REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCCR NO. 157 OF 2008

JEREMIAH THURANIRA……APPELLANT

VERSUS

REPUBLIC……..…….RESPONDENT

LESIIT J.

JUDGEMENT

The appellant was convicted of the alternative count of having committed an indecent act with a child contrary to section 11(1) of the Sexual Offence Act No. 3 of 2006. The main charge facing the appellant was defilement contrary to Section 8(1) of the Sexual Offences Act. He was sentenced to serve 15 years imprisonment.

The appellant was aggrieved by the conviction and of the sentence. He has raised five grounds of appeal. One, that the evidence of the prosecution was contradictory because each of the witnesses PW1,3 and 4 contradicted each other as to who was present when the incident occurred. Secondly, that a vital witness by the name Kimathi was not called as a witness. Three, his defence was rejected without consideration. Four, that the learned trial magistrate flouted section 198 of the CPC as she did not indicate the language used during the hearing. Finally the learned trial magistrate flouted section 169(1) and (2) of the CPC by failing to indicate the section she used to convict the appellant.

The appeal has been opposed by the state. Mr. Kimathi learned State Counsel submitted that the evidence adduced against the appellant was water tight. He urged the court to find that the complainant's evidence was water tight and that the conviction was proper. Mr. Kimathi however submitted that this offence was committed in 2005 and therefore the appellant ought to have been tried under the provisions of the Penal Code and convicted under the same provisions. Mr. Kimathi urged the court to apply section 354 of the CPC, alter the findings of conviction under the Sexual Offences Act and convict under the Penal Code.

I will start with the last issue raised by Mr. Kimathi. The appellant was initially charged with defilement of a girl contrary to section 145(1) of the Penal Code and alternatively with indecent assault of a female contrary to section 144(1) of the Penal Code. When the appellant took plea on the 15th September 2005

that was the charge he was facing. The trial commenced on the 29th May 2006 with the taking of evidence of PW1. The evidence of PW2 was taken on 29th August 2006. On 14th May 2007 an application was made before the learned trial magistrate for the substitution of the charges against the accused. That application was allowed and the old charges were substituted with fresh charges. These fresh charges were one count of defilement contrary to section 8(1) of the Sexual Offences Act No.3 of 2006 and one alternative count of indecent act with a child contrary to Section 11(1) of the same Act.

The Sexual Offences Act No. 3 of 2006 commenced operation on the 21st July 2006. Under the Second Schedule of the Act sections 139 to 149 among others of the Penal Code were repealed. These sections included the section under which the appellant in this case was charged with. Under the Transitional Provisions in the Sexual Offences Act, First Schedule paragraph 3 thereof provides as follows:

"Any proceedings commenced under any written law or part thereof repealed by this Act shall, so far as practicable, be continued under this Act".

I find that the substitution of the charges against the accused from the provisions under the Penal Code to the Provisions under the Sexual Offences Act were in line with the Transitional Provision under the Sexual Offences Act. The Transitional Provisions were enforceable as provided under section 48 of the Sexual Offences Act which makes it mandatory for the Transitional Provisions to apply. In the circumstances the conviction of the appellant under the Sexual Offences Act for an offence committed before the enactment of the Sexual Offences Act, was leak and proper and cannot be challenged.

The facts of the prosecution case are that on the material day the complainant PW5, a child of six years of age was playing with her siblings i.e Ntinyari PW3 and one Kimathi when the appellant called her. The appellant is a cousin of the complainant. He took the complainant to his house removed the complainant's pants and told her to lie on the bed. The appellant then removed his trousers and lay on top of the complainant who was lying on her back. The complainant said that she felt pain in the place she uses for urinating because of what the appellant was doing to her. That when she told the appellant that she was feeling pain he stopped what he was doing came off, her told her to dress up and then gave her ten shillings and peanuts. The complainant reported to her sibling PW3 who was 14 years of age who went and reported to their maternal grandmother PW4. PW4 eventually reported to PW1 the mother of the complainant. That is when the matter was reported to the police who arrested and charged the accused.

The accused gave unsworn statement. In his statement he said that he says that he is a 37 year old man. In his defence he dwelt on an incident he alleges took place on the 1st of September 2005 at 10.00 pm. The accused stated that he came across PW1 with another man in his maize plantation. The appellant said that PW1 tried to bribe him with 200/- so that he could keep quiet and that it is thereafter that PW1 sent PW3 to PW1's mother in law i.e. PW4, to tell her that the appellant had grabbed the complainant. The appellant said that his grandmother refused to act against him and that is when PW1 reported the matter to the police.

I have carefully considered this appeal. I will deal with each of the issues raised by the appellant in his appeal. In the first place I find that the evidence of the prosecution was not contradictory as he alleged. There was only one eye witness, that is, the complainant herself. The rest of the witnesses only received a report of the incident. The complainant reported to her sibling PW3. PW3 went and reported to her maternal grandmother PW4, who in turn informed the complainant's mother PW1. Even if there may have been any contradictions in the information reported to them which I maintain were not there, they were immaterial as they did not affect the substance of the charge against the appellant.

The witness the appellant claim was not called as a witness was one Kimathi. He was a sibling of the complainant and a twin of PW3. He was with PW3 and the complainant when the appellant called the complainant to him. In the case relied upon by the appellant i.e. **Bukenya vs Uganda** (1972), LUTTA Ag. VICE PRESIDENT of the Eastern African Court of Appeal held:

"The prosecution must make available all witnesses necessary to establish the truth even if their

evidence may be inconsistent.

……Where the evidence called is barely adequate the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution".

I find that the prosecution made available all the witnesses necessary to establish the truth in this case. It was not necessary for the prosecution to call every witness who may have known something about the case. The requirement is that the prosecution calls adequate evidence to support its case. Nothing therefore turns on this point.

In regard to the rejection of his defence I find nothing to support the appellant's allegation.The learned trial magistrate adequately considered his defence summarizing it in the judgment and also analyzed it against the evidence of the prosecution. Nothing therefore turns on this point.

Regarding the language I find that the learned trial magistrate indicated the language used by the witnesses which was Kiswahili, including the complainant. It was the same language the appellant used when he gave his defence. I am satisfied that the appellant followed the proceedings as is demonstrated by the rigorous cross examination of the key witnesses especially PW1, PW3 and PW5, whom he had recalled so that he could further cross examine them. Nothing turns on this point.

The learned trial magistrate clearly indicated the section under which she convicted the appellant Nothing turns on the last point raised by the appellant.

I have looked at the judgment of the learned trial magistrate. This is what she found:-

"Having heard the testimony of the complainant child M.K as against that of the accused, this court does not hesitate in finding that the child was such a straight forward and believable witness. Accused is her cousin, and there is no suggestion that she could have been mistaken about the identify of the perpetrator. She had no language to describe her anatomy, but she was clear that accused, who was lying on top of her, did something to her pubic area which caused her enough discomfort that she protested. She confirmed that this was not the first time he had lain on her, but this was the first time she had felt any pain. If the accused had not given the child so much money, and if the sister had not realized that something was amiss, this is a routine that could have gone on unnoticed.

The accused had a chance to cross-examine the complainant. Her statement did not falter, but remained steadfast. In this regard, this court has no reason to disregard the complainants statement of what had happened to her. The accused's defence was totally uncorroborated. Even if he had caught the complainant mother in a compromising situation with another man, there is no relevance to the charges before court".

Section 124 of the Evidence Act provides as follows:-

"124.Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

The learned trial magistrate subjected the evidence of the complainant child to the correct test as provided under Section 124 of the Evidence Act, especially the proviso thereof. The complainant's evidence did not receive any corroboration. The doctor who was called to produce the P3 form on the complainant was stepped down on the ground that he was not the maker of the document and therefore could not produce it because the accused person objected to his evidence.

With due respect to the learned trial magistrate, she disregarded the provisions of Section 77 on the Evidence Act which allows the court to accept the production of such a statement even where it is not produced by the maker. That section provides that the court may subsequently summon the maker of such a document for examination as to the subject matter thereof, if the court thinks it fit to do so. PW2 Dr. Macharia should have been allowed to produce that document.

The learned trial magistrate found that from the evidence of the complainant it was not clear exactly what the appellant had done to her and found no evidence to sustain a conviction for the main count. She therefore convicted the appellant for the alternative count of an indecent act with a child. Given the circumstances of the case the learned trial magistrate took the correct step to convict for the alternative count of indecent act with a child for the reasons that she gave in her judgment.

I have analyzed and evaluated the entire evidence given before the learned trial magistrate as required of a 1st appellate court. In **OKENO V. REPUBLIC [1972] EA 32** the role of a first appellate Court is given as follows:-

"**An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [**Pandya vs. Republic (1957) EA 336] **and to 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 v. Republic [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 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 seeing the witnesses, (See** Peters v. Sunday Post, [1958] EA 424.)"

I am satisfied that the evidence adduced by the prosecution was overwhelming against the appellant. The complainant's evidence was strong the complainant was found to be a straight forward and believable witness. The learned trial magistrate after assessing the demenour of the complainant and the evidence she gave in court found that she was telling the truth. I cannot fault the learned trial magistrate's finding. It was a finding of fact made after the assessment of the witness who was before her. I agree with learned trial magistrate's finding of fact as to the evidence of the complainant.

The appellants defence was a mere denial of the charge. He did not dwell on the day in question as in his defence he raised a totally different issue alleging that an incident had taken place three weeks after the date it is alleged he committed this offence. I have examined the cross examination by the appellant of PW1. The issue of the incident of 1st September 2005 was raised only on the third time PW1 was called for further cross examination by the appellant. It appears that this is an afterthought. The appellant's allegation that PW1 was divorced by her husband was denied by PW1. I agree with the learned trial magistrate that even if such an incident took place it has no relevance to the changes before the court or the veracity of each of the witnesses who testified before the court.

I am satisfied that the learned trial magistrate carefully analyzed the entire evidence that was adduced before her and came to the correct conclusion. I find no merit in the appellant's appeal against the conviction and I dismiss it accordingly.

In regard to the sentence the appellant was sentenced to 15 years imprisonment on 14th August 2008. The learned trial magistrate made the following statement before passing the sentence.

"ORDER
In view of the seriousness of these offences, and in view of the lack of any mitigating factors, the accused herein is hereby sentenced to serve 15 years imprisonment. R/A 14 days explained".

The appellant had been in custody throughout the pendency of the case from the 15th September 2005. The learned trial magistrate ought to have taken that period of confinement into consideration when passing sentence. The learned trial magistrate did not consider that the appellant was a first offender and also his age. Even though the offence is very serious, having failed to take all these factors into consideration I find that the sentence was harsh. In the circumstances I will allow the appellant's appeal against sentence and vary it as follows.

The section of the law under which the appellant was convicted provides for a minimum sentence of ten years imprisonment. I will set aside the sentence of 15 years imprisonment and substitute the same with a sentence of 12 years imprisonment and order that the sentence shall run from the date the accused was charged in court.
Those are my orders.

Dated and delivered at Meru this 10th day of March 2011.

LESIIT, J.
JUDGE