REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 530 of 2009

MICHAEL KIONGO WAITITU .....APPELLANT

-VERSUS-

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 237 of 2008 in the Resident Magistrate's Court at Gatundu – D. G. Karani (RM) on 20th August 2009)

JUDGMENT

1. This appeal arises from the conviction and subsequent sentencing of the appellant on a charge of defilement of a girl contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act** of **2006**. The particulars of the main charge were that on the 14th day of May 2008 at 4.30 p.m. at Thika District within the Central Province, the appellant intentionally and unlawfully committed an act which cause penetration with S. W. W. a girl aged 10 years. (identity concealed on account of her age)

2. Upon conviction the appellant was sentenced to life imprisonment. On 19th November 2009 he filed his petition of appeal setting out six grounds of appeal, which in summary, contended that the evidence adduced against him was not sufficient to sustain a conviction, that his defence was not given due consideration, and that the sentence imposed upon him was excessively harsh.

3. Mr. Mbiyu Kamau, learned counsel for the appellant filed written submissions in which he averred, first, that the evidence of the prosecution was inconsistent, contradictory and uncorroborated. That whereas **PW1** the complainant, testified that her dress was muddied and blood stained and that she was treated and the matter reported to the police the same day, **PW2** on the other hand, testified that the matter was reported to the police the next day on 15th May 2008 after treatment, while **PW4** the Dr. testified that the complainant's dress was soiled but had no blood stains.

4. I have scrutinized the evidence and note that **PW2** and **PW3** examined the private parts of the minor shortly after the incident and saw fresh blood. Pexh. 5, a copy of the initial treatment card shows that when the minor was seen at Gatundu District Hospital a few hours later on the same day there was a visible tear on the hymen and there was slight bleeding on the left labia minora. This corroborated the evidence of **PW2** and **PW3** that there was bleeding from **PW1**'s private parts shortly after the incident.

5. **PW4** who produced the P3, Pexh.3 told the court that those injuries were consistent with traumatic sexual intercourse such as what **PW1** explained she went through.

6. Secondly, Mr. Mbiyu Kamau argued that the circumstances in which the offence occurred were

not favourable for positive identification, and that the witnesses gave what amounted to blanket identification of the appellant. The learned state counsel, Miss Kuruga, responded that the testimony of **PW1** and **PW2** confirmed that the complainant had identified the appellant as her assailant.

7. It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make a basis for conviction. See **OSCAR WAWERU MWANGI VS. REPUBLIC Criminal Appeal No. 2 of 1999** – (unreported).

8. From the evidence on record the appellant was someone well known to **PW1** as is evinced by her testimony in examination in chief that:

"I found the accused (points at him) on the road side. He lives near our home".

She went further to state on cross-examination that:

"I have seen you severally on the road.

I know you well."

Identification was therefore by recognition of a person well known to the minor prior to the attack, and the assault occurred in broad day light. Those were conditions conducive for proper identification. When the minor gave the description of the assailant to **PW2**, **PW2** was able to comprehend at once whom she was referring to.

9. Thirdly, Mr. Mbiyu Kamau contended that the failure of the manager of Mutuma Factory who took **PW1** and **PW2** to hospital to testify, was fatal to the prosecution's case and should be construed to mean that his evidence would have been adverse to the prosecution. Further that the P3 form should have been produced in evidence by Dr. Mbiata who filled it and not **PW4** who purported to be familiar with his handwriting and signature.

10. Miss Kuruga responded that there was no procedural flaw in the fact that **PW4** produced in evidence, a P3 form authored by a person she knew well, and with whom she had worked for six months.

11. Indeed a P3 form is a formal document and it was procedural for it to be produced by another doctor, who testified that she was familiar with the handwriting and signature of Dr. Mbiata, and that the said Dr. Mbiata was nolonger in government employment. There is no requirement under **Section 77** of the **Evidence Act** that a medical report must be produced by the maker. I have also taken note of the case of **Jacob Odhiambo Omumbo v Republic Cr. App No. 80/2008** (unreported) to which the learned state counsel referred me.

12. On the failure to call the manager of Mutuma factory to testify, no particular number of witnesses shall, in the absence of any provision of law only to the contrary, be required for the proof of any fact. In any case if the evidence of the manager of Mutuma Factory was that he drove **PW1** to hospital after the attack, it would not contribute to the proof of the ingredients of the offence. The facts to be proved were that the victim was a minor, that she was defiled and that it is the appellant who defiled her. The prosecution could prove all three ingredients through evidence tendered by any other witnesses.

13. Mr. Mbiyu Kamau also urged that the learned trial magistrate shifted the burden of proof to the appellant when he made a finding that failure on the appellant's part to cross-examine **DW3** could only be taken to imply that the appellant himself did not believe the evidence of **DW3**.

14. In addition Mr. Mbiyu Kamau submitted that the learned trial magistrate considered the appellant's defence in a casual manner. He opined that the appellant's failure to deal with the occurrence of the 14th May 2008 should not have been construed against him as it merely meant that he was not responsible for

what occurred on that day and was only aware of the events of 19th May 2008 when he was arrested.

15. Miss Kuruga respondent that the appellant tendered an unsworn defence in which he stated that he had been framed by the complainant's mother. He did not put these allegations to the mother in cross-examination, and that in any case, the probative value of the appellant's unsworn statement in defence was put to test.

16. This being a criminal trial the appellant was under no burden to prove his innocence by way of cross-examination or by defending himself. I am however satisfied that the learned trial magistrate's observations did not amount to shifting of the burden of proof to the appellant. The appellant's allegations should have been put to the complainant's mother in cross-examination and raising them in his unsworn defence meant that their veracity could not be tested on cross-examination either of himself or of the complainant's mother.

17. Finally, Mr. Mbiyu Kamau argued that the sentence imposed upon the appellant was inordinately high, and that the proper construction of **Section 8(1)** and **8(2)** of the **Sexual Offences Act No. 3** of **2006**, should in circumstances such as those of this case, be supplemented by the provisions of **Section 8(3)** and **Section 8(4)** of the **Sexual Offences Act No. 3** of **2006**.

18. **Section 8(2)** of the **Sexual Offences Act** under whichthe appellant was sentenced does not give the court any discretion in sentencing. There was no dispute that the complainant was aged 10 years when the appellant ravished her. This was the age indicated in the charge sheet, and in the P3 form and which could also be computed from her child Health card produced in evidence as Pex 6.

19. **Section 8(2)** provides that a person who commits the offence of defilement with "**a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."** There was no room for the learned trial magistrate to **"supplement"** the construction of **Section (2)** of the **Sexual Offences Act** with the provisions of Section **8(3)** and **8(4)** of the **Sexual Offences Act** as submitted by Mr. Mbiyu Kamau.

20. Mr. Mbiyu Kamau referred me to a list of authorities which I considered and distinguished from the case before me as follows:

(1) **In John Kamau Githuku vs R CA No. 123/2009 (Nyeri)**

The offence occurred at night and the circumstances of identification were therefore different from those in the case before me.

(2) **In Joseph Keplimo vs R CA No. 416/2010 (Eldoret)**

The court set aside the sentence of 50 years imposed by the trial court and reinstated the life sentence provided for under **Section 8(2)** of the **Sexual offences Act**.

(3) **In Daniel Makokha Ogutu vs R CA No. 155/2011 (Kisumu)**

The P3 form was produced by the investigating officer who would not be in a position to answer any questions of a medical nature put to him.

(4) **In Simon Amoah vs R CA No. 171/2009 (Kisumu)**

The appellant was aged below 18 years at the time of the commission of the offence and should have been sentenced under the Children Act.

For the foregoing reasons I find that the appeal before me is lacking in merit, and is therefore dismissed in its entirety.

It is so ordered.

SIGNED DATED and **DELIVERED** in open court this **17th day** of **April 2013.**

L. A. ACHODE

JUDGE