REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL CASE NO. 1 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

SAMUEL KIBET KOECH.....ACCUSED

(An Appeal from the Judgment of the Resident Magistrate Honourable E. Kigen in Eldoret Chief Magistrate's court Criminal Case No. 4473 of 2014 dated 12th January, 2018)

JUDGMENT

SAMUEL KIBET KOECH, the appellant herein was charged in the main count with the offence of defilement, contrary to *Section 8(1)* as read with *Section 8(2)* of the *Sexual Offences Act No. 3 of 2006.*

The particulars of this offence being that on the 3rd day of July 2014 in Eldoret East District, within Uasin Gishu County, the appellant intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of *MJ*, a child aged 5 years.

In the alternative the appellant faced a charge of indecent act with a child contrary to *Section 11(1)* of the *Sexual Offences Act, No. 3 of 2006*. The particulars hereof are that on 3rd day of July 2014 in Eldoret East District, within Uasin Gishu County, the appellant intentionally caused his genital organ (penis) to come into contact with genital organ (vagina) of *MJ*, a child aged 5 years.

On 23rd October 2014 the trial magistrate, *Hon. T.Olando* (RM), conducted voire dire on the complainant and ruled that:-

"*The minor is competent. She can give evidence but unsworn".* However immediately after she introduced herself she broke down crying and was stepped down. Two other witnesses, the complainant's teacher and mother, were subsequently heard.

Their evidence is that *MJ* was aged then 5 years and was schooling at [Particulars Withheld] primary school in Kipkabus. She was in Top class. On 3rd July 2014 PW-2 was in class at 9.30 a.m. The complainant knocked on the door and got in. PW-2 asked her why she was late and she started crying. PW-2 calmed her down and still asked her why she was late. She replied that it was because of *Kibet*. The teacher asked her who was *Kibet* and what he had done. She responded that *Kibet* found her on the way and pulled her to the bush where he laid on her. PW-2 led her to the Head teacher who sent some pupils to call the complainant's mother (PW-3) to the school. She went and was informed about the defilement claim. They all went to Kaptagat police station and reported the case. Their statements were recorded. PW-3 was given a P-3 form and referred to Moi Teaching and Referral Hospital.

Some two AP's interrogated the complainant about the incident. They went with the complainant to look for *Kibet*. At around mid-day *Kibet* was traced and the complainant was able to identify him as the assailant. He was arrested and taken to the police station.

The foregoing evidence was taken by *Hon. T.Olando.* Thereafter it was mentioned before several other magistrate's before it was taken over by *Hon. E. Kigen* (RM) on 5th July, 2017.

On 24th July, 2017 another witness (PW-4), a doctor, was heard before her. Before doing so, the provisions of *Section 200 (3)* of the *Criminal Procedure Code* was not complied with. The doctor who gave evidence produced the P3 form on behalf of its maker, *Dr. Yatich*. The adduced evidence is that the complainant's private parts were swollen and the doctor concluded that she had been defiled. PW-5 produced the complainant's clinic card which shows that she was born on 22nd March, 2009.

The complainant was recalled on 31st July 2017. By that time she was schooling at [Particulars Withheld] primary school, in class two. She was aged 8 years then. The magistrate subjected her to another voire dire, after which she ruled that:-

"the minor is aged 8 years old and due to tenderness of her age she'll give sworn evidence".

In her evidence she said she knew the accused person. He is a close neigbour. He pulled her to the bush on 3rd July, 2014, removed her clothes and laid on her. He removed his penis and inserted it into her vagina.

The prosecution closed their case and the court found that the appellant had a case to answer. The appellant opted to give sworn evidence and call no witness. His defence is that he was born in 1999 and was a student at [Particulars Withheld] primary school, in class 6. At the time of the alleged offence he was 17 years old. The complainant was known to him as a neighbor. On the alleged date of the offence he was in school and did not meet the complainant. He did not defile her. A five years old girl cannot be defiled without breaking her virginity. The complainant's mother had a grudge against him. She alleged he had taken her phone but she later recovered it. They were not in talking terms.

He called one more witness on 14th November, 2017, who is his father. The father said he, the appellant, was born in the year 2000. On 3rd July, 2014 the appellant had gone to school. He learnt later that he had been accused. On his part he had no grudge with PW-3 who is his neighbor.

The trial magistrate evaluate the evidence found the appellant guilty on the main count and sentenced him to serve life imprisonment.

The appellant dissatisfied with the said conviction and sentence, appealed to this court on the grounds that:-

1. The trial magistrate failed to consider that he was a child at the time of the alleged offence.

2. The adduced medical evidence did not support the offence convicted of.

3. The trial magistrate failed to order for his age assessment.

4. The evidence on his identification was unreliable and unbelievable.

5. On sentence, it was weighed that he is a first offender.

6. His defence was unfairly ignored.

7. Provision of Section 200 (3) were not complied with.

I have re-evaluated the charges, evidence adduced, trial procedure, judgment and sentence passed, as well as the grounds of appeal raised. I have as well considered submissions by both sides.

It is true as indicated by the state prosecutor in her submissions that the record does not show the provisions of *Section 200 (3)* of the Criminal Procedure Code was complied with, when the partly heard case was taken over by another magistrate. Though she argued that such did not prejudice the appellant, the courts have held in similar situations that such prejudices the accused in the trial and failure to comply with the mandatory provisions of *Section 200 (3)* of the *Criminal Procedure Code* renders the trial a nullity.

In ***Ndegwa –vs- R (1985) KLR 535***, the court held that:-

> ***"...No rule of natural justice, no rule of statutory protection, no rule of evidence and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration..."***

In ***Richard Charo Mole –vs- Republic [2010[eKLR*** the court observed that:-

> ***"Section 200 (3) (Supra) requires in mandatory tone that the succeeding magistrate shall inform the accused person of the right to demand a recall of any or all witnesses to be reheard by the succeeding magistrate. The duty is reposed on the court and there is no requirement that an application be made by the accused person. The failure to comply with that requirement would in an appropriate case render the trial a nullity."***

In this case the said section was not complied with which renders the trial a nullity.

Given the seriousness of the charge and that the success of the appeal is based on a technicality, I do find that a retrial before a different magistrate will serve the ends of justice. I there do order a retrial before a different magistrate.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 7th day of March, 2019.

In the presence of:-

(1) The Appellant

(2) Mr. Mwaura for State

(3) Mr. Mwelem - Court assistant

Court:-

This matter be mentioned before the Deputy Registrar for a mention date before the Chief Magistrate’s court.

S.M GITHINJI

JUDGE

7/3/2019