who examined her on 14th December, 2009 estimated her age as twelve (12) years. He also produced age assessment report prepared by Doctor Kerry, his senior at the Mariakani District Hospital indicating that the girl was aged twelve (12) years old at the time of the assessment which was on 14th December, 2009 …... The Complainant also appeared before me and I had the benefit of seeing her and in my own assessment from her physical appearance and stature, I am satisfied that she was about the age of twelve (12) years. I therefore find that she was a child aged twelve (12) years at the time of the alleged incident".***

I do not find any good reason to fault the learned trial magistrate's evaluation and conclusion on age assessment from the evidence on record before him.

Amongst other things he did rely on an age assessment report prepared by Doctor Kerry and the evidence of the mother of the girl. I am satisfied that there was proper age assessment of the Complainant.

Weight of Evidence and Identification.

This is what the trial magistrate observed at page 3 line 18 of his Judgment,

> ***"The circumstances under which the Accused is said to have been identified are that it was about 5:30 am and he was with another. Although the Complainant appeared to say that it was about 6:30 am to 7:00 am. I do find from the evidence of PW 2 and PW 3 that it was about 5:30 am to 6: am, that conflict, I do not find to be of major significance as will be the evidence of the Complainant and PW 2 and PW 3 that the Accused colleague did not take part in harassing them …..***
>
> ***PW 2 gave a vivid description of his appearance. She said that the Accused person had severally approached her during the night as she rebuffed him. I believe that helped her recognize him very well at the scene. Moreover, he was known to her before. He was also known to PW 3 before. Therefore, their identification of him that morning was not***

difficult.

It was day break and there was sufficient light to enable them see him well. Since they had been walking in that light for some time and since it was improving as the day broke further, I am satisfied that their eyes had become accustomed to that light and so were able to see clearly. The Accused took his time engaging in sexual intercourse with the Complainant and so she had a good opportunity to see him. He then escorted her from the scene upto where her colleagues were".

I concur with the reasoning of the trial magistrate. It was at day break (dawn) there was no evidence to the effect that there was use of torches or other implements. The complainant and her Witnesses were walking in the bush on their way home.

Their eyes must have gotten accustomed to the available light at that time. The Accused had engaged them in some talk that night before following them in the morning.

He was also know to the Complainant PW 2 and PW 3. He also used to guard a pan (small dam) from where girls used to draw water (including PW 2 and PW 3).

I am satisfied that though the complainant did not know the appellant by name she had seen him before and she had ample opportunity to observe his features before the act. When he was chasing her, during the act and after the act as he did escort her to where her colleagues were. Identification was proper.

Penetration

The complainants testimony is that she was raped. At page 3 line 14 she states,

"He removed my panties then raped me, when he finished, he left me. My colleagues had ran away but were waiting for me at a neighbours house. I found them. I was bleeding and carrying my panties in the hand.

I handed it over to police".

PW 6 was the clinical officer based at Mariakani District Hospital. Upon examining the Complainant he found as follows

"Skirt and petticot were soiled in blood. She was sober. Had scratch marks on her forehead and both parietal regions..... Had no hymen, she had Whitish vaginal discharge. I concluded that there was adequate penetration of a minor".

Upon careful evaluation of the record of proceedings. I am satisfied that the Evidence against the Appellant was over whelming and there is no good reason to disturb and or interfere with the Conviction.

It is noted that the Appellant was Sentenced to fifteen (15) years imprisonment. This was a very lenient Sentence.

The appeal has no merit and its disallowed.

Judgment delivered dated and signed in open Court this **30th** day of **September, 2014.**

….....

M. MUYA

JUDGE

30TH SEPTEMBER, 2014

In the presence of:-

Learned Counsel for the State Mr. Jami

The appellant present

Court clerk Musundi