REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO.40 (A) OF 2011

(FROM ORIGINAL CONVICTION AND IN CRIMINAL CASE NO.231 OF 2010 AND SENTENCE OF THE RESIDENT MAGISTRATE COURT AT HOLA BEFORE HON.M.O.OBIERO RM)

DANIEL NAMASAKA SITINI…….....……
APPELLANT
VRS
REPUBLIC…….....
……..STATE

JUDGEMENT

1. DANIEL NAMASAKA SITINI, the appellant herein was charged in the Lower Court with the offence of Defilement of a girl under the age of seven years contrary to section 8 (2) of the Sexual Offences Act. The particulars of the charge were that on 12th October 2010 in Tana North District he defiled a girl aged 6 years. After a full trial, he was found guilty, convicted and sentenced to life imprisonment on 18/2/2011. He now appeals to this court against both conviction and sentence. He relies on eight amended grounds of appeal which can be summarized as follows:

a. The charge sheet was defective.

b. The appellant's constitutional rights were violated as he was arraigned in court well after 24 hours of arrest, contrary to Section 72 (3)(b)of the Old Constitution and Article 49 (i) of the 2010 Constitution.

c. The evidence of the minor complainant was received without voire dire examination.

d. Grounds 4-6 attack the quality of the evidence used to convict him, while in ground 8 the appellant complains that the Lower Court failed to consider his defence.

e. In Ground 7, the appellant disputes the jurisdiction of the trial magistrate to impose a life sentence by virtue of Section 7 (2) (a) of the Criminal Procedure Code.

The appellant also put in written submissions.

2. The State through MR. KEMO oppose the appeal by restating the evidence of the witnesses who testified in the Lower Court, which this Court is mandated to reconsider and re-evaluate on a first appeal (see **NJOROGE VS REPUBLIC (1987) KLR 19).** The Prosecution called five witnesses during the trial. The sum total of their evidence can be restated as follows:

3. D.N. (PW1) the complainant was a girl aged six years and a nursery school student. On the evening of

12/10/2010 together with two other girls namely, E and J, she went to play at the home of the appellant who is a neighbor. Somehow her friends left her at the home and went away. The appellant then came and led her to his home where he proceeded to have sexual intercourse with her. Back home, another girl called M reported to PW1's uncle one I.M (PW2) that DAN (the appellant) ''had done something bad ''to D.N. When questioned by PW2, PW1 confirmed that she had been defiled by DAN. Her mother, E.K (PW3), who had since stepped out of the house on hearing PW1 crying, also heard the report. She noted on checking that PW1's clothes and underwear were bloody. Her vagina was bruised and had blood. PW1 then led the two adults to the house of the appellant where she pointed at the bed on which she was defiled.

4. On the next day, PW1 was treated at Hola Hospital after police had been duly notified. Eventually a doctor at the hospital (DR. MWANGI) who testified as PW4 completed the P3 form confirming PW1's injuries. PW5 is the investigating officer to whom PW2 made a report of the incident on the morning of 14/10/2010. He interviewed PW1 and also escorted her for treatment. The next day he learned that the appellant was preparing to leave the village. He pursued the appellant and had him arrested by an officer at a road block at a place called Charidende while travelling in a Nairobi bound bus. He eventually preferred charges against the appellant.

5. In his unsworn defence statement, the appellant confirmed that PW1 and her relatives visited his home on the material evening, accusing him of defiling PW1. Thereafter, he and his father, in the company of a village elder went to the home of PW1 but a disagreement allegedly arose and police were called and later arrested and charged him.

6. Although the state did not respond directly to some of the grounds of the appeal, they deserve to be dealt with albeit in brief. Among these are grounds 2 and 7 which can be disposed of right away. Regarding the appellant's complaint that his constitutional rights under S.72 (3) (b) of the old Constitution were violated, such violation would entitle him to sue for damages and has no bearing on this appeal (see **JULIUS MBUGUA VS R [2010] eKLR**).

7. Secondly, it is clear the trial magistrate was clothed with the necessary jurisdiction to try and sentence the appellant by virtue of Section 7(1) b of the Criminal Procedure Act. Grounds 2 and 7 of the amended grounds of appeal have no basis therefore. To my mind, this appeal principally turns on grounds 1 and 3, the latter which somewhat overlap in some respects with grounds 4-6.

8. The Appellant was charged with "Defilement of a girl under the age of seven years contrary to Section 8 (2) of the 'Sexual Offences Act No.3 of 2006''.This section provides inter alia:

"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…"

That is the penalty prescribed for the offence of defilement created by Section. 8 (1) of the Sexual Offences Act, which states that **"a person who commits an act which causes penetration with a child is guilty of an offence termed defilement…"**

9. Ideally, the Appellant should have been charged under Section8 **(1) as read with** S. 8 (2) of the Sexual Offences Act, and therefore his complaint that the charge was defective has merit. The charge sheet must include both the offence as created and the penalty prescribed upon conviction. The non-disclosure of the offence in this case is a fatal defect not amenable to cure under Section 382 of the Criminal Procedure Act. The subsequent trial, conviction and sentencing of the appellant being premised on a defective charge are null and void.

10. The allegation by the Appellant that the evidence of the Complainant minor was received without conducting a voire dire examination may be inaccurate, but the record of the proceedings of the lower Court in this regard is not entirely satisfactory. Labelled "EXAMINATION OF THE MINOR AS TO HER COMPETENCY TO TESTIFY", the same concluded after a question and answer sessions with the following directions by the Court: "The minor shall testify without being sworn." Clearly, the trial

magistrate appreciated his role under Section 19 of the Oaths and Declarations Act when confronted with the proposed evidence of a child of tender years, and was seemingly satisfied that the minor was competent to give unsworn evidence.

11. In spite of this, the court erroneously proceeded to swear the child who was even cross-examined thereafter. It is futile to swear a witness who does not understand the nature or meaning of an oath as the trial magistrate had obviously concluded by virtue of his direction. That was a serious anomaly. And especially so, because in his judgment the trial magistrate noted the failure by the Prosecution to call another key witness M, as well as "material contradiction in the evidence of PW2 and PW3". He went on to state: "As such, the only evidence to be considered is the evidence of the Complainant in the absence of any corroborating evidence…"

12. Firstly, and with due respect, the trial magistrate did not demonstrate the alleged "material contradictions". Secondly, while not expressly saying so, the learned Magistrate seemingly believed the minor's testimony, and further took into account the medical evidence as proof of the element of penetration. In the circumstances, it was erroneous for the trial magistrate to conclude that there was no corroboration of the minor's evidence.

13. The trial court appears to have nevertheless been alive to the proviso to section 124 of the Evidence Act, which makes possible a conviction for a sexual offence solely upon the evidence of the victim, " if, for reasons to be recorded in the proceedings the court is satisfied that the alleged victim is telling the truth…"

14. In view of the defects highlighted, this court finds that the conviction entered in the lower court was unsafe and ought to be set aside together with the sentence. The next issue that falls for consideration is whether to order a retrial or to set the appellant at liberty.

15. The principles to be considered by this Court when making a decision whether or not to order a retrial have been well settled. The Court must consider inter alia whether there was overwhelming evidence adduced in the trial, that would most likely result in a conviction in a retrial. The Court will not order a retrial where the same amounts to handing the Prosecution another chance to fill gaps in the evidence against an accused person, or where it would be against the interest of justice **(**see **Criminal Appeal No 251 of 2001- Mombasa- Alfred Mumo Kioko VS Republic)**

16. In the case of **MERALI & OTHERS VS REPUBLIC 197 EA 221**, it was held that a retrial "may be ordered only when the original trial was illegal or defective". I have already highlighted the defect in the charge and the unsatisfactory handling of the evidence of the Complainant minor at the trial. But the Court must also consider if a retrial will be in the interest of justice and whether the same will occasion prejudice upon the Accused (see **AHMED SUMAN VS REPUBLIC 1964 EA 481**). In that case the court stated that each order for retrial depends on the unique facts and circumstances of each case. In the case of **MWANGI VS REPUBLIC 1983 KLR 522**, the Court stated:

"We are aware that a retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result."

17. The offence alleged in this case is serious and involved a minor aged six years who will likely be traumatized for her entire life as a result of her defilement. The process of appeal has proceeded expeditiously and the appellant has only been in custody for one year since the end of the trial. Witnesses would still be available to testify, hence no prejudice is likely to result.

18. At the same time, the evidence adduced at the trial appears overwhelming: the minor's evidence was corroborated by the medical evidence and the conduct of the Appellant subsequent to the offence. An order for retrial commends itself as more appropriate in the interest of justice, therefore, than setting the appellant free. Accordingly, I order that a retrial be held in this case. The appellant should be produced before a different but competent trial magistrate for plea on 20/2/2012.

Delivered and signed at Malindi this 6th February, 2012.

In the presence of Mr Naulikha for state, appellant in person, cc Mungai.

C.W MEOLI
JUDGE