REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 36 OF 2016

MOSES CHERUIYOT YEGON....APPELLANT

VERSUS

REPUBLIC.................................RESPONDENT

(Being and appeal against the conviction and sentence in Molo CM Criminal Case Number 2040 of 2011 by Hon. W. Kagendo, Chief Magistrate on 15th February, 2016)

JUDGMENT

1. The appellant Moses Cheruiyot was charged with offence of **DEFILEMENT CONTRARY TO SECTION 8(1) as read with 8 (2) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006.** It was alleged that on *the 5th day of October 2011 at [particulars withheld] in Kamwaura of Molo District of the Nakuru County, he caused his genital organ penis to penetrate the genital organ vagina of MC a child aged 2 years.*

In the **alternative** he was **charged** with **INDECENT ACT WITH A CHILD CONTRRARY TO SECTION 11(1) OF THE SEXUAL OFFENCES ACT NO. 3 OF 2006.** It was alleged that *on the 5th day of October 2011 at [particulars withheld] in Kamwaura in Molo District of Nakuru County, did intentionally and unlawfully cause his penis to come into contact with the vagina of MC a girl aged 2 years.*

2. He took plea on 10th October, 2011 and pleaded not guilty.

3. The witnesses were not traced until 4th June 2015 when PW1 testified. She said her name was CCK and she was mother to seven (7) children including MC the complainant who was the third born and at the material time was three years old. They lived in [particulars withheld] near Kamwaura.

4. On 5th October, 2011 she had left home around 3.00 p.m. leaving her three children, D, B and the complainant MC, grazing cattle. She came back at 6.00 p.m. Her child was crying saying she could not pass urine. She asked her two sons D and B whether they had pierced her with a stick and they said no. D then told her that while they were grazing one Moses had come by and told them that there was a person harvesting maize in their grandmother's farm and they needed to go and check. He told the two boys they could leave and he would remain with the cattle and MC. That the two of them left leaving Moses and MC to take care of the cows. As they left, they heard their sister crying. When they returned, Moses told them the child had wanted to go follow them.

5. Upon hearing this, CCK examined the child's private parts, as she was still crying and her legs were apart. She did not see anything peculiar in the child's private parts save that the child could not pass urine. Together with her neighbour Eunice they took the child to the village elder Richard. He also examined the child. He then called other villagers and mobilized them to find Moses. The child could not talk but was crying and touching her private parts. According to CCK, when she asked her what was the problem, the child just said, Moses.

6. Moses was found sleeping in a neighbor's house and escorted to the General Service Unit (GSU) camp, where he was detained. PW1 was told to take the child there as well but instead they went to Kamwaura Police Station. The police officer there rang the gender desk office at Molo Police Station and the following day 6th October, 2011 they went to Molo. She testified that at the hospital, the doctor said the child had been sexually assaulted and it was not the first time. She was given medicine and was able to pass urine. That when the doctor asked MC what had happened she just said that "*mtu mwigine*" had touched her there.

7. The witness said Moses was known to the family as he was a frequent visitor to their home almost every day and was known to MC.

8. On cross-examination, she said she had travelled from Kipkabus to come to court to testify about what appellant had done to her child. That the appellant was a family friend and a partaker of the traditional brew that she made. He would visit her home, buy her children

ngumu and sweets, sometimes he would go with the child but she was not aware he was abusing the child. She denied having any relationship with the appellant, saying that it was the appellant who had told the police that she was his wife. She said that she was married to one Johnstone and they were not separated. She said she did not know exactly what he had done to/ or with the child but that the child's private parts were torn. She said the doctor did not suture the children's private parts. That the appellant had attempted to run away but her husband and another man by the name Johnstone had arrested him.

She confirmed that she knew the appellant's house, and she and her sister in law, one named Tabitha helped to fix his house by smearing it with cow dung.

9. PW2 DK aged 12 years was brother to MC, the complainant. His testimony was that the appellant whose second name he did not know would visit them at home, he was known to him. On the material day, the appellant went to their home and found him, his brother K and MC grazing cattle near the home. The appellant told him to go and chase some boys who were harvesting his grandmother's maize. He left with his brother K, and left the appellant grazing the cattle together with MC. They found the two boys, who had harvested and were roasting the maize. While there, they heard MC crying. When they got back the appellant took off. MC was lying down crying, they asked her what had happened. Initially she said nothing. After some time he asked her again what had happened. She told him that the appellant had pushed her on the ground. She then lifted her skirt. She was wearing a panty. She removed it, and showed him her private part. She was still crying. They took her home and he noted that MC was walking with her legs apart. When their mum came home, she reported what had happened. He identified the appellant as the person with whom he had left his sister MC.

10. On cross-examination, he said they had come from Kipkabus. That his brother K saw the appellant defile the child. He said the appellant stayed at his grandmother's a lot. He confirmed that the appellant was a common visitor at their home. He denied that appellant visited their home at night. That their father lived at Mauche. He did not know whether his sister had been defiled before. He did not know whether appellant was related to his father.

11. On re-examination, he said he saw accused lying over the child who was lying down.

12. PW3 Rachel Chepkemoi Chesire the clinical officer testified that the child was two (2) years old on 8th October, 2011 when she examined her, that the mother gave history of defilement. She said she noted;

- Darkening along the thighs
- Cracks on the vaginal wall
- Torn hymen
- No discharge
- That P3 was filled on 7th November 2011
- That offence was committed on 5th October, 2011

Her conclusion; possible defilement. She produced the treatment card P3 and Post Rape Care Forms.

On cross-examination, she said she first saw the complainant on 8th October, 2011, and defilement was on 5th October, 2011. She was not given the name of the defiler. She could not recall why the child was not brought to hospital on 5th October, 2011.

13. PW4 No. 58685 PC George Kipngetich Kosgei was the investigating officer. He took over from PC Eliakim Eliot who passed on on 9th October, 2013. The complainant was two years old. He reiterated what PW1 told him. He said his colleague visited the scene. He produced the deceased investigating officer's statement as evidence. On cross-examination, he said the scene was in a maize plantation. That the appellant threatened the complainant until they moved from Taita to Kipkabus. He denied that it was not the other children who had defiled the child. That the child identified the appellant as the defiler. That it was not the mother who had penetrated the child with her finger.

14. The trial court noted on the record that this investigating officer was not prepared for the case at all and could not answer questions.

15. The prosecution closed its case.

16. The appellant was placed on his defence, and gave an unsworn statement. He testified how on 3rd August 2011 people came to his house, they did not find him. His house was leaking so he was sleeping at the neighbour's. They came there. They called out his neighbour. The neighbour went out. When he too went out to see what was going on, he was arrested by those who had come. He heard them ask asked PW1 why she had not arrested her son. At the GSU camp where they took him she was asked to bring the child victim. She never did. He was interrogated at the GSU camp. He told them he had not left his home that day. That he had lived with the PW1 for some time as her husband was away in Mauche and the story was he was he was responsible for her two pregnancies; that she was now trying not to be chased by her husband. That he had all along denied defiling the child. That even after the PW1 and her family disappeared, he had waited for them all this time for them to come and testify.

17. In her judgment delivered on 15th February 2016 the trial magistrate found that the evidence was consistent. The appellant was well known to the family. The sweets and *ngumu* were used to lure MC. That there was no eyewitness but the circumstantial evidence was over whelming. That the child was two years old and could not explain what had happened to her; that was penetrative sex between the appellant and the said MC and convicted him accordingly. On 17th February 2016 she sentenced the appellant to serve a prison sentence for the remainder of his life.

18. Aggrieved by the finding, the appellant filed an appeal, and amended Grounds of Appeal together with written submissions on 1st July

2019.

The Appeal

19. The Amended Grounds of Appeal were;

> 1. **THAT the learned trial magistrate erred in law and fact by failing to find that the prosecution did not discharge its duty of disclosure pursuant to Article 50 of the Kenya Constitution.**
>
> **2. THAT the learned trial magistrate erred in law and fact by failing to appreciate that the trial magistrate did not begin and end without undue delay pursuant to Article 50 of the Constitution of Kenya.**
>
> **3. THAT the learned trial magistrate erred in law and fact by failing to appreciate that the medical evidence adduced was insufficient and could neither support the charge not support a safe conviction.**
>
> **4. THAT the learned trial magistrate erred in law and fact by failing to appreciate the evidence adduced at the trial to an extend of misdirecting herself on material facts in her judgment.**
>
> **5. THAT the learned trial magistrate erred in law and fact by failing to observe the provisions of Section 169 of the Criminal Procedure Code when writing the judgment.**

20. In his written submissions the appellant pointed out that the complainant did not testify and neither did the prosecution avail any reasons for their failure to avail the complainant. That the trial magistrate misdirected herself as she ought to have declared the complainant a vulnerable witness as required by **Sections 31(1) (b) (2) (a) , 3, 4 (b) and 5 of the Sexual Offences Act** which he cited. That failure to call the complainant or comply with the provisions of the **Sexual Offences Act** violated his right to fair trial as provided for by **Article 50(1) of the Constitution.**

21. Secondly, he was arraigned on 10th October, 2011 but the trial never started until 4th June 2015, during the whole waiting period he was not issued with witness statements or documentary evidence, leading to further violation of his right to fair trial.

22. That as a defender of the Constitution the trial court failed in its duty as set out at **Articles 259 of the Constitution**, and **20(3)** of the same Constitution.

23. Regarding the medical evidence, the appellant submitted that it was insufficient to support the conviction. That the same was uncertain and vague and did not corroborate with that of the mother of the child who examined her immediately and did not notice anything of significance, except the child could not pass urine, that the child was probably suffering from some ailment that prevented her from passing urine. Finally, that the trial magistrate misled herself that there was evidence of vaginal penetration yet no such evidence was available.

24. That the trial magistrate did not set out the issues for determination as required by **Section 169 of the Criminal Procedure Code**.

25. The appeal was opposed by the state through prosecuting counsel; It was submitted that the mother of the child testified because the child could not testify for herself. That the child said it was Moses who hurt her when her mother found her crying. That the evidence of PW2 further confirmed the guilt of the appellant, all of which was corroborated by the doctor. That the prosecution had proved its case and the sentence was lawful as the age of the child was between two and three years old.

Analysis and Determination

26. This being a first appeal I am obligated to reassess the evidence and draw my own conclusions always bearing in mind that I never did hear or see the witnesses. See **Okeno vs Republic (1972) EA 372** where it was stated

> "The first appellate court must itself weigh conflicting evidence and draw its own conclusion (SHANTITLAL M RUWALA V R, [1957] EA 57). It is not the function of a first appellate court merely to scrutinise the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusion 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 witness."

27. I have carefully considered the evidence on record and the submissions. The issues for determination appear to be;

1. **Whether the appellant's right to fair trial was violated.**
2. **Whether the evidence on record was sufficient to support the charge and conviction.**
3. **Whether the trial magistrate failed to adhere to the provisions of Section 169 of the Criminal Procedure Code.**

28. The first issue is two pronged. The length of the waiting period, and the failure to call the complainant.

29. Article 50 of the **Constitution** provides;

"50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right—

(a) to be presumed innocent until the contrary is proved;

(b);

(c);

(d);

(e) to have the trial begin and conclude without unreasonable delay;

(f);

(g);

(h);

(i);

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;"

The appellant took plea on 10th October, 2011. He made seventy (70) appearances in court in a span of over three years **BEFORE** the trial took off on 4th June 2015.

30. The record shows, that he was in custody most of this time except for the period between **22nd February 2013 and 21st May 2014**, when he was out on personal bond; that he missed court at some time, a warrant of arrest was issued and on 11th September 2014, and his bond was cancelled. He was to remain in remand custody up to the end of the trial.

31. It is evident that it took more than three (3) years to start the trial. **Article 50 (2) (e)** guarantees an accused person the right to have the trial begin and conclude without reasonable delay. Is three years eight months reasonable for the case to start? Clearly not. For any person who has been charged with any offence, and who is in custody to have to wait for almost four (4) years for the first witness to be called is grossly unjust and a clear violation of the accused person's right to fair trial. In addition, there was ***not even a single explanation*** as to why the witnesses were not coming to court. The record only shows that they were not being traced. The investigating officer's feeble attempt to place blame on the appellant alleging that the appellant had threatened the family was not only ingenious but escapist. None of the witnesses told the court that they had not been coming to court because of threats. That issue never arose all the time the case was pending. Moreover, the appellant was mostly in remand. In fact, the prosecution at one stage sought to withdraw charges, a process that is riddled with blurriness and also took long, but never materialized to a withdrawal. After almost a year, the DPP sent instructions to the prosecution to locate the witnesses.

32. It can be understood why the trial magistrate was not in a hurry to have the matter terminated; the case involved a two (2) year old complainant whose parents were at some point, accused by the investigating officer, of not cooperating. That means that the I.O was not telling the truth when he said they were not traced. He knew where they were but they were not cooperating. Notice that at that time he never said that they were facing threats from the appellant. On the strength of his concerns the trial magistrate issued a warrant of arrest for the parents/guardians to be availed in court, nothing happened. When these witnesses finally appeared neither the prosecution nor the court made any effort to provide the accused with any explanation, these witnesses were not put to task as to her whereabouts, especially because at one point the investigating officer intimated that the accused had threatened them. None of them said that, none of them was asked whether this was the position or if that was true what action the investigating officer had taken against the accused person. Clearly therefore appellant's right to an expeditious trial was violated.

33. On the second prong of the first issue, the record clearly shows that the complainant did not testify. **Section 2 of the Sexual Offences Act** defines complainant, that

"Complainant " means, the Republic or the alleged victim of a Sexual Offence and in the case of a child or a person with mental disabilities, includes a person who lodges a complaint on behalf of the alleged victim where the victim is unable or inhibited from lodging and following up on a complaint of sexual abuse".

34. There is a difference between lodging a complaint and giving evidence. There is a difference between following up on a complaint and testifying. That is why this definition must be read with **Section 31** of the same Act which goes into details with regard to the manner of giving testimony by such complainants.

35. In this case, the complainant is alleged to have been two (2) years old. The trial magistrate never saw her, never spoke to her; there is nothing on record to show that this child existed. She was never presented to court. How then would the trial court ascertain that there was

indeed a child by the name MC***, who was unable to speak for herself?*** Yet, the mother and brother said she could speak. The mother said she could say “Moses”. The brother said she told him that Moses had pushed her down. The investigating officer too said he spoke to the complainant. Surely, in those circumstances the court had the duty to satisfy itself that indeed the child could or could not speak, and the least that was expected was to have the child presented to court. The worst thing about this scenario is that there was no mention anywhere by the prosecution that the child would not testify or the child could not be brought to court for any reason. The case just proceeded. Prosecution closed its case, and the same was treated as normal.

36. The appellant pointed out the failure by the trial court to comply with the law. **Section 31 of the Sexual Offences Act** exists to take care of this kind of situation. For the avoidance of doubt, it is quoted here;

> **“*S. 31.* (1) A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is -**
>
> > **(a) the alleged victim in the proceedings pending before the court;**
> >
> > **(b) a child; or**
> >
> > **(c) a person with mental disabilities.**
>
> **(2) The court may, on its own initiative, or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court’s opinion he or she is likely to be vulnerable on account of -**
>
> > **(a) age;**
> >
> > **(b) intellectual, *psychological or physical impairment;***
> >
> > **(c) trauma;**
> >
> > **(d) cultural differences;**
> >
> > **(e) the possibility of intimidation;**
> >
> > **(f) race;**
> >
> > **(g) religion;**
> >
> > **(h) language;**
> >
> > **(i) the relationship of the witness to any party to the proceedings;**
> >
> > **(j) the nature of the subject matter of the evidence; or**
> >
> > **(k) any other factor the court considers relevant.**
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> **(3)The court may, if it is in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon an intermediary to appear before the court and advise the court on the vulnerability of such witness.**
>
> **(4) Upon declaration of a witness as a vulnerable witness in terms of this section, the court shall, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures ;**
>
> > **(a) allowing such witness to give evidence under the protective cover of a witness protection box;**
> >
> > **(b) directing that the witness shall give evidence through an intermediary;**
> >
> > **(c) directing that the proceedings may not take place in open court;**
> >
> > **(d) prohibiting the publication of the identity of the complainant or of the complainant’s family, including the publication of information that may lead to the identification of the complainant or the complainant’s family; or**
> >
> > **(e) any other measure which the court deems just and appropriate.**
>
> **(5) Once a court declares any person a vulnerable witness, the court shall direct that an intermediary referred to in subsection (3), be appointed in respect of such witness unless the interests of justice justify the non-appointment of an intermediary, in which case the court shall record the reasons for not appointing an intermediary.**

(6) An intermediary referred to in subsection (3) shall be summoned to appear in court on a specified date, place and time to act as an intermediary and shall, upon failure to appear as directed, appear before the court to advance reasons for such failure, upon which the court may act as it deems fit.

(7) If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may -

(a) convey the general purport of any question to the relevant witness;

(b) inform the court at any time that the witness is fatigued or stressed; and

(c) request the court for a recess.

(8) In determining which of the protective measures referred to in subsection (4) should be applied to a witness, the court shall have regard to all the circumstances of the case, including -

(a) any views expressed by the witness, but the court shall accord such views the weight it considers appropriate in view of the witness's age and maturity;

(b) any views expressed by a knowledgeable person who is acquainted with or has dealt with the witness;

(c) the need to protect the witness's dignity and safety and protect the witness from trauma; and

(d) the question whether the protective measures are likely to prevent the evidence given by the witness from being effectively tested by a party to the proceedings.

(9) ………

(10) A court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary.

(11) …..

(12) …….

(13) An accused person in criminal proceedings involving the alleged commission of a sexual offence who has no legal representation shall put any questions to a vulnerable witness by stating the questions to the court and the court shall repeat the questions accurately to the witness."

37. The trial magistrate or the prosecution had the legal duty to have the complainant declared a vulnerable witness and then put in place the processes for taking her evidence due to her tender age. The mother could also not be treated as an intermediary without the court following the laid down processes.

38. It is also my view that in dealing with this case, the court, the police and the ODPP were obligated to cross-reference the various statutory provisions that exist for the protection of children. The complainant here by virtue of the offence that was allegedly committed against her became a child in need of care and protection vide **Section 119 (1) (n) of the Children Act**. The police officer bringing the charge sheet ought to have opened a **Protection and Care** file for the child victim, using the **P&C** forms available to all Juvenile Justice Agencies. This would have accompanied the "Adult Criminal File" to court. The trial magistrate proceeding under the provisions of **Section 4 of the Act, Section 78, and 120 would** then have requested for a Children Officer's Report on the victim for purposes of safeguarding the welfare of the child. This report would have contained details about the child, her home, parents etc. and any factors the court would be required to take into consideration for the preservation and safeguarding of the rights and welfare of the child as required by **Section 4 of the Children Act,** and the requisite provisions of the **Victim Protection Act.**

39. The police officer at the station while opening the protection and care file would have completed the Protection and Care Form.

40. All this would have captured the details of the child and her family, and would have assisted the court to see whether there was need to apply any of the measures under **Section 114 of the Children Act**.

41. The vulnerability of the child would be clear from all this and the proceedings under **Section 31** would just kick in. Even if the court was just to apply the requirements of **Section 31** by conducting the requisite inquiry, the court would have satisfied itself as to the vulnerability of the child and proceeded to declare the child vulnerable and appoint an intermediary. In this case, none of these processes was complied with and the trial magistrate proceed without ever seeing the child/satisfying herself that the child actually said the things attributed to her. By failing to do so the trial magistrate locked out crucial evidence to the prejudice of the appellant and effectively rendered the testimony of PW1 and PW2 hearsay with regard to what the child is alleged to have said to them, more so because PW1 did not testify as an intermediary.

42. Regarding the rest of PW1's testimony, she told the court that the child was walking with the legs apart but when she examined her private parts did not see anything peculiar. That the main complaint was that the child could not pass urine. That was the same day, a few hours after the alleged offence. The testimony of the clinical officer who examined the child on 8th October 2011, three days later, filled the

P3 on 7th November, 2011. First, there is no explanation why P3 was filled on 7th November 2011, if the examination was on 8th October, 2011.

43. I looked through the original file. I did not see the P3, Post Rape Care or treatment card. Nevertheless, the record bears PW3's testimony, it creates an unlikely scenario, so that except for the torn hymen which perhaps the mother could not have seen, the rest of the injuries have not been explained. She also concluded that it was possible that the child may have been defiled. For a two (2) years old baby to have been penetrated by an adult male, that should not have been in doubt. The evidence of PW2 was also doubtful. First, he confirmed that Moses had NOT duped them that there were some boys harvesting their grandmother's maize, he confirmed that he and his brother found two (2) boys having harvested their grandmother's maize and were roasting it. So, it was not just a dupe to get them off the scene.

44. Secondly, he said when they arrived from chasing the maize thieves, the accused took off. In the same breath, he said his brother saw the accused defiling the child. They were together with his brother when they went to chase the thieves and when they came back. So at what time did his brother see the accused defiling MC? This brother was conveniently not called as a witness. PW2 also said in the very same breath he said he saw the accused on top of the child. These are the two (2) witnesses who were supposed the be first hand witnesses yet their testimony as rendered is not reliable.

45. The trial court was concerned by the investigating officer's lack of preparedness in giving his testimony in this case. The record shows that though the investigating officer took over the case from another investigating officer, he did not make any effort to get in touch with the case so that he could give his testimony properly. He appears to have come only prepared to produce his colleague's statement – as P. Exhibit 4. On perusing the file, P. Exhibit 4 was not the investigating officer's statement but extracts from the Investigation Diary. This witness did not even know what he was producing in court.

46. For what it is worth the report indicates that on 6th October, 2011 at 2.40 a.m., PW1 and a village elder, by the name Stanley Ngetich reported that she had left the children playing. Upon return, she found MC crying. She was told by PW2 that the accused had lured the child and defiled her. She reported to the village elder who traced the accused and took him to GSU camp. The accused was brought to the police station at 4.00 a.m. by the officers from the GSU camp.

47. Even this report does not tally with the evidence of PW1 and PW2, that the accused had sent the other children away and was left with the minor. Here the report is that he lured her away from the other children and defiled her. There is no mention of her brother seeing the accused defiling her, or the accused being found with the child and running away. The village elder was also not called to testify.

48. From the foregoing, it has emerged that the appellant's right to an expeditious, fair trial was violated in this case.

49. With regard to the third issue the trial magistrate framed issues with regard the ingredients of defilement. She cannot be faulted for that.

50. With regard to the second issue it is evident that the prosecution failed to prove the charge against the appellant to the required standard and it is my view that the conviction was not safe.

51. To that end the appeal succeeds, the conviction is quashed, the sentence is set aside and the appellant is to be set at liberty unless otherwise legally held.

Dated, Delivered and signed at Nakuru this 9th day of April, 2020.

Mumbua T. Matheka

Judge

In the presence of; Via zoom

Edna Court Assistant

Ms Mburu for state

Appellant present