REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL APPEAL 30 OF 2017

TITUS MUTHUI MAITHYA...............APPELLANT

VERSUS

REPUBLIC..RESPONDENT

*(*Being an appeal from the Original Conviction and Sentence in **Kyuso Principal Magistrates**

Court Criminal Case No. 55 of 2016 by **Hon. B. M. Kimtai S R M** on **06/07/16)**

J U D G M E N T

1. Titus Muthui Maithya was arraigned in court for the offence of defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act.** After being taken through full trial he was convicted and sentenced to serve **twenty (20) years** imprisonment.

2. Aggrieved, by the decision of the court he appealed on grounds that; the trial was a nullity as the court failed to accord him services of an interpreter during the testimony of PW4 and PW5 and failure to conduct a voire dire examination upon PW1 who was a minor as the law demands; the burden of proof was not discharged and the provisions of **Section 169(1)** of the **Criminal Procedure Code** was not adequately complied with in relation to the defence statement.

3. Facts of the case were that the complainant, a minor aged **fourteen (14) years** with her younger brother were from fetching water when they encountered the Appellant who grabbed her and placed her by the river. Her brother on wanting to scream was slapped. He proceeded to violate her sexually. She later informed her aunt who reported the matter to the police. She was examined at **Tseikuru Hospital.** Investigations carried out culminated into the arrest of the Appellant who was charged.

4. When put in his defence the Appellant stated that on the date it was alleged he committed the offence he was doing some work for his cousin **Mutemi Musyoki.** That on the **23/2/16** the **Assistant Chief** rang him requiring his presence as he purchased a parcel of land from his sister. The Assistant Chief offered to give **Ksh. 150,000/=,** a sum his sister needed so as to purchase another parcel of land in Embu but he objected. Consequently his sister wanted to fix him. On the **3/3/16** he went to **Tseikuru town** where he saw his sister and was arrested as he entered a club. He denied having committed the offence.

5. The appeal was canvassed by way of written submissions. The State opposed the appeal. It was urged that the issue of lack of interpreter was not raised at trial, the case was proved to the required standard and that it was not demonstrated how **Section 169(1)** of the **Criminal Procedure Code** was not complied with. I have considered rival submissions filed.

6. This being the first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**

7. It is urged by the Appellant that when PW4 and PW5 testified in English there was a language barrier since he did not understand the language. This was in contravention of **Article 25 (c)** and **50 (m)** of the **Constitution.**

The alluded provisions of the law provide thus;

> ***"25. Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—***
>
> ***(c) the right to a fair trial; and***

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

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;"

PW4, No. 100882 P.C Dolphin Wangeci and **PW5 Eunice Kiema**, a clinician testified in English language. On both days a court clerk known as **Mulinge** was present in court. After both witnesses testified the Appellant cross examined them and subsequently testified in his defence. In the case of **Said Hassan Nuno vs. Republic (2010) eKLR** the Court of Appeal stated that:-

"... at each stage of the proceedings a court clerk was in attendance and we take judicial notice that one of the core duties of a court clerk is to offer interpretation services to accused or even to the court where it does not understand the language of the accused; or witness to the case."

The appellant could only have participated in the trial after **Mr. Mulinge** the court clerk discharged his duties of interpretation. In the result the Appellant was not prejudiced.

8. Further, in the case of ***George Mbugua Thiongo vs Republic, Criminal Appeal No. 302 of 2007*** the Court stated that:-

"For the court to nullify proceedings on account of lack of language used during the trial, it should be clear from the record that the accused did not at all understand what went on during his trial. That is not the case here. The Appellant cross examined all the witnesses with no difficulty. He had no difficulty in conducting his defence. It is clear that the appellant clearly understood the proceedings. We do not therefore consider that the omission by the learned trial magistrate to record the language occasioned a miscarriage of justice. In the circumstances, the proceedings that transpired cannot be declared a nullity."

9. It is also the Appellant's contention that the complainant was not taken through *voire dire* examination before testifying. That the court could only form the opinion if the complainant was a child of tender years with sufficient knowledge to testify after conducting the examination. A birth certificate Serial No. **2052506** issued to the complainant at birth was adduced in evidence. She was born on **13th March, 2002.** At the time of the offence she was of an apparent age of **fourteen (14) years**. The court appreciated the fact that the complainant was a minor and proceeded to have her sworn prior to testifying. In the case of **Johnson Muiruri vs Republic [1983] KLR 445** it was stated thus:-

"where in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth..."

In the case of **Kigageny Arap Korir vs Republic [1959] E.A. 92,** it was established that a child of 'tender years' means a child under the **fourteen (14) years.** Therefore it was not necessary for the court to conduct *voire dire* examination in the instant case.

10. To prove the case the prosecution was required to prove;

i. The age of the complainant;

ii. The act of penetration; and

iii. The identity of the perpetrator of the offence.

11. As aforesaid the age of the child was proved by production of the birth certificate.

12. The child was subjected to medical examination. PW5, the clinician stated that the complainant's hymen was broken. This was evidence of the child having been penetrated. The prosecution's evidence was that the perpetrator of the act of penetration was the Appellant. It is however contended that the age of injuries was **sixteen days** as stated by the clinical officer therefore the act could not have been committed on the date stated in the charge sheet. The act is stated to have been committed on the **13/2/16** and the child was examined on the **1/3/16.** This was within the time frame stated. The complainant testified that after the act she went home and waited for her aunt who was away in Embu that is when she reported the matter to her.

13. The complainant's evidence as to the identify of her assailant was corroborated by that of PW2 a minor aged **ten(10) years** who stated that when he screamed the appellant slapped her and threatened to kill him if he reported him.

14. In his defence the Appellant testified that he was working at **Nzambani** on the material day. What was not stated is how far **Nzambani** was from **Kaunguni village.**

15. The Appellant alleged that he disagreed with his sister over sale of land. However, when PW3 **FK** the complainant's aunt who reported to the police testified it was not insinuated that there was such a disagreement that would have made her cause the Appellant to be arrested. The learned trial magistrate who had the opportunity of observing the demeanour of PW1 and PW2 reached a finding that their evidence was consistent, sufficient and credible. They were not mistaken as to the Appellant's identify. Having reconsidered evidence on record I find that he did not misdirect himself in reaching a finding that the perpetrator of the act of penetration into the complainant's genital organs was the

Appellant.

16. Regarding the last ground of appeal, **Section 169(1)** of the **Criminal Procedure Code** provides thus:

> **"(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it."**

The alluded to provisions of the law requires every judgment to be written by the magistrate in charge of the Court and to contain points for determination, the decision thereon and the reasons for the decision. In his submission the Appellant did not state how the trial magistrate wrote the Judgment and what made it erroneous. The Judgment was written by the learned magistrate who heard the case, in English an language of the Court. It has issues for determination, the decision thereon and reasons for determination.

17. Finally, the sentence the learned magistrate imposed was the minimum prescribed sentence for the offence.

18. In the result the appeal is devoid of merit and is dismissed in its entirety.

19. It is so ordered.

Dated, Signed and **Delivered** at **Kitui** this **9th** day of **January, 2019.**

L. N. MUTENDE

JUDGE