REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 228 OF 2013

SIMON GITAU WANIKO………………………………..APPELLANT

VERSUS

REPUBLIC……………………………………………….RESPONDENT

(Being an appeal against conviction and sentence in a judgment delivered in Kigumo Senior Resident Magistrates Court Criminal Case No. 1078 of 2010 (Hon. S. Mbungi) on 13th April, 2011)

JUDGMENT

The appellant was charged with two counts of defilement contrary to **section 8(1) (3)** of the **Sexual Offences Act, No. 3 of 2006** and two alternative counts of committing an indecent act with a child contrary to **section 11(1)** of the same Act. The offences in both the principal and alternative counts are alleged to have been committed on 5th September, 2010 in Kigumo district of the central province.

In the first count, it was alleged that the appellant intentionally and unlawfully caused his penis to penetrate the vagina of JWM a child aged thirteen while in the second count he is alleged to have intentionally and unlawfully caused his penis to penetrate the vagina of JWM a girl aged sixteen.

According to the particulars of the alternative counts, the appellant is said to have intentionally and unlawfully touched with his penis the vaginas of JWM and JWM who were children aged thirteen and sixteen respectively.

In his judgment the learned magistrate acquitted the appellant on the first count and the alternative charge of indecent act with a child; he however, held that the prosecution had proved the second count beyond reasonable doubt. The appellant was accordingly convicted and sentenced to fifteen years imprisonment. It is against this conviction and sentence that the appellant appealed; he faulted the decision of the subordinate court on the following grounds:-

1. The learned magistrate erred in law and in fact in convicting him when the key witnesses did not testify;

2. The learned magistrate erred in law and in fact when he convicted the appellant without subjecting him to any medical examination;

3. The learned magistrate erred in fact and in law in convicting the appellant without considering the appellant's defence;

4. The learned magistrate erred in law and in fact in failing to consider that the appellant was held in

custody for more than twenty four hours;

5. The learned magistrate erred in law in admitting the unsworn evidence of a prosecution witness.

Before this court makes its own conclusions on whether there was sufficient evidence to sustain the appellant's conviction and therefore whether the appellant's appeal is merited, it is not only necessary but it is the appellant's legal entitlement to have the entire evidence as presented at the trial examined and evaluated afresh. This position was emphasised in **Okeno versus Republic (1972) EA 32** where the court of appeal was of the view that:-

"An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."(See page 36 of the decision thereof).

The prosecution case was made up of the testimonies of five witnesses; these witnesses were the clinical officer, the complainant's uncle, their teacher, a child who was with the complainant when the appellant is alleged to have led them to his house and the investigating officer.

In his evidence the **clinical officer (PW1)** produced the P3 forms and the treatment cards in respect of the complainants. He produced these documents on behalf of Dr. Njenga who examined the complainants but was said to have been away for further studies at the time he was scheduled to testify.

According to the doctor's findings, the first complainant was mentally retarded. Her genital organ was normal and her hymen was also found to be intact. There was nothing abnormal detected in her vagina and urine. A vaginal swab did not reveal any signs of penetration.

As for the second complainant, the doctor established that she was sixteen years old but mentally retarded. Her genitalia were painful upon touch and her hymen was broken. There was a vaginal discharge and a vaginal swab revealed traces of spermatozoa. The P3 forms and the treatment records were admitted in evidence.

In view of the doctor's evidence on the complainants' mental status, the learned magistrate ordered that the complainants be examined to establish whether they could follow the proceedings. In compliance with this order the complainants were examined by a psychiatrist who opined that the complainants' concentration, judgment and intellectual capacity were markedly impaired and they were effectively incapable of following legal proceedings. The psychiatrist's reports to this effect were filed in court. In the face of these handicaps the complainants did not testify.

PM (PW2) was informed by a villager that the complainants who happened to be his nieces had been sexually assaulted by the appellant. Immediately he got this report he went to the appellant's house where, together with other persons he was apparently accompanied with, broke the door to the appellant's house and found him with the complainants. They arrested the appellant and took him to the police station.

The complainant's teacher, **E W K (PW3)** testified that she was a teacher at [Particulars Witheld] which is a special school for mentally retarded pupils. She confirmed the complainants to be her pupils and produced letters to this effect.

IM (PW4) testified that he was in the company of the complainants when the appellant enticed them away; he opted not to follow them but he instead went and informed his mother.

According to the investigating officer **Corporal Oware (PW5),** the appellant was brought to Kigumo police station where he was based by members of the public. His investigations established that the appellant had waylaid the complainants as they came from church. He was arrested by members of the public in his house where he was found with the complainants after **IM (PW4)** informed his mother of what had happened to them. The officer re-arrested the appellant and took the complainants for treatment.

In his defence, the appellant simply denied the charges against him and alleged that they were made up. He said that he was arrested because he did not have his identification card. He asked the court to acquit him.

Looking at the evidence that was presented at the trial, it is fair to conclude that the appellant's conviction was based on circumstantial evidence; the complainants were certified to be mentally retarded and for this reason they could not testify. In the absence of the complainant's evidence there was no other direct evidence or an eyewitness' account of what transpired. It would therefore follow, that in evaluating the evidence in its entirety, the pertinent question is whether the appellant's guilt was the correct inference to be drawn from the available circumstantial evidence.

Before addressing this question I must say something about the testimony of **IM (PW4).** According to the record from the subordinate court, M was six years old at the time he testified. The learned magistrate is recorded to have noted that the witness was very young and therefore could not give sworn evidence; he proceeded to take his evidence unsworn.

There is no doubt that the learned magistrate misdirected himself on the law relating to admission of evidence of persons of such age as M's; being only six, the witness was a child of tender years whose evidence could only have been admitted after a *voire dire* examination. It is only after this examination that the trial court can be certain whether the evidence of a child of tender years, of whom M was one, can be taken sworn or unsworn. The basis of a *voire dire* examination is section **19 of the Oaths and Statutory Declarations Act**, (Cap 15). It provides as follows:

"Where in any proceedings before any court or person having by law or consent of the parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court , or such person as aforesaid, understand the nature of an oath, his evidence may be received, though not given upon oath, if , in the opinion of the court or such other person as aforesaid, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that section."

In considering this provision of the law in **Nyasani s/o Bichana versus Republic (1958) E.A 190,** the court of appeal said at page 191 of its decision that**:-**

"It is the duty of the court under that section (that is section 19 of the Oaths and Statutory Declarations Act) to ascertain, first, whether a child tendered as a witness understands the nature of an oath, and if the finding on this question is in the negative, to satisfy itself that the child "is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth". This is a condition precedent to the proper reception of unsworn evidence from a child, and it should appear upon the face of the record that there has been a due compliance with the section."(Underlining mine)

It is apparent from the record that the learned magistrate did not comply with this condition precedent before he took the evidence of this witness. The result of non-compliance with this provision of the law is that the evidence of M was rendered futile and of no consequence.

Coming back to the question of circumstantial evidence I am conscious that such evidence must be narrowly examined before drawing any inference and coming to any conclusion; this must have been

what the Court of Appeal for East Africa had in mind when it quoted "**Wills on Circumstantial Evidence"** in **Republic versus Kipkering Arap Koske & Another (1949) XVI EACA 135** and said:-

"***In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."***

The evidence by **PM (PW2)** that the appellant was arrested in his house where he had locked himself with the complainants was not controverted. There was also uncontroverted evidence by **corporal Oware (PW5)** that after the complainants were rescued from the appellant's custody, they were medically examined; the treatment notes and the examination reports as reflected in the P3 forms showed that the second complainant had been defiled. Traces of spermatozoa in the vaginal discharge, the tenderness of the complainant's external genitalia and the freshly perforated hymen were a combination of factors that demonstrated that the complainant had been defiled soon before the examination. In my view, these facts may properly be regarded as inculpatory facts which were incompatible with the innocence of the appellant and were incapable of explanation upon any other reasonable hypothesis than the appellant's guilt.

The exclusion of the evidence of IM **(PW4)** would not necessarily have led to any other conclusion; it was not the only evidence or rather the only evidence without which the appellant would not have been convicted.

The appellant's defence was in effect a bare denial that he had committed the offence with which he was charged; while the burden is always on the prosecution to prove beyond reasonable doubt that the accused person is culpable of the offence with which he has been charged, I cannot not find anything in the appellant's defence that would cast doubt on whether this burden was effectively discharged.

The Privy Council in **Teper versus Republic (1952) AC 480** cautioned that the trial court must be wary of any circumstances that would weaken or destroy the inference of guilt whenever a conviction is based on circumstantial evidence. At page 489 of its decision the court held that:-

> ***"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."***

The evaluation and analysis of the circumstantial evidence against the appellant does not suggest that there were any other co-existing circumstances that would weaken or destroy the inference that appellant was guilty of the offence of defilement as charged in the second count of the charges against him.

In my humble view, the appellant was properly convicted and sentenced; accordingly I hold that the appellant's appeal has no merit and it is hereby dismissed.

Signed, dated and delivered in open court this 24th October, 2014

Ngaah Jairus

JUDGE