REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 243 OF 2012

STANLEY MATHENGE KARANI……APPELLANT

-VERSUS-

REPUBLIC ……RESPONDENT

(Appeal from the original conviction and sentence in Criminal Case Number 84 of 2012 in the Principal Magistrate's court at Baricho – HON. S. Jalang'o (SRM)

JUDGMENT

This being a 1st appeal this court is mandated to look at the evidence adduced before the trial magistrate's court afresh, re-evaluate and re-assess the same and reach its own independent decision on whether or not to uphold the conviction having in mind that the court did not see first heard the witnesses testifying so as to deduce their demeanor as illustrated in the case of ***NJOROGE –VS- R (1978) KLR 19.***

The appellant herein ***Stanley Mathenge Karani*** was charged with and tried for the offence of defilement contrary to ***section 8(1)*** of the ***Sexual Offences Act NO. 3 of 2006*** (and hereafter to be referred to as the charge) with 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*** in the principal Magistrate court at Baricho.

The particulars of the offence as per the amended charge sheet (amended on 4th May 2012) allege that on the 1st February 2012 in Kirinyaga West District within Central province intentionally caused his penis to penetrate the vagina of ***CM*** a child aged 5 years. The particulars of the alternative charge is of less importance here owing to the finding of the trial court so I leave it at that.

After the trial the appellant was convicted as charged and sentenced to life imprisonment and it in the basis of this that the appellant felt aggrieved and preferred this appeal against both conviction and sentence. The appellant was un represented in this appeal. He therefore prepared his own petition of appeal and signed it in person. He listed 8 grounds as follows:

1. **The he pleaded not guilty.**
2. **The Learned magistrate erred when he failed to address himself as to whether the case against him had been proved in accordance with the law.**
3. **That learned magistrate erred by law and in fact by sentencing him to life.**
4. **That learned magistrate erred by law and in fact by sentencing him to life imprisonment in total disregard of the contradiction and in consistencies inherent on the prosecution side.**

5. **That the learned magistrate erred by law and fact by failing to take heed on the appellant's defence.**
6. **That there was no cross examination of the complainant with no clear reason.**
7. **That the learned magistrate erred by law and in facts by failing to address himself that there existed a grudge between the accused and PW1 who was his ex-wife.**
8. **That learned trial magistrate erred by law and in facts by failing to give the appellant a reasonable time to cross-examine witnesses.**

This court will on the outset deal with the first ground which for me is misplaced and holds no water whatsoever. The record of appeal clearly show that the appellant pleaded not guilty to the said charge and that is why there was trial where the prosecution presented four(4) witnesses who testified and gave evidence that led to the appellant being put on his defence and eventually being convicted . A plea of not guilty is not a bar to conviction.

This court will now address the second ground of appeal which will be done simultaneously with grounds three and four since the same touches on the weight of evidence adduced at the trial of the appellant. The appellants holds that the evidence against him was weak. In his written submissions the appellant has stated that there was no eye witness and that the time the offence took place was 7p.m. making it difficult for the minor to recognize him. The appellant has also faulted the reliance of P. Exhibit 3(a small black panty)said to belong to the minor and which the appellant says there was no member of the public who came out to testify that the said exhibit was found in his possession. The appellant further opines the failure to establish the presence of a similar body fluid like his in the private parts of the minor was a prove that the investigation was shoddy and therefore evidence against had what he terms "doubts" and "uncertainties" in his petition of appeal. The appellant has urged this court to find that the prosecution did not prove the case beyond reasonable doubt and the trial magistrate erred when he failed to take note of the same.

The appellant took up a new ground of appeal in his submissions from the grounds presented in his petition of appeal. The appellant alleged in his submissions that the charge sheet presented to the trial court was defective on account of inconsistencies on the dates of the offence as reflected on the charge sheet. He submitted the evidence presented to court showed that the offence was committed on 1st February,2012 while the charge sheet indicated that the offence was committed on 31st January, 2012 .

Mr Sitati for Director of Public prosecution strongly opposed this appeal arguing that decision of the trial magistrate was sound and was based on law and evidence placed before him. He has supported both the conviction and the sentence. He says the issue of identification was dealt with clearly by the witnesses presented before the trial court. The state has urged this court to observe that the complainant properly identified the appellant by name which she referred to as "Mathenge". The evidence Mr Sitati says was properly corroborated by evidence of the mother who was PW2 at the trial court. The Director of Public prosecution's position on exhibit 3 was that the same was positively identified and was found in possession of the appellant by PW4 one ***P.C. Nickson Tallam***. He has urged this court to find no merit in the appellant's submissions that the case was not proved to the required standard at the trial court. ***Mr Sitati*** in particular pointed out the corroboration evidence of PW2 and PW3 and PW4 to show that the trial court was right in finding the appellant guilty of the said offence.

The appellant listed further grounds of appeal (5, 6, 7 and 8) and for purposes of evaluating this court shall lump 6 and 8th grounds together and deal with grounds 5 and 7 separately.

To begin with grounds 5 and 7 ***Stanley Mathenge Karani*** stated that he raised a defence which was not heeded. According to him he had a previous relationship with PW 2 who is the mother to the victim, (the PW1 in the trial court). He has stated in his appeal that prior to the time of the incident he had had an alterations with PW2 over a sofa set and other issues. It was his defence that PW2 had scores to settle with him.

The appellant has also appealed on the grounds that he was not allowed to cross examine the victim

(PW1) and that generally the trial court never accorded him sufficient time to cross examine.

This court has looked at the record in view of the last two grounds of appeal. The trial court upon questioning the minor/victim who was PW1at the trial court, formed an opinion that the minor aged 5 years did not appreciate the importance of oath and therefore took unsworn evidence from her. This effectively meant because the evidence was unsworn the appellant could not, cross examine the witness. The evidence of the minor on its own could not have formed the basis of conviction of the appellant and the appellant's ground could have stood had the prosecution not called more evidence to corroborated the evidence of the minor. This court has checked at the proceedings of the trial court and from the record, it is apparent that prosecution lined up three more witnesses who gave vivid evidence to corroborate the evidence of PW1.

The appellant cross examined the three witnesses at length and there nothing on record to suggest that the appellant was prevented from further questioning of witnesses to test the verify of the evidence tendered before the trial court. This court finds that he had sufficient time for cross examinations and that is why the answers from cross examination covers a least more than a page for each the three witnesses called to testify. The appellant did not register any dissatisfaction in the manner the proceedings were being conducted at the trial court even in his defence I do not find anywhere where he has stated that he wished to have had more time to cross examine witnesses who had been called to testify . This court also finds that the defence put forward by the appellant was analyzed against the evidence adduced by the prosecution and the trial court on this score appeared to have balanced the scales of justice well and only found that the same tilted against the appellant. That does not mean that the defence was not considered.

The appellant took up a new ground in his appeal at the hearing which was that the charge sheet was defective. This court at the hearing pointed to the appellant, the particulars of the amended charge sheet which I consider important to point out in this judgment. . The charge sheet was amended by prosecution on 4th May 2012 and from the record of proceedings the new particulars of the amended charge sheet were read to the appellant and he pleaded to them denying the same and the trial proceeded. This court does not find any inconsistency on the dates appearing on the amended charge sheet and the evidence adduced before the trial court. The date of the offence is 1st February 2012. The evidence adduced in its entirety is consistent and this court finds so.

On the ground that the appellant and ***AWM*** *(PW2)* had a sour relationship , this court finds no connection that was established by the appellant at the trial court between the offence committed and the alleged relationship between the appellant and PW2 in any event who denied existence of such relationship. Had the offence related to the PW2 then the same could have been considered and the trial court therefore cannot be faulted for disregarding it for lack of relevance.

This court has considered the weight of evidence adduced at the trial court and the submissions of both the appellant and the state through the Director of Public Prosecution. The appellant has stated that the case was not proved to the required standard but the state has strongly opposed demonstrating the weight of the evidence tendered. This court has seen the evidence of the minor and though the evidence was unsworn it was well corroborated by the evidence of PW2, PW3 and PW4. In cases of this nature law requires the prosecution to discharge two important elements of burden of proof. These are;

i. ***Establish that the offence was committed by an accused person.***
ii. ***Establish that the age of the victim.***

Mr sitati pointed out four salient features that he opines demonstrated sufficient prove that the appellant committed the offence. These are;

1. The minor was able to positively identify the appellant as they are neighbours. The witness properly identified the appellant by name as ***Mathenge.*** This dispels the appellant's ground that the time of the incident (7pm) was not possible for positive identification. Apart from the fact that his court finds that 7pm is early enough for a person to be identified by a person known to him/her. A person can positively identify a person he is familiar with even in darkness by means

of voice alone.

2. The recovery of small black panty which was recovered from the appellant and produced as exhibit 3. The same was positively identified by PW1 and PW2 stated that the exhibit was recovered in the appellant's house under a pillow at his bed. The victim stated in the trial court that the appellant removed the pant before embarking on the offence.
3. PW 3 the clinical officer gave evidence showing that the minor was indeed defiled. He produced exhibit 1 (P exhibit 1)) and gave an account about the first treatment the victim received and the conditions she was in a few hours after the incident. This court finds that the evidence of PW3 crucially proved beyond reasonable doubt that the said offence was indeed committed.
4. Regarding establishment of age, this court finds that this salient feature was established beyond reasonable doubt. A birth certificate which was produced as P exhibit 2 is sufficient proof that the minor was aged 5 years at the material time.

The appellant was properly charged with the offence of defilement contrary to ***section 8(1)*** of the ***Sexual Offences Act No. 3 of 2006*** which provides:

"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement". As to whether the penetration was complete or not this court finds that the trial magistrate properly directed himself on the provisions of the law under ***Section 2*** of the ***Sexual Offences Act, 2006*** which gives the meaning of "penetration" as used in the statute. The evidence adduced before the trial court sufficiently supported charge and this court agrees with the state that the case was proved beyond reasonable doubt at the trial court with the evidence tendered.

On the conviction and the sentence meted out against the appellant, this court finds that for the reasons and analysis aforementioned the trial magistrate was correct in the sentence meted out. The minor was aged approximately 5 years at the material time and ***Section 8(2)*** of the ***Sexual Offences Act, 2006*** provides:

> ***"A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life".*** The statute provides for no other punishment for this kind of offence and the trial magistrate cannot be faulted for the proper application of the law stated above.

The upshot of this is that his court finds no sufficient reasons to interfere with the finding, conviction and the sentence of the trial magistrate. The appellant was properly convicted and accordingly this appeal is dismissed.

R.K. LIMO

JUDGE

DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 25TH DAY OF NOVEMBER, 2014 in the presence of:

The appellant

Mr Sitati for state

Martin Court Clerk