THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

HC.CRIMINAL APPEAL NO.52 OF 2009

KALEMBI MULEI..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From original conviction and sentence in Cr. Case No.2079 of 2004 in the Senior Resident Magistrate's Court at Kitui by T.M. Mwangi on 25th July, 2008.)

JUDGMENT

Kalembi Mulei, hereinafter "***the appellant***" was charged with the offence of defilement of a girl under the age of 16 years contrary to section 145(1) of Penal Code in the Senior Resident Magistrate's Court at Kitui. Particulars of the offence were that on 3rd November, 2004 at 4 p.m. in Maluka Sub location, Nzangathi Location in Kitui District, he had carnal knowledge of **Y.J** a girl under the age of 16 years. Alternatively, he was charged with Indecent assault contrary to section 144(1) of the Penal Code. Particulars thereof being that on the same day, place and time he unlawfully indecently assaulted **Y.J** a girl of 14 years by touching her private parts namely, vagina. The appellant denied both counts and he was tried.

Police Constable **Veronika Kapowa** (PW.1), **J.J** (PW.2), Administration Police Constable **Stanley**

Rilunga (PW.3), **Dorcas Munyua** (PW.4) and **Y.J** (PW.5) all testified on behalf of the prosecution. In summary their evidence was as follows; **Veronika** was the Investigating Officer of the case. On 4th November, 2004 whilst at Kitui Police Station, **Y.J**, hereinafter "***the complainant***" was brought to her by her mother. She was accompanied by Administration Police Officer **Rilunga**. The mother reported that the complainant had been defiled. **Veronika** took down the report, issued her with P3 form and then accompanied her to Kitui General Hospital where she had the P3 form filled by one, **Judy** a Clinical Officer then based at the said Hospital. **Dorcas Munyua**, gave evidence on her behalf though, since she had been transferred to Kiambu. She had concluded upon examination of the complainant that there had been penetration given the broken hymen of the complainant. Penetration had occurred short time earlier because of bruises in the vagina.

The mother of the complainant had been with the complainant until about 9 p.m. on 3rd November, 2004 when she went out to answer a call of nature. She left the complainant sleeping in her bed. The appellant who was her employee was thereat. When she came back, she found the complainant crying with the appellant on top of her. She pulled him off the complainant and saw his penis which was exposed. On looking at the complainant, she saw that her underpants had been removed to one leg and semen as well as blood was dripping from her private parts. When she asked the complainant, what the appellant had done to her, she responded that he had been poking her with his penis. She immediately ordered the appellant to leave. The following day, she caused the appellant to be arrested by the Administration Police Officer, **Rilunga** of the then Nzanguthi Chief's camp who in turn handed him over to **Kapowa**.

In her own words, the complainant stated that on 13th November, 2004 she was sleeping in the kitchen. Her mother was not around at the time. The appellant came and carried her to the bedroom and used his penis to prick her vagina. By then he had removed her under wear. He was found in the act by her mother. Her mother then had him arrested and taken to the Police Station.

Put on his defence, the appellant elected to give unsworn statement of defence and called no witnesses. He stated that the complainant's mother had employed him as a farm hand. By 4th November, 2007, the mother had defaulted in paying him his monthly dues. On that day, however, she came with two people who held and beat him up on the allegation that he had defiled a child. They took him to the Chief's Office where again he was beaten. To him, the case was a frame-up so that the complainant's mother could not pay him the arrears of his salary.

The learned magistrate having carefully evaluated the evidence on record reached the verdict that, the appellant was guilty as charged. He therefore convicted him and sentenced him to fifteen (15) years imprisonment.

Aggrieved by the conviction and sentence aforesaid, the appellant lodged the instant appeal on grounds that his Constitutional rights under section 77(2)(c) of the old Constitution and article 50(2) (c) (j) of the current Constitution were violated, the evidence on record was highly inconsistent and contradictory, the case was not proved beyond reasonable doubt, provisions of sections 144, 150 and 169 of the Criminal Procedure Code were violated and finally, the sentence imposed was manifestly harsh and excessive.

When the appeal came before me for plenary hearing on 3rd November, 2011, the appellant elected to canvass the appeal by way of written submissions which I have carefully read and considered.

The appeal was opposed. **Mr. Mwenda**, learned State Counsel submitted orally that the appellant was found in the act by the complainant's mother, the appellant was identified by the complainant whose testimony the learned magistrate found to be credible. There was medical evidence of defilement as well. The evidence of the complainant was sufficiently corroborated. The sentence imposed was neither harsh nor excessive. It was even lenient according to the learned State Counsel. He therefore urged me to dismiss the appeal.

As a first appellate court, it is my duty to rehear the whole case with a view to reaching my own decision on the case that was before the trial court. This duty is cast upon me by such decisions as **Pandya Vs. Republic [1957] E.A.336, Okeno Vs. Republic [1972] E.A.32** and **Kariuki Karanja Vs. Republic [1986] KLR 190**. In all these cases, it was held that an appellant on a first appeal expects the appeal court to exhaustively examine the evidence afresh, remembering always though, that such court did not have the privilege of hearing and seeing the witnesses who testified before the trial court. As I consider and evaluate the evidence afresh, I am also reminded that I should not ignore the judgment of the trial court, but should carefully weigh and consider it.

I have now carefully reconsidered and evaluated the evidence afresh. I have also carefully weighed and considered the judgment of the trial court.

The conviction of the appellant turned on the evidence of the complainant, the complainant's mother and to some extent, medical evidence. The complainant is a child of tender years. I doubt that she could have been used to frame the appellant for an offence that he did not commit. The detailed nature of her evidence is such that it rules out the possibility of her having been coached on what to say by her mother so as to frame the appellant, to pave way for her mother not to meet her monthly obligations towards the appellant in terms of salary. The narration of the events leading to and after the commission of the offence is such that it must have been true. Her cross-examination by the appellant did not at all cast doubt as to whether the offence was committed, and if so by whom. It was the appellant all the way. Within 24 hours of the commission of the offence, the complainant was examined by a clinical officer who confirmed that the complainant's hymen was broken and there were bruises on her vagina. I doubt that the appellant's mother would have gone to the extent of injuring her own daughter so to frame the appellant in a bid to avoid paying him his dues.

The appellant was an employee of the complainant's mother. Therefore, the appellant's identification by both the complainant and her mother cannot be in doubt. The learned magistrate found the evidence of these witnesses credible. I cannot fault him. Of course, there are contradictions and or variations in their testimonies here and there. The learned magistrate appreciated those contradictions but held that those contradictions were not material, and rightly so in my view. In this kind of cases where minors are involved, it is not unheard of for such contradictions to occur. After all, a minor does not have a brain of an adult. As long as those contradictions are minor and do not go to the root of the prosecution case, they can be ignored and or tolerated.

The clinical officer confirmed defilement. This was an independent witness with nothing to gain by falsely testifying against the appellant. She had nothing to gain from such an undertaking. I also doubt that she would have sacrificed her oath of her profession at the altar of unknown benefit.

The appellant has raised the issue that section 77(1) (c) of the old Constitution and article 50(2) (c) (j) of the current Constitution were violated with regard to his prosecution. My response is that judgment of the learned magistrate was delivered on 25th July, 2008 long before the current Constitution came into force. Since the current Constitution did not have retrospective effect, the appellant cannot seek reliance on it presently. The appellant's complaint in this regard is that he was never given adequate facilities to prepare his defence. I think that the submission is hollow given that the appellant was out on bail pending trial throughout. The record does not show that he even requested for witness statements and exhibits and he was denied. Nor does it show that he raised these alleged contravention of his Constitutional rights with the trial court and he was ignored. By raising these issues in this appeal, the appellant is merely clutching on straws to avoid impending drowning.

The appellant too has raised the issue of the evidence on record being highly contradictory and inconsistent. I have already addressed the issue elsewhere in this judgment. Suffice it to add that by the learned magistrate stating that the contradictions were not material; he did not thereby abdicate his duty of holding the scales of justice and therefore entered the arena of conflict on behalf of the prosecution as submitted by the appellant. The magistrate was simply performing her duty of analyzing and evaluating the evidence tendered as required of her by law.

The appellant too has submitted that the prosecution has a duty to prove its case beyond any reasonable doubt. That in the instant case the prosecution miserably failed to discharge that mandate. That submission is based once again on the alleged contradictions. I do not think that the appellant is being fair to the prosecution when he makes that submission. As already stated, the contradictions alluded to were minor and did not go to the root of the prosecution case. In any event, the appellant was found by the complainant's mother red handed and in the act.

Finally, the appellant complains that his defence was not given due consideration. I do not consider such submission to be merited. The learned magistrate no doubt evaluated the defence alongside the prosecution case and found it wanting and hollow. He rightly rejected it.

The sentence imposed though legal was in my view a little bit harsh and excessive considering that the appellant was a first offender. The offence charged attracted a maximum sentence of life imprisonment. The appellant was however, sentenced to 15 years imprisonment. For a first offender, that sentence was excessive and calls for this court's intervention. The appellant has been behind bars from 25th July, 2008, a period of 3 years. I think that he has been sufficiently punished. I would therefore commute the sentence imposed on the appellant as aforesaid to the term so far served with the consequence that the appellant should be set at liberty forthwith.

The upshot is that the appeal on conviction is dismissed. However, the appeal on sentence succeeds

to the extent aforesaid.

Dated, signed and **delivered** at **Machakos**, this **30th** day of **November,** 2011.

ASIKE-MAKHANDIA

JUDGE