REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANGA

HIGH COURT CRIMINAL APPEAL NO. 422 OF 2013

(Appeal from the Original Conviction and Sentence in Criminal Case No. 4205 of 2011 dated 27th February 2012 in the Chief Magistrate's Court at Thika by Hon. L. Wachira - PM)

JOHN MAINA KAMAU……………………………………..APPELLANT

VERSUS

REPUBLIC………………………………………………..RESPONDENT

JUDGEMENT

The Appellant herein John Maina Kamau was convicted by the trial Magistrate for the offence of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act, No. 3 of 2006. He had been charged with defilement of a girl contrary to Section 8(1) of the Sexual Offences Act. He was sentenced upon conviction on the alternative count and sentenced to serve 21 years imprisonment. He appeals against that conviction and sentence.

The Appellant's Grounds of Appeal were as follows:

1. That the learned trial Magistrate made an error in both law and facts and misdirected himself by failing to put into account that the case for the prosecution was not proved beyond reasonable doubt as was required by law.

2. That there was no medical examination in respect of the Appellant availed in Court hence no evidence to link the Appellant to the commission of the offence charged.

3. That the prosecution failed to prove as to the origin of spermatozoa detected by the doctor in the complainant's genital organ.

4. That the Appellant's defence statement was not properly taken into consideration.

The Appellant wished to be furnished with the record of the Court proceedings and judgment to enable him raise Grounds to be adduced at the hearing of the Appeal and he wished to be present at the hearing of the Appeal.

Upon being furnished with the record of Appeal the Appellant filed Amended Grounds of Appeal and written Submissions. The Amended Grounds of Appeal were:

1. That the Learned Trial Magistrate made an error in both law and facts and grossly misdirected himself by entering a conviction without first making a finding in relation to the burden of proof.

2. That the Learned Trial Magistrate made an error in both law and facts and misdirected himself by entering into the arena by filling in gaps on the prosecution case with his own created theories not canvassed in the evidence.

3. That the case for the prosecution was not proved beyond reasonable doubt.

4. That the trial Magistrate made an error in both law and facts by holding that that the evidence of the 3 witnesses called in support of the defence was of no probative value whereas it was the Appellant's right to call such evidence.

The Appellant appeared before me on 15th October 2013 and urged his Appeal. The State was unrepresented. He urged the Court to rely on the submissions he had filed. The submissions were to the effect that the learned trial Magistrate made an error of both law and fact by entering a conviction before making a finding in regards to the burden of proof. He submitted that the trial Magistrate fell into error by filing in gaps on the prosecution side by making his own theories not canvassed by the doctor. He submitted that the trial Magistrate was duty bound to weigh the evidence from both parties and arrive at a finding and more so a finding in relation to the burden of proof. The Appellant relied on the reported case of **Burunyi & Another v. Uganda** where Sir Udo Udoma CJ held: *"It is not the duty of the Court to stage manage cases for the prosecution nor is it the duty of the Court to endeavour to make a case against the accused if there is none"*

The Appellant also attacked the finding on the commission of an indecent act. He stated that the particulars of the charge sheet did not mention by what means the victim's private parts were touched. He asserted that the charge sheet omitted to indicate the organ or object used to touch the private parts of the victim.

Regarding the presence of spermatozoa in the birth canal of the victim the Appellant submitted that the finding by the trial Magistrate where it reads

"In conclusion, I will find that the accused person indeed committed an indecent act with the complainant and even went ahead and ejaculated on her" was a crucial misdirection because first of all it appeared that the trial Magistrate had already made a case against the Appellant to the effect that the spermatozoa found on the victim's vaginal canal was ejaculated by the Appellant. According to the Appellant this was a wrong presumption as Dr. Namarome Wekesa PW3 had clearly stated in his testimony he could not say that the Appellant was the assailant but that there was evidence of the commission of the act because of the presence of spermatozoa in the vaginal canal. The Appellant submitted that it was with regret that the prosecution failed to establish the source of spermatozoa found in the victim's vaginal canal.

Regarding the evidence for the Appellant's defence, the Appellant stated that he called in his defence 3 witnesses who were his children. The Appellant submitted that it was quite unfair for the trial Magistrate to have said that the children would of course not have incriminated their father and that the children were not present during the ordeal and therefore their testimony was of no probative value. The Appellant asserts it was a critical misdirection for the trial Magistrate to have stated that PW1 had not stated that the Appellant's defence witnesses were present at the scene of crime. The Appellant stated that the evidence of the witnesses were crucial.

There was also a challenge on the age of the victim and the Appellant asserted that the age of the victim was not proved.

The case for the prosecution was that the minor aged 9 was defiled by the Appellant. PW1 testified that on the material day the minor was playing within the Appellant's compound with her sister and the daughter of the Appellant. She testified that the Appellant grabbed her hand and took her into his house where he placed her on his bed and removed her panty and removed his trouser and penetrated her twice. Both times she screamed in pain. When the Appellant penetrated her the second time, PW1 heard her sister call out her name. The Appellant told PW1 to stay put but she walked out and which

point her mother PW2 saw the minor leaving the Appellant's house and immediately took her into the house and the minor confessed to what had transpired. The child was taken to hospital immediately and examined where spermatozoa were found in her birth canal. PW1 testified that the other children had left the compound when the incidence took place. PW2 testified how she saw her daughter leave the Appellant's house arousing her suspicion thus leading to the examination of the minor. The doctor testified that on examination when a high vaginal swab (HVS) was taken there were spermatozoa noted to be present in the vaginal canal of the victim. This was in short the evidence of the prosecution. The prosecution had a burden to prove the case beyond reasonable doubt and it was not the duty of the Appellant to disprove the prosecution case. There was no reverse burden of proof.

The Appellant gave a sworn statement and was cross-examined on it. He was not able to explain why if there was a grudge between the two families PW1 would play with his children. His evidence revolved around the arrest. He called 3 of his children as defence witnesses. The first, DW1 testified that he was far with is brother. He stated he had left his father and his sister with PW1 in the compound when he left to fetch firewood. He stated that at the time the parents were not enemies but at the time of his testimony they were now enemies. He was candid that he did not know what had happened when he went away. DW2 also testified that he was not in the house or compound at the material time as he had gone to cut firewood with DW1. In cross-exam he stated the families were friends prior to the case. DW3 the daughter of the Appellant testified that she was chased from school for not paying fees and when she got home she found her dad who swept the compound. She was later called by PW2 and when she got to PW2's house she played with PW1. She was adamant that PW1 did not come to their compound on that day.

This being a first Appeal, I must evaluate the evidence and ascertain if the findings made and the conviction made were safe and also if the sentence meted out was proper.

The evidence on record shows that PW1 was born on 29th May 2002. The allegations that the age of the victim was not proved does not hold water. The incident took place on 31st August 2011. At the time the minor was 9 years. There is proof of the age of the child who was ascertained. In relation to the evidence proper, the minor who testified gave an account of what transpired. She pointed to the Appellant as the person who defiled her. Her mother confirmed the child had been defiled. The report to hospital and the events attendant were within a short span of time thus eliminating the possibility of a frame-up. The evidence tendered by the PW3 Dr. Wekesa was testament to the fact there was spermatozoa present in the birth canal of the victim. Her hymen was intact thus disproving penetration.

No tests were done to ascertain the source of the spermatozoa and it was therefore not clear whose sperms these were. The doctors who examined PW1 had a duty to ascertain the DNA of the sperms and connect it to the suspect in the case. The doctor instead prepared a report that revealed an offence had been committed but left the identity of the culprit uncertain. The doctor who examined the victim could have taken samples and conducted tests and seek an order under Section 36 of the Sexual Offences Act for DNA samples from the Appellant for comparison and to ascertain whether or not the accused person committed the offence.

The uncertainty as to whether the Appellant was the culprit or not means that the prosecution case was not proved beyond reasonable doubt. The Appellant may have as well committed the offence but the failure to ascertain whether the spermatozoa found in the victim was from the Appellant somewhat weakens the prosecution case. As pointed out earlier it is the duty of the State to prove the case. It was not for the Appellant to prove his innocence. The learned Trial Magistrate fell into error in filling in the prosecution gaps and making a finding of fact regarding the spermatozoa when there was no scientific evidence connecting the Appellant to the sperms.

The conviction was unsafe and I therefore set aside the conviction and quash the sentence passed against the Appellant and set the Appellant free.

Orders accordingly.

Dated, signed and delivered this 28th day of November 2013

Nzioki wa Makau

JUDGE