REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. 54 OF 2011

LESIIT, J

PETER KITONGA ……..…….APPELLANT

V E R S U S

REPUBLIC……..……RESPONDENT.

JUDGMENT

1. The Appellant was charged with one count for defilement contrary to section 8(1) as read with section 8(2) of Sexual Offences Act. He was found guilty convicted and sentenced to life imprisonment. Being aggrieved by the conviction and sentence he lodged this appeal.
2. He relied on grounds on the filed petition of appeal where nine grounds were cited as follows:

1. **The learned Resident Magistrate erred in law and in fact in failing to appreciate the contradiction between the testimonies of PW1 and 4 on presence of blood as contrasted with that of PW3 the doctor.**
2. **The learned Resident magistrate erred in law and in fact in associating breakage of the complainant's hymen with the appellant without sufficient evidence to prove the same.**

3. **The learned Resident Magistrate erred in law and in fact in relying on hearsay evidence to hold that the appellant was the last person seen with the complainant.**

4. **The learned Resident magistrate erred in law and in fact in basing her conviction on the unsworn evidence of a child of tender age without warning herself on the dangers of doing so.**

5. **The learned Resident Magistrate erred in law and in fact in failing to appraise the evidence of the individual prosecution witnesses in the judgment to appreciate the contradictions therein but instead recorded a set of 'facts' with a present mind on guilt or otherwise of the appellant.**

6. **The learned Resident Magistrate erred in law and in fact in making conclusive statements in respect of penetrating which was not proved without appraising the defence evidence and or submissions.**

7. **The learned Resident Magistrate erred in law and in fact in misinterpreting the evidence of PW3 the doctor, to make adverse comments against the appellant in the process of**

evaluating evidence.

8. **The learned trial Resident Magistrate erred in law in shifting the burden of proof to the defence.**

9. **The learned Resident Magistrate erred in law and in fact in arriving at a decision wholly against the weight of the evidence before the court and the applicable law.**

3. When this appeal came up for hearing Mr. Mwarania represented the Appellant. He relied on the amended grounds of appeal and adopted the written submissions filed by the Appellant.
4. In brief the Appellant in his written submissions urged that the charge was not proved to required standard, that the case number indicated in the charge and one he was charged in were inconsistent, that the charge was defective and learned trial magistrate did not comply with the requirements of section 214 of the Criminal Procedure Code and finally that the complainant's evidence was not supported by the doctor because the doctor never noted any bleeding in the complainant's private parts.
5. Ms Mwangi represented the State and opposed this appeal.
6. This is a first Appellate court. As such I have subjected the evidence adduced before the lower court to a fresh analysis and evaluation while bearing in mind that I neither saw nor heard any of the witnesses, and have given due allowance and drawn my own conclusion. I am guided by the Court of Appeal case of **Okeno Vrs. Republic** 1972 EA 32. It was stated in that case as follows:-

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vrs. R. (1957) EA. 570). 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 finding and conclusion; 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 seeing the witnesses, see Peters Vrs Sunday Post [1958] E.A. 424."**

7. The facts of the prosecution case were that the complainant aged 5 years was left under the care of the accused wife. the accused wife took PW2 to other child to play. PW1 needed to go to a "**Chama**" meeting at 2 pm. At 5 pm when she returned, PW1 did not find PW2 with other children. When she called her name, PW2 emerged from a maize plantation crying. PW1 went to her and saw the Appellant whom she accosted. PW 2 reported that appellant had called here to the maize plantation where he lay on her and she felt a lot of pain. She was taken to a doctor who found a laceration in the vagina outer aspect, broken hymen. The doctor concluded there was penetration. Complainant also had soft tissue injuries on her back. The accused also had pus cells in vagina swab evidence of infection.
8. PW1 the complainant's mother testified that after accosting the accused for defiling his daughter, he ordered him to carry the complainant on his back as she could not walk. That as they went to hospital, PW1, PW2 and accused met the complainant's father PW3. In his evidence PW3 said that the accused sought forgiveness from him saying the devil entered him because of bhang and that he offered to sell his land and pay the complainant's parents for his action.
9. The accused defence was a denial of involvement. He called his wife DW2 and brother DW3. DW1 admitted that PW1 took her daughter PW2 to her at her stall home where she was washing clothes. DW2 that said the child was with her daughter and her sister both also children, until 5 pm when PW1 went to pick her. DW2 stated that her husband, the accused was selling at their stall across the road from their home and that he never left the stall.
10. DW3 stated that he went to his brother's (accused) stall at 2 pm to chew miraa with him. He said that he was with him at home where he left at 8 pm. He said that he saw PW1 arrive at accused stall with the complainant DW3 testfied that PW1 started arguing with the accused over a debt. That PW1 left then returned with her husband. DW3 stated that they went to the police where the

story changed.

11. I have considered this appeal together with submissions by both counsel. I have also subjected the entire evidence adduced before the lower court to a fresh analysis and evaluation and have drawn my own conclusions while bearing in mind that I neither saw nor saw heard any of the witnesses and have given due allowance.

I am guided by the case of **Okeno Vrs. Republic** 1972 EA 32 where the Court of Appeal stated the duties of the first appellant court as follows:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vrs. R. (1957) EA. 570). 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 finding and conclusion; 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 seeing the witnesses, see Peters Vrs Sunday Post [1958] E.A 424."**

12. Mr. Mwarania urged that the evidence against the Appellant was that of PW2, the child complainant of 6 years. He urged that her evidence was not corroborated and that since she gave an unsworn statement her evidence should have been treated with caution. He urged that the complainant's evidence was not clear who she was talking about because she made reference to 3 different people.
13. Ms Mwangi opposed the appeal. It was her submission that the prosecution evidence of PW1, 2 and 3 was well corroborated and that the learned trial magistrate arrived at the correct conclusion. Learned state counsel urged that the doctor had noted lacerations in the vagina and pus cells and found that the complainant had been defiled.
14. The complainant in her evidence was very clear of the events which led to the defilement and who was the culprit. The complainant stated that her mother took her to mama K's home where she played with N and K. She testified that while she was playing with the two children, Baba K, identified as the Appellant called her and asked her to get him a hammer at her home. He walked with her but then took her to another person's shamba where he lay on her and defiled her. She said that after her mother came Peter Kitonga carried her and that Kabuso met them on the way.
15. I have noted that Peter Kitonga is Appellant's name. He was also called Baba K because K was his daughter. The learned Appellant's advocte submission that the Complainant implicated three different people with the offence is misdirection and therefore in correct. Nothing turns on this point.
16. Mr. Mwarania urged that PW1 and 4 exaggerated in their evidence by alleging that the complainant was blood stained in her private parts. Counsel urged that the P3 form did not mention that there was bleeding yet it was filled 4 hours after the alleged offence. He urged that the Doctor who examined the complainant only made physical findings which were presence of pus cells Mr. Mwarania urged that the Doctor stated that pus cells could have been caused by disease but stated that no disease was found on the complainant.
17. The P3 form was an exhibit and it indicates that lacerations were found on the vaginal intuitus posterially and that there was a broken hymen. A laceration is a deep cut while a hymen is a muscle at the opening of the vagina. A laceration would definitely lead to bleeding and so would the breaking of the hymen. Taking into account PW1 noted that he daughter was bleeding at the scene of incident, and fact she was carried, it is possible bleeding had stopped by the time they reached the doctor.
18. In any event the issue is not whether or not there was bleeding. The issue is whether there was evidence of defilement. Dr. Macharia who examined the complainant found that the complainant had not only been penetrated but deep cuts caused in the posterior wall of her vagina. That was

evidence not only of defilement but of assault causing actual bodily harm.

19. There was evidence that the complainant had been defiled. The evidence adduced by the parents of the complainant established that the Appellant was the one who caused the injury and that at the onset he was not denying having done so. He even physically carried the complainant to the Police as evidence of his remorse. The issues being raised do not affect the evidence against the Appellant in any material way.
20. Mr. Mwarania made heavy weather of fact PW1 did not state that she heard the Appellant telling PW4 that the devil entered him. I agree that evidence of PW1 and 4 had a variation on that point. However, variation does not of necessity create a doubt on the veracity of the prosecution evidence especially where the same does not go to the substance of the case.
21. The variation was the fact PW4 said that the Appellant told him that he had defiled his daughter because the devil entered him due to use of bhang. PW1 was walking along the two but never stated in her evidence that she heard Appellant's confession to PW4. There can be an explanation for this like PW1 walking way behind PW4 and the Appellant That variation does not go to the substance of the charge against the Appellant nor does it affect the facts of the case or the evidence adduced against the Appellant. I find nothing turns on this point.
22. Mr. Mwarania submitted that the learned trial magistrate had a preset mine and made observations not based on evidence when he concluded that the Appellant was the last person seen with the Appellant. It is true there is such an observation by the learned trial magistrate towards the conclusion of her evidence.
23. The evidence on record was that PW1 called out her child and she emerged from maize plantations. The child implicated the Appellant and PW1 went towards the direction the complainant pointed at and found the appellant trying to go away. Going by the evidence of PW1, even though she did not talk about the Appellant being the last person seen with the complainant, she did implicate the Appellant as the person she found with the complainant when the complainant's mother went to collect the complainant. The finding was therefore not without a basis.
24. The Appellant in his written submissions raised issue with conduct of proceedings urging that S.214 of the Criminal Procedure Code was not complied with. S.214 talksof right of an accused where the charge against him has been amended or substituted or there has been a takeover of case from one judicial officer to another.
25. I have perused the record of the court and have confirmed that the case was heard from beginning to end by Mrs. C. Ndubi Magistrate. I also confirmed that the charge against the Appellant was never amended and or substituted. Nothing turns on this point.
26. The Appellant in his written submissions alleged that the charge against him was defective because it indicated that the Criminal case against him was Number 1890 of 2009 but that when he was finally taken to court, his case was given No.190 of 2009.
27. I noted a correction on the case No. of the Appellant's case both on the file cover and the charge sheet. That is not of material importance as it was a mere correction on case numbers. The rest of the file particulars, including the name of the Appellant, the charge and statements of particulars were not affected. Nothing turns on this point.
28. I have noted that the learned trial magistrate considered the Appellant's defence and the evidence of his witnesses and found that it did not shake or create doubt in the evidence of the prosecution adduced against the Appellant.
29. I agree with the learned trial magistrate's evaluation, analysis and conclusions on the defence case. The defence witnesses gave obvious lies. For instance DW3 the appellants brother who claimed he was with the Appellant continuously between 2 pm and 8 pm. Yet at 5 pm, the appellants was found in a shamba, not far within the place where the complainant was found. The Appellant even carried the complainant to the police station in the company of PW1, and 4 and others. PW5 received the group at the police at 6 PM. DW3's evidence that Appellant was home up to 8 pm that day was not true.
30. DW2 in her evidence stated that she was at home washing clothes as accused sold wares at their shop across the road from where she was. She said she saw the Appellant selling between 2 pm when complainant was left at their home and 5 pm when PW1 returned. That cannot be true as not only was the Appellant found in a large plantation with the complainant, he also made an admission to PW4 the complainant's father of his involvement in the offence.

31. After considering this appeal I am satisfied that the evidence adduced against the Appellant was watertight. The complainant knew the Appellant before being her neighbor. She also knew his children. There was no possibility of mistaken identity.
32. The Dr. confirmed that the complainant had been defiled 4 hours before she went for examination. The complainant's evidence that she had been defiled received corroboration from a medical doctor.
33. I find that the evidence against the Appellant was over whelming. I find that the conviction entered against the Appellant was safe. I accordingly uphold it.
34. The Appellant was sentenced to life imprisonment. He had been charged under S.8(2) of the Sexual Offences Act. section 8(2) provides that a person convicted of defilement under that section shall be sentenced to life imprisonment that is mandatory sentence. The court could not impose any other sentence other than life imprisonment for that offence. In the circumstances this court cannot interfere with the sentence imposed against the Appellant. I therefore confirm the said sentence.
35. In the result the Appellant appeal fails and is dismissed in total.

DATED SIGNED AND DELIVERED AT MERU THIS 13TH DAY OF NOVEMBER 2013.

LESIIT, J.

JUDGE