REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 148 OF 2011

DANIEL MUGAMBI MUTHOMI…….. APPELLANT

VRS

REPUBLIC …… RESPONDENT

Being an appeal against both conviction and sentence in Criminal Case No. 59/2010 in Nkubu Law Courts – before S.M. Githinji.

J U D G M E N T

The appellant DANIEL MUGAMBI MUTHOMI was charged with an offence of defilement contrary to section 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on 10th day of January 2010 in Imenti South District within Eastern Province, the appellant committed an act which caused penetration with his genital organ into genital organ of D M, a child aged 15 years old. The appellant faced alternative count of indecent act with a child, contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence are that on 10th day of January 2010 in Imenti South District, within Eastern Province, the appellant did an act of indecency with D M a child aged 15 years by touching her breast, buttocks and vagina.

The appellant was convicted of defilement and sentenced to 20 years imprisonment. Being aggrieved by the conviction and sentence he filed this appeal setting 13 grounds of appeal as herein below:-

1. **That the Learned Trial Magistrate erred in Law and fact in**

Failing to notice that the charges pressed against the

Appellant were defective abi initio.

2. That the Learned Trial Magistrate erred in both Law and fact In convicting the appellant against the weight of evidence Adduced by the prosecution witnesses.

3. That the Learned Trial Magistrate erred in Law and fact in

Finding a conviction against the appellant without setting Out the issues for determination in his judgment.

4. That the learned trial magistrate erred in law and fact in

Convicting and passing an illegal sentence against the appellant without first establishing the

exact age of the

Complaining witness.

5. That the learned trial magistrate erred in law in not testing the complaining witness by way of vior dire examination.

6.That the learned trial magistrate erred in law and fact in giving a blind eye to the serious contradictions in the evidence of the prosecution witnesses.

7. That in the view of the nature of the offence facing the

Appellant before the lower court, the learned trial magistrate erred in law in appreciating evidence based on investigations conducted by a male police officer.

8. That the learned trial magistrate erred in law in placing the appellant to his defence in both the main and alternative counts.

9. That the learned trial magistrate erred in Law and fact in

conducting the proceedings in open court in blatant disregard of the nature of the charges facing the appellant.

10. That the learned trial magistrate erred in law and fact in

misdirecting himself that the only reliable defence under

the Sexual Offences Act No. 3 of 2006 is section 8 (5)

of the Act.

11. That the learned trial magistrate erred in law and fact by

failing to factor in his judgment and the appellant's alibi

evidence was never controverted by the prosecution.

12. That the learned trial magistrate erred in law and fact in

failing to explain to the appellant who was unrepresented in the lower court that he had a right to make oral submissions both at the close of the prosecution and defence cases.

13. That the learned trial magistrate erred in law and fact in

passing an unspecified and excessive sentence against

the appellant in the circumstances of the case.

This is the first appeal and being first appellate court I have the duty and obligation to re-evaluate and re-analyse the evidence that was adduced at the lower court to enable me reach my conclusion. When doing so I have to bear in mind that I never had the opportunity to observe or hear the witnesses give evidence and observe the manner and demeanor of the witnesses. Those basic principles were set down in the case of

OKENO – V- REPUBLIC (1973) EA 32 where Court of Appeal set out the duty of the first appellant court in the following terms:-

"An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh ad exhaustive examination (pandya vrs Republic (1957) EA 336) and to the appellant Court's own decision on the evidence. The first appellant court must itself weight conflicting evidence and draw its own conclusion (Shantialal M. Ruwala v. Republic [1957] EA 570). It is not the function of a first appellant 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 magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeking the witnesses, (see Peter v. Sunday Post, [1958] EA 424)"

The appellant was represented by Mr. Ndubi, learned advocate who made the following submissions. Mr. Ndubi argued some of the grounds of appeal.

He argued that the charge was defective as regard in particulars for failure state the genital organ that the appellant's genital organ penetrated. He referred to section 2 of the Sexual Offences Act on the definition of genital as including the whole or part of male or female organs and for the purpose of the Act to include anus. He further urged that the victim was aged 15 years and that there is nothing to show she was imbecile as that did not come out of the evidence. He further submitted that section 169 of the Criminal Procedure Code requires that the judgment should contain issues for determination. That on page 35-41 of the judgment he submitted the requirement of section 169 of Criminal Procedure Code was not met. Mr. Ndubi further argued that the sentence set against the appellant was illegal as the exact age of the child was not established by the court. That the charge sheet showed the girl's age as 15 years but evidence of P.w.3 shows the complainant as an adult. Mr. Ndubi further submitted the victim being a minor the court ought to have tested her intelligent by conducting vior dire examination. He further urged that it was not in order to appreciate evidence of a male investigating officer in a case of defilement involving a girl or female. He argued the danger of with a male officer conducting investigation is that the officer can defile the victim and frame the suspect and he further argued it is also traumatizing. He further that all cases relating to defilement should be done in chambers and in the instant case there is no evidence whether it was done in chambers or in open court. He submitted that trial court misdirected itself in this case and reached at wrong decision in its finding that the only defence available to the appellant is only under section 8 (5) of the Sexual Offences Act. On the sentence Mr. Ndubi argued that the sentence imposed upon the appellant is not specific.

The appeal was strongly opposed by Mr. Ongige, learned State Counsel, who urged that the appeal should be dismissed. On the issue of the charge sheet he submitted that the charge sheet is properly framed. On the issue of the age of the victim, he submitted that the charge sheet states the age of the victim as 15 years and that P.W.3 in her evidence stated she was 16 years old. Hence he submitted that there is no misdirection on the issue of the victim's age. He urged that under Sexual Offences Act, there is no specific provisions that in Sexual offences where the victim is a female a female police officer should carry out investigations for it to be proper. On the trial of the case before Lower Court he submitted that conducting of the case in open court could not have prejudice the appellant's case even if the proceedings were conducted in open court. He also argued that under section 8 (5) of the Sexual Offences Act, the only defence that trial court can consider is where the victim deceives the perpetrator that she was above 18 years. He urged in the instant case there was no such evidence. On the sentence Mr. Ongige submitted that the trial court was specific on the sentence. He submitted the appellant was sentenced to serve 20 years imprisonment. Mr. Ongige urged that for the interest of justice the court should order a retrial on the ground that their were contradictions on the evidence of P.W.4 and P.W.1 on the dates the victim was attended to at the hospital. On the issue of interpretation he urged there was no proper interpretation.

Mr. Ndubi, learned counsel for the appellant in reply he submitted that state conceded to the appeal that there should be a retrial and urged the court to order a retrial. He further urged that the trial court record shows that the victim was an adult and on that basis he sought retrial. He also urged that the defence available to an accused person in a Sexual Offence Act is not only limited to section 8 (5) of the Sexual Offences Act and that there are other defence available to an accused person such as a defence of alibi.

Mr. Ndubi concluded by urging the court to find that the conviction was unsafe and set the appellant at liberty or order a retrial.

The brief facts of the prosecution case is that P.W.1 D M, who operates an hotel business in Mombasa and who has two daughters who live in Australia namely D M (P.W.3) and R M travelled to her rural home in December 2009 for Christmas holiday at [particulars withheld]. That on 10.1.2010 the family was still at their rural home. That at 8.00 p.m. D M (P.W.3), the complainant who is deaf and dumb, went to visit her grandmother, I I. That on arrival P.W.3 told P.W.2 M M that she was required by P.W.1 instead of telling her to accompany her back to the house. P.W.2 left to see P.W.1, who on arrival was told that was not what P.W.3 had been told. She was advised to go back and accompany P.W.3 back home as it was late. P.W.3 went back for P.W.3 but could not find her and was told by her grandmother that P.W.3 had left shortly after P.W.2 had left. P.W.2 went back to P.W.1's home to confirm P.W.3 had arrived home but on arrival she could not find her consequetly. P.W.1 and P.W.2 started seeking for P.W.3.

P.W.3 testified that on 10.1.2010 at 8.00 p.m. she met the appellant at her grandmother's home. That the appellant touched her body and kissed her. He removed her bra and pant. He then removed his clothes. He touched her private part and inserted is penis into her vagina. He was not wearing condom. That the two were in bed. That P.W.1 and P.W.2 searched several places for P.W.3 and at last went to appellant's room which was not bolted but just shut. They found D M, P.W.3 in appellant's room seated on the appellant's bed, while the appellant was standing next to bed. The appellant was in T-shirt and a trouser which was not zipped. P.W.1 screamed attracting P.W.2 to the room. P.W.2 came and found the appellant standing next to the bed still in unzipped trouser and D standing next to the door but in one shoe. P.W.3 stated that the appellant led her to the room and in his room the appellant kissed her, touched on her breast, removed her trouser and laid her on bed where they had sex. The appellant denied the allegation. Appellant was then taken to Nkubu police station. P.W.5 booked the report, issued a note to enable the complainant obtain medical treatment. The complainant was treated at Consolata Hospital.

The following day the complainant and the accused were taken to Kanyakine District hospital for examination. P.W.4 examined the complainant and noted that the minors were bruised and hymen broken. There was whitish discharge from her vagina orifice. It was examined and had no spermatozoa but there were pus cells and epithelial cells. The clinical officer concluded that there was bacterial infection and evidence of penetration. He noted injuries were two hours old and concluded they could have been caused by penis. The degree of injury was assessed as grievous. P3 was produced as exhibit.

The appellant gave sworn statement in his defence. He testified that on 10.1.2010 he was working for P.W.2 at her home the whole day and P.W.2 came and asked her about material she had bought 2 weeks ago claiming he was occasioning wastage. P.W.2 also asked about a welding machine which she was claiming the appellant had not returned and he kept quite. He further testified that in the evening he went to [particulars withheld], market where he stayed till 9.15 p.m. and proceeded to his house which he had been given by P.W.2 to stay. That when the appellants was washing he heard someone calling him "Mugambi" and on checking he found it was P.W.2. She enquired about missing materials to which he told her he was not aware of any missing materials. That P.W.2 left and after 5 minutes retuned accompanied by P.W.4. P.W.2 had a rope in her hands. That P.W.2 told P.W.4 to tie appellant's hands. He was tied and led to[particulars withheld] market where P.W.2 got a vehicle and the appellant was taken to Nkubu police station. He was put in cells and informed that he had defiled his boss daughter. The appellant was later charged with this offence. He denied the offence.

During cross –examination he testified that P.W.2 D M was mother to the girl allegedly defiled. He testified that P.W.2 testified that she found him in the house with the girl at his door. He admitted that he had a room in the compound. The appellant further denied seeing the girl in the compound.

The appellant challenges his conviction and sentence in his appeal. Mr. Ndubi, learned counsel for the appellant advanced several grounds of appeal and Mr. Ongige, state counsel on the other hand opposed the appeal.

The appellants first ground of appeal is that the charge in this case his defective because the particulars did not specify the genital organ that was penetrated by the appellant's genital organ. Section 2 of the Sexual Offences Act defines "genital organs" to be the whole or part of male or female genital organs and for the purposes of Act this includes anus. The charge sheet gave particulars as genital organ of D M. The charge sheet was specific of that organ penetrated into as defined in the Act. The appellant was not in doubt of the organ referred to throughout the proceedings and I find he was not prejudiced as the genital organ was specifically stated in the charge sheet. I find no merit in that ground and it is dismissed.

The appellant faulted the trial court for convicting the appellant without setting out the issues for determination in the judgment. Section 169 of the Criminal Procedure Code provides:-

> ***169. (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.***
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> ***(2) In the case of a conviction, the judgment shall***
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> ***specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.***
>
> ***(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty.***

I have perused the court judgment and it is clear from the judgment that the trial court set out point for determination being whether the offence against the appellant was proved by the prosecution beyond reasonable doubt. The court analyzed the evidence and reached its decision and gave reasons for its decision. I find that section 169 of Criminal Procedure Code was complied with. The ground of appeal has no merits and it therefore dismissed.

The appellant argued that the sentence imposed upon the appellant is illegal since the exact age of the child was not established. The charge sheet indicates the age of the child as 15 years. P.W.1 D M, mother to P.W.3 gave her age as 16 years. The complainant P.W.3 gave her age as 16 years. The particulars of P.W.3 as recorded by trial magistrate indicates adult which is a recording by magistrate but not evidence by the witness, that is P.W.3. The record of particulars of whether a witness is a minor or adult is usually recorded by the magistrate or judicial officer without asking the witness evidence of the witness in most cases and as such that cannot be a basis of assessing the age of the witness especially in a Sexual offence or any. The court currently found the age of the complainant at the time of hearing of the case was 16 years. The charge sheet shows that when the offence was committed the complainant was 15 years. Section 8 (3) of the Sexual Offences Act provides sentence upon conviction for an offence of defilement with a child below the age of twelve and fifteen to be imprisonment for a term of not less than twenty years.

The appellant was convicted and sentenced to serve 20 years in accordance with the provisions of the law. The sentence is therefore lawful and the ground of appeal has no merit and is dismissed.

The appellant submitted that the complaint being a child the court ought to have tested her intelligence. At the time of hearing of the case the complainant was 16 years and not a child of tender years and as such the court was justified in proceeding without testing the intelligent of the child herein. The ground of appeal is therefore without merit and is dismissed.

The appellant faulted the investigation by a male police officer in a complaint of defilement by a female child. He argued that the danger with the male officer conducting investigation is that the officer can defile the child and frame the suspect. The appellant did not quote any provisions of law in support of his argument however it is usually recommended in cases of defilement and even rape that the report be made

to a female police officer and the investigation be carried out by female police officer so as to protect the victim from being embarrassed or being put under a lot of psychological and mental torture, but this do not make the investigation by a male police officer unlawful, unmaintainable if done by a male police officer. In a situation where there are no female police officers to receive the report or carry out investigation it would perfectly in order for male police officer to receive the report and carry out investigation for the ends of justice. I have considered the ground herein and I have found that it is only intended to embarrass the male investigating officer. This is a ground that has no merit and is dismissed.

The appellant faulted the trial court for conducting the case of defilement in open court whereas the case ought to have been conducted in camera or in chambers. The court record do not show where the proceedings were being conducted.

I agree with the appellant that in rape or defilement cases the proceeding should be conducted in camera or chambers. That by conducting the case in open court it was the complaint who was put into embarrassment and that should not have been the case, however that notwithstanding the appellant was not prejudiced in any way. There was no miscarriage of justice. The appellant was not denied any justice and for that reason the grounds of appeal is without merit and is dismissed.

On defence the court considered the appellant defence and found its was unmaitainable.

I therefore find the conviction of the appellant was based on evidence of P.W.1, P.W.2, P.W3, P.W4 and P.W5. Evidence of P.W.3 was corroborated by evidence of P.W.1.P.W.2 AND P.W.4. The evidence of P.W.1,P.W2 and P.W3 placed the appellant at the scene of incident as the appellant and P.W.3 were found in appellant room with appellant trouser unzipped. P.W.3 told P.W.1 and P.W.2 that the appellant took her to his room touched her breast, kissed her and they had sex. The trial court believed the prosecution case. The position and manner of dressing of P.W.3 and the appellant confirmed that P.W.3 had told P.W.2 and P.W.1.

I have carefully examined the evidence of P.W.1, P.W2, P.W3, P.W4 and P.W5 and find it to be consistent and unshaken and carefully pointed to the identification of the assailant as the appellant. The appellant denied having committed the offence with which he was charged. He gave sworn statement. The trial court consider the appellant's defence and termed it as an afterthought. He never raised the issues raised in his defence anywhere during cross examination of the prosecution witnesses. The trial court found it to be untrue. The issue is whether the appellant was at the scene of the incident.

P.W.1 and P.W.2 in their evidence were specific that they found the appellant at his room with P.W.3 with his trouser unzipped. The appellant did not challenge P.W.1.P.W.2 and P.W.3 on that issue nor did he give evidence of being framed by the witnesses on being found with P.W.3. P.W.1 and P.W.3 had no grudge with the appellant.

I have very carefully persued the evidence of P.W.1, P.W.2 and P.W.3 and I have found that the evidence of the aforesaid witnesses dislodged the appellant's defence of alibi. The appellant was known to P.W.1 and P.W.2 and they had met him and found him with P.W.3, who admitted in appellant's presence that they had sex. The medical records confirmed so. The appellant was properly recognized.

The state counsel Mr. Ongige urged the court to order the trial on the ground that P.W.1 and p.w.4 contradicted each other on the date the complainant attended hospital for treatment and further on the ground that the interpretation was not done properly. P.W.1 testified the police told her to have the child taken to the hospital on the following day. (11th January 2010) and they did so, whereas P.W.4 testified that the child was seen on 10th January 2010. There is no dispute that the child was seen and attended to at the hospital. The issue is whether it was on 10th January 2010 or 11th January 2010 may it make no much difference. The main issue is whether the child had been defiled on 10th January 2010 and whether she was seen by a doctor a and report made before she had interfered with the evidence. A re-trial on this point would be in court's opinion be a wastage of valuable time and unjustified. On the issue of interpreter on page 16 of the proceedings he stated that she is a sign language teacher at Nkubu Special Unit. That she knows basics in American, Britain and Austrialian sign languages and was also a specialist

in Kenyan sign language. She holds a degree in special education. The trial court found that she was well qualified in the area of interpretation sought by the court.

The learned state counsel did not state why he thought the interpreter was not qualified and why he thought there was no proper interpretation. The appellant did not complain during the trial nor did the appellant raise that amongst his grounds of appeal. The court record is proper and clear that the interpreter was well qualified. In the circumstances the appellant was not prejudiced during the trial and there was no misapprehension on part of the court or the appellant on the complainant's evidence to warrant ordering a re -trial. I find no basis on the state counsel seeking a re0trial and further I find no basis has been laid and established to warrant ordering of a re- trial.

The upshot of the matter is that this appeal is dismissed as the same has no merit. I hereby uphold the conviction and confirm the sentence that was imposed by the learned trial magistrate.

Right of appeal explained.

DATED, SIGNED AND DELVIERED AT MERU THIS 30TH DAY OF OCTOBER 2013.

J.A. MAKAU

JUDGE.

DELIVERED IN OPEN COURT IN THE PRESENCE OF

1. Mr. Ongige for state.

2. Mr. Ndubi for the appellant

J.A. MAKAU

JUDGE.