REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT CRIMINAL APPEAL NO. 76 OF 2017

JOHN KING'ORI MACHARIA............APPELLANT

-VERSUS-

REPUBLIC...RESPONDENT

(Being an appeal against conviction and sentence of the judgment delivered on 29th November 2017 by Honourable Ruth Kefa (SRM))

JUDGMENT

1. The Appellant was charged with sexual assault contrary to Section 5 (1) (a) (i) (2) (sic) of the Sexual Offences Act No.3 of 2006. The particulars of the offence are that on the 19th day and 23 day of November 2015 at [Particulars withheld] area in Nyeri County the he unlawfully used his fingers to penetrate the vagina of DW a child aged five years.

2. In the alternative he was charged of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No.3 of 2013. That on the 19th day and 23rd day of November 2015 at [Particulars withheld] area in Nyeri County the Appellant intentionally touched the vagina of DW a child aged five years with his fingers.

3. He pleaded not guilty to both charges.

4. The prosecution called 4 witnesses and the defence 2. At the end of the trial magistrate found Appellant guilty of the main charge of sexual assault contrary to Section 5(1)(a)(i) as read with s. (2) of the Sexual Offences Act No.3 of 2006, convicted and sentence him to 20 years' imprisonment.

5. Aggrieved by both the conviction and sentence the Appellant filed this appeal on the following grounds: - That

> ***a) The trial magistrate erred in law and fact for failure to observe section 124 of the Evidence Act Cap 80 because there was no proof of penetration hence the case was not proved beyond reasonable doubt.***
>
> ***b) The trial magistrate erred in law and fact for failure to note that the Appellant did not undergo medical examination to ascertain he was the assailant.***
>
> ***c) The trial magistrate erred in law and in fact for failure to consider that the hymen can be broken in many ways such as sports, riding a bicycle, accidents and indeed some are born without one.***
>
> ***d) The trial magistrate fell into error for failure to consider that a crucial witness was not called contrary to section 150 of the Criminal Procedure Code.***
>
> ***e) The trial magistrate failed to consider that the prosecution witnesses were inconsistent and self-contradicting.***
>
> ***f) The trial magistrate erred in law and in fact in failing to consider the Appellant's defence that displace the prosecution's case.***
>
> ***g) The trial magistrate imposed a sentence that was manifestly harsh and excessive considering the circumstances of the case.***
>
> ***h) The conviction was improper and a miscarriage of justice.***
>
> ***i) The trial magistrate erred in law by failing to conduct a fair trial contrary to Article 50(2) of the Constitution.***

6. The appellant relied on his written submissions filed on 30th October 2018 and the additional oral arguments. The state opposed the appeal through Mr. Magoma who made oral submissions.

Appellant's submissions

7. The appellant argued that the case against him had not been proved beyond a reasonable doubt on several grounds.

The Medical Evidence

i. That prosecution failed to prove the age of the injuries hence it could not be stablished when the offence was alleged to have been committed. That the medical evidence in the P3 was inconclusive. He on **Samuel Ithagi Muhira v Republic Appeal No. 113 of 2015 (Unreported)** where the Court of Appeal held that a P3 form which fails to disclose the age of the injury in case of defilement cannot be relied upon to prove the guilt of the accused.

ii. That although the doctor PW5 testified that samples were taken for examination no Laboratory request form was produced hence any information on the PRC or P3 relating to such a report must have been doctored and he urged the court to disregard the same.

iii. That the absence of outpatient treatment documents was critical and weakened the case for the prosecution as there was no proof that the victim was taken to hospital 23rd as alleged. It was also the testimony of PW2 that the appellant was not arrested for a whole month from the date of the alleged offence because the child was undergoing treatment. This could only be proved by production of the outpatient notes.

iv. That the evidence of the doctor PW5 was clear that if the child had been defiled using fingers or a penis there would have been accompanying injuries of bruises laceration, bleeding or tears. That the broken hymen per se was not proof of defilement/sexual assault as the hymen could be perforated or lost through other means including trauma. That not everyone was born with a hymen.

v. That the whitish discharge was not examined to confirm whether it was from the victim's body or whether it was a foreign substance. No effort was made to connect it with the appellant upon his arrest to confirm whether the discharge could have come from himself. That the child was said to have an infection. That the appellant was not examined to check whether he was the one who had caused it. Neither was the panty examined, nor produced in court. That no spermatozoa were found in her genitalia.

vi. That for a child of 5 years to have gone through such a sexual assault, it would have been expected that the child would have pain and injury. But there was no evidence that the child had suffered any pain or injury

vii. He referred the court to the Moi Girls's High School case that was trending at some point, where he submitted that s. 124 of the Evidence Act had been used against them and here all the male suspects were made to undergo DNA testing to determine whether any of them had committed the offence, and the results had absolved them. His request in this case for his DNA testing was rejected

On Identification

He submitted:

i. That he was not properly identified. He relied on **Gabriel Kamau Njoroge v Republic (1982-88)1KLR Page 134** That the court relied on a single witness while there was another witness who the prosecution failed to call, the brother to the victim who was at the scene.

8. He relied on the case of **JMN v Republic CR Appeal No. 139, 140, 141** where it was held that failure on the part of the prosecution to call vital witness created doubts leading to the conclusion that the case was not proved beyond a reasonable doubt.

On the Inconsistencies in the Evidence;

i. He submitted that the child had been coached by the mother and this came out when she stated that she was told by her mother to talk to court which meant that the incident did not even occur and the case was fabricated against him.

ii. That the child's mother had testified that she used to go to tuition from Monday to Sunday, yet no explanation had been made as to how she was at home on the material day.

iii. That the trial magistrate created evidence in the judgment that was not adduced during the trial such as stating that PW1 had stated that the Appellant had been left alone with the complainant in the house. Also that the doctor never testified that a broken hymen is not normal for children at the age of the complainant.

iv. That the Investigating Officer lied that he the appellant had disappeared yet he was arrested on 27th November 2015 from the same plot where he lived with the complainant and PW2 , and all this time he was going on with his usual chores

On his Defence

i. That he had raised an alibi defence which the court had not considered and which the state had not displaced its burden as required

by s. 212 of the CPC. That his defence was supported by the evidence of the Doctor PW5.

9. He relied on **Kimotho Kiarie v Republic CR Appeal 93 of 1983** where it was held that a court ought to give cogent reasons for rejecting a defence as provided under section 169(1) of the Criminal Procedure Code.

On the sentence

10. That the sentence of imprisonment for 20 years meted on him was unfair taking into consideration the provisions of section 5(1)(a)(i) providing for the minimum sentence of ***ten years."***

As a first offender he should have benefitted from minimum sentence.

On Language

11. That his rights to a fair trial were violated at the end of the trial when the court failed to provide interpretation during delivery of Judgment, as a result of which, because he never followed the proceedings, he did not give his mitigation. As a result, he was prejudiced.

The Respondent's Submissions.

Mr. Magoma submitted;

i. On the evidence it was argued that it was well corroborated, and the appellant was properly identified

ii. That the medical evidence as produced by PW3 proved that the offence had been committed, and that the child had been put on medication.

iii. That the age of the child was proved by birth certificate

iv. That the appellant was given the opportunity but failed to mitigate

v. That the conviction and sentence were proper

Issues for determination

12. In determining the appeal, I reiterate that role of a first appellate court to subject to a fresh evaluation and analysis the entire evidence adduced in the court below bearing in mind the lack of opportunity to see and hear the witnesses to test their demeanor as was set down in the Court of Appeal case of **Okeno V. R. (1972) E.A. 32** thus: -

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic (1957) E.A. 336) and 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 Vs. R. (1957) E.A. 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 finding and conclusion; 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) E.A. 434)"***

13. The appeal raises the following issues for determination: -

a) Whether the prosecution proved penetration.

b) Whether the appellant was identified properly

c) Whether the appellant's alibi defence was properly considered.

d) Whether the case for prosecution was proved beyond a reasonable doubt

e) Whether sentence was harsh in the circumstances.

After the voire dire the court formed the opinion that the child did not understand the solemnity of the oath and decided that the child would testify unsworn. She testified that on 23rd November 2015 she was at the plot where they live with the accused whom she named as King'ori. That at 10:30am he

> *"put his finger in my private part. "he then put his mkia…which he uses for urinating he puts here* (Court: Minor points at her private parts) *I felt bad …I was left alone by mother. King'ori told me to go and play. He did it on the grass. Outside the store. I later told my mother she took me to hospital. I was treated".*

14. On cross examination she told the court that her mother had told her that morning to talk to the court. That on 23rd they went to the aunt's place. On re exam she said that Nebster her brother had gone for tuition and that they went to the aunt's on a different day. That the incident happened on Monday and Saturday but she only told her mother about one.

15. Her mother was PW2. She testified that on the plot where they lived there were 7 houses but only three were occupied, ne herself, the other by Kingo'ri the accused. The 3rd tenant was away. She left the child PW1 alone while she went to hawk her CDs, and her other child went to tuition. She returned at 6:30pm and found N wailing outside the gate, and the child sitting close to the door. That the child told her that

> *'D of house no. 1 had removed her clothes and put his finger and his mkia at the store. I checked her blue pant and biker and they were dirty and smelly. I decided to report to the police.*

She said that the child was treated for a whole month. That the child said the accused had done it to her on another day, on Saturday.

16. On cross examination she said that each tenant had their own gate key. That she did not know whether the other neighbour was around during that time. That the child identified him. That on the material date she left the child at home and the appellant was there washing. That the stains on the child's pants were sperms. That the appellant was not arrested immediately because the child was undergoing treatment. That even 'after the alleged assault the appellant was just within.

17. Two Doctors testified. PW3 and PW5.

18. PW3 said the patient was 5 years old. He filled the P3. He said the pant, was stained and smelly. Genitalia was normal. Hymen was broken. There was whitish vaginal discharge. Swabs were taken and revealed pus cells. No spermatozoa. The approximate age on injury was unknown.

19. PW5 produced a P3 and PRC form. He said he did not know when the hymen was broken. He said it was only complete penetration in sexual intercourse that could cause a broken hymen. He opined that if there was trauma, there would have been bruises around the genital organ. That for a minor of 5 years it was unusual to have a broken hymen. On cross examination he reiterated that if the hymen was broken through penetration, the child being five years old, there would have been bruises around the genitalia.

20. PW4 was the police officer who investigated the case. He was assigned the case on 24th November 2015. He recorded statements, took over the smelly pants and charged the accused person. He did not produce the pants. On cross examination he said that the appellant had disappeared for some time.

21. The appellant gave a sworn testimony in his defence and called one witness. He defence was that he was at the home of DW2 on the 15th November 2015 where they were constructing his house. He would be there from 8:00am to 5:00pm. He would then go home. That on 21st November he and the PW2 quarreled because he wanted the keys to their common water meter so that he could fix their water pipe which had burst. When he asked her for the keys she threw on the ground. Apparently they had their own disagreements prior to that. She had removed their common clothes line which the land lord had fixed them. He also enquired why she was closing their gate as early as 6:00pm forcing him to jump over when he came late. This provoked the insult 'kihii' (uncircumcised boy) from her to him. She told him that since her husband was a police officer she would ensure he was arrested. That the child was never left alone and was always left with her brother N.

22. From the evidence before me it is evident that child said that the accused not only inserted his fingers inside her vagina but that he proceeded to insert his mkia, the urinating one- the penis inside her. According to her initial testimony it happened once but when she was recalled, she stated it happened twice but for some reason she chose to report one incident only to the mother.

23. It was submitted that the child was coached because she said her mother had told her to talk to the court. I do not think that that statement per se is proof of coaching. While that is possible considering the age of the child, the child simply said she was told to talk to the court. It could mean anything.

24. The appellant went at great lengths to analyse the evidence the prosecution availed to prove penetration. While medical evidence is not necessary to prove penetration of defilement, its relevance cannot be discarded or wished away. That is why we say that the victim be taken to hospital as soon as possible, proper examination and tests be taken, not only for purposes of evidence but treatment of the victim This was a 5-year-old. According to the evidence the accused had put his fingers in her vagina and also penetrated her with his penis. That was her testimony and that testimony was confirmed by the mother. But the question is where was the evidence of the penetration? According to the prosecution, proof was in the broken hymen. However, it is clear from the evidence of PW5 that for a child of that age, there would be other evidence other than a broken hymen, because such penetration whether by fingers or penis would be traumatic. The genitals were normal. That was abnormal, as his opinion was that there would have been some bruises. The anal area was normal. So what evidence is there to support the child's narrative that she was penetrated with fingers and a 'mkia' of an adult man? Such lack of this supporting evidence, of pain, of injury negates the child's testimony.

25. The appellant had a point, that it was necessary in the circumstances to establish the source of the whitish smelly discharge which the PW2 testifies were sperms. How did she know? Whose sperms were they yet the medical examination stated that no spermatozoa were found? Of course it not necessary to have spermatozoa to prove penetration but where a witness testifies it was there and another says it wasn't, then a material contradiction arises. So does when the child says she was penetrated with fingers and a penis, and there is no evidence of such. It raises doubt as to whether the offence was committed in the manner alleged. PW4 chose to charge the accused with sexual assault despite the fact that the child said she was defiled and also assaulted. No explanation was given for this except that he did not have any evidence to support the charge.

26. An examination of the PRC raised concerns as raised by the appellant. First it is a carbon copy. Nothing was said about it being a carbon copy or the whereabouts of the original during the trial. It also contains some additional information in original ink whose source was not mentioned at the trial. Again nothing was said about that. It speaks about the child being penetrated with fingers and the accused touching her vagina with his penis on the 21st November 2015 and the child being taken to hospital on the 23rd November. The P3 says that date of offence is 21st November 2015 at an unknown time but report was made on 23rd November 2015. The child alleged to have been defiled by a person well known to her. She and her mother specified the time as 10:30am. It is noteworthy that when the accused asked the IO about the variance in these dates the IO said something vague about a mistake in the calendar. This is not just a mere variance in dates. When looked at together with all the other evidence including the appellant's statement of defence, it goes to the root as to when the offence is alleged to have been committed. So when was this committed? The child said 23rd, the mother said the 23rd, the I.O said the 23rd. However, the police and medical records said the 21st. This raised serious concerns as to when the offence was committed. The same was made worse by the fact that the doctor could not ascertain the age of the alleged injury(breaking of the hymen)

27. There is no evidence led about the alleged 1st incident and how, when it happened save foe a vague mention that the appellant did 'it' twice to the child, on a Monday and a Saturday. There was the other child N who arrived before the mother on the material day. Why was he not called yet he may have witnessed something related to the incident e.g. as to whether the appellant was actually at home or the other neighbor was present, or whether he had gone for tuition or was at home with the sister as alleged by the appellant. What kind of tuition would an 8year old be attending during school holidays?

28. The appellant was not a stranger to the child and that is admitted by the appellant. He said they were neighbours for two months prior to these allegations. PW2 testified that he never went anywhere between the alleged date of the offence and the date he was arrested. However, the IO testified that he had disappeared. Another material contradiction in the case for the prosecution. Even the delay in the arrest of the appellant was not explained as the child reported the incident the same day it happened, the child was taken to hospital the same day but appellant was arrested much later. The appellant was at home all this time; it cannot be true that the delay in his arrest because the child was undergoing treatment. There is no evidence that the child was undergoing treatment. It does not add up

29. The record does shows that the appellant did not offer any mitigation. On the day the Judgment was delivered the record does not show whether there was interpretation and that could explain why the appellant did not say anything. Being a first offender it was important also for the court to explain the enhanced sentence. The fact that he had not tendered any mitigation cannot be a good reason to enhance the sentence from the minimum to double the minimum. The Sentencing Policy Guidelines exist to offer a guide in such matters so that the sentences coming from the hands of courts are founded not only on the law as they must but on the circumstances of the case. A pre-sentence report with a victim impact statement would be a good place to start. It locates the crime and its impact on the community of the offender, the offender, the community of the victim and the victim. The court is the wiser with the report. Though not binding, it is a necessary guide.

30. From the foregoing it is my view that the appellant was well known to the complainant so the issue of identification would not have arisen. However, the identity the appellant appears to be addressing in his submissions is not just the physical identity, but identity based on forensic investigations. The argued that there were body fluids on the child which, if properly examined could have given a clue as to actual culprit. That did not happen. The investigators failed to carry out that important investigation especially in such a case where the rest of the evidence was weak. Even with section. 124 of the Evidence Act in place this case eventually required more evidence to support the case for the prosecution.

31. In conclusion, I have examined the evidence, the submissions and the authorities cited. I have demonstrated from the analysis that the case for the prosecution against the appellant was weak, with material contradictions and inconsistencies unexplained by the prosecution which rendered the conviction herein unsafe.

32. The appeal succeeds, the conviction is quashed. The sentence is set aside and the appellant is at liberty unless otherwise legally held.

Dated, delivered and signed at Nyeri this 7th March 2019.

Mumbua T.Matheka

<u>Judge</u>

In the presence of:-

Court Assistant: Juliet

Magoma for state

Appellant –present

Mumbua T.Matheka

Judge

7/3/19