REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

HIGH COURT CRIMINAL APPEAL NO. 22 OF 2019

DAVID MUCHIRA MBURU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of Hon. S. Ngii

dated 20th September 2013delivered in CR.C No. 23 of 2013 at Wanguru)

JUDGMENT

1. The appellant, *David Muchira Mburu*, was charged, tried and convicted of the offence of defilement contrary to *Section 8 (1)* as read with *Section 8 (2)* of the *Sexual Offences Act*. The particulars of the offence alleged that on 7th and 8th January 2013 in Kirinyaga County, he intentionally caused his penis to penetrate the vagina of *DWK*, a child aged 7 years and 9 months.

2. Upon conviction, the appellant was sentenced to serve life imprisonment which is the mandatory sentence prescribed under *Section 8 (2)* of the *Sexual Offences Act* (hereinafter the Act).

3. The appellant was aggrieved by his conviction and sentence hence this appeal. In the grounds encapsulated in his petition of appeal filed on 2nd November 2013, the appellant mainly complained that he was wrongly convicted as the evidence adduced by the prosecution was insufficient to sustain a conviction and that the learned trial magistrate erred in failing to appreciate that crucial witnesses were locked out of the trial. He also complained that the trial magistrate did not fully evaluate his defence.

4. When the appeal came up for hearing, the appellant chose to entirely rely on his written submissions which he filed in court on 12th July 2017. The prosecution also relied on written submissions which were filed on 12th September 2019.

5. In his submissions, the appellant denied having committed the offence as alleged and asserted that the evidence adduced by the prosecution did not prove the offence against him beyond reasonable doubt. He submitted that PW1 in her evidence identified the person who had sexually assaulted her as *Mose or Muche* which names did not refer to him. He urged the court to note that the offence was allegedly committed at night at 8pm and the circumstances then prevailing were not conducive to a proper and positive identification of the culprit. He also contended that the medical evidence relied on by the prosecution was not sufficient to prove penetration beyond reasonable doubt and that had the learned trial magistrate considered his defence, he would have found that it displaced the prosecution case and that he was thus entitled to an acquittal. He implored the court to find merit in the appeal and allow it.

6. The appeal is contested by the respondent. In her brief submissions, learned prosecuting counsel *Ms Muthoni* asserted that the appellant was properly convicted and sentenced as the prosecution had proved the charges against him beyond any reasonable doubt. She submitted that the appellant was positively identified as the culprit who defiled the complainant not once but twice and that there was evidence to show that the appellant was known to the victim before the date the offence was committed; that as the medical evidence adduced by PW5 proved that the complainant had been defiled, the appeal lacked merit and ought to be dismissed.

7. This is a first appeal to the High Court. I am fully aware of the duty of the first appellate court which is to revisit and to thoroughly reconsider all the evidence adduced before the trial court to draw its own independent conclusions regarding the validity or otherwise of the trial court's decision. In so doing, I should be careful to remember that unlike the trial court, I did not have the benefit of seeing or hearing the witnesses. ***See: Okeno V Republic [1972] EA 32; Kinyanjui V Republic[2004]2 KLR 363.***

8. I have carefully considered the grounds of appeal, the submissions filed by the parties as well as the evidence on record. I have also read the judgment of the learned trial magistrate. Having done so, I find that the key issue for my determination in this appeal is whether the

learned trial magistrate erred in his finding that the prosecution had proved the charges preferred against the appellant beyond any reasonable doubt and in consequently convicting him as charged. If my answer to this question will be in the negative, then I will proceed to determine whether the sentence meted out against the appellant was lawful.

9. In order to resolve the first issue, it is important to summarise the evidence that was presented before the trial court. The prosecution in support of its case called a total of five witnesses. The complainant testified as PW1. After a brief *voire dire* examination, she narrated how on 7th January 2013 at about 8pm, a man she identified as *Muche* found her playing with another child called *LW* and took her to a shop. He bought her some sweets after which he pushed her to the shop's corridor, undressed her and defiled her.

10. After the ordeal, she dressed and went back home. She identified that man to be the appellant in this case. The appellant allegedly defiled her for the second time the following day at around the same time (8pm) after he ordered her to lie on the grass near *Sam's* shop. After she went home that night upon enquiry by her mother (PW2) and father (PW3), she told them what the appellant had done to her. PW2 and PW3 reported the matter to Wanguru Police Station after which the appellant was arrested by PW4.

11. After reporting the incident to the police, PW1 was issued with a P3 Form and was treated at Kimbimbi Hospital on 9th January 2013. On the same date, she was examined by PW5 *Lucy Wangui Kariuki,* a clinical officer who also completed the P3 Form. She produced the treatment notes and P3 form as Pexbts 1 and 2 respectively.

12. In her evidence, PW5 recalled that upon examining PW1, she found a lacerated wound around her vaginal canal and noted that the hymen was freshly broken. There was a smelly discharge from her genitalia. She concluded that PW1 had been defiled.

13. In his defence, the appellant decided to give an unsworn statement. He did not call any witness. In his brief statement, he narrated how he was arrested and denied having committed the offence as charged.

14. After analysing the evidence tendered in this case, I have no doubt in my mind that the complainant was indeed defiled as evidenced by the medical evidence adduced by PW5. The question I must now answer is whether the prosecution had adduced sufficient evidence to prove beyond any doubt that it is the appellant who had committed the offence.

15. In his judgment, the learned trial magistrate after analysing the evidence on identification tendered by the prosecution made a finding that the appellant was positively identified by PW1 as her assailant. He expressed himself in the following terms:

> ***"Despite the fact that, the complainant, was not asked by the prosecution to clarify whether or not at Mama Lucy's home, Mama Bancys kiosk, Sams shop and at the corridor where her sojourn's with the "Muche" began paused and climaxed respectively there were any sources of light which would enable her see "the Muche" clearly. I have no doubt in mind that following the prolonged friendly interaction between the complainant and "the Muche" the complainant was able and in a position to identify the person she was dealing with on both occasions."***

16. The learned trial magistrate appreciated that the prosecution did not adduce evidence to prove that there was any source of light at the places where the complainant allegedly interacted with the appellant despite the fact that the offence was committed at night.

17. As correctly pointed out by the trial court, this case turned on the evidence of PW1 since no independent witness was called to support her identification of the appellant as her assailant. It is trite law that evidence of identification at night especially by a single witness must be treated with great caution because if the circumstances prevailing at the time of the commission of the offence are not conducive to a clear and positive identification, mistakes are likely to occur.

18. In ***R V Turnbull & Others, [1976] 3 All ER 549***, the court held that mistakes can be made even in the recognition of friends and close relatives and that an honest witness may nonetheless be mistaken. This position was further reiterated by the Court of Appeal in ***Kiarie V Republic, [1984] KLR 739*** where the court stated as follows:

> ***"It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be water tight to justify a conviction."***

Again, in ***Wamunga V Republic, [1989] KLR 424***, the Court of Appeal had the following to say on identification:

> ***"It is trite law that where the only evidence against a defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction."***

19. It must be noted that in this case, the prosecution was not relying on the evidence of identification by a number of witnesses but as appreciated by the trial court, the evidence turned on the evidence of a single identifying witness.

The trial court properly addressed its mind to the general rule that such evidence ought to be examined with great care. The trial court correctly referred to the Court of Appeal decision in ***Maitanyi V Republic, [1986] KLR 198*** where the court emphasized this principle and expressed itself thus:

> ***"Subject to well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it***

is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.''

20. In this case, though PW1 claimed to have identified or recognized the appellant as her assailant, she did not disclose in her evidence how exactly she was able to identify or recognize the appellant. She did not specify whether it was through visual identification, voice identification or any other form of identification. Given that there was no evidence to prove that there was any kind of light in any of the places where the complainant said she interacted with her assailant, it is difficult to establish how PW1 was able to see and identify her assailant. If the identification was made through voice recognition, for instance, such identification would be most unreliable since no evidence was adduced to prove that the complainant previously knew the appellant well enough and was actually familiar with his voice.

21. In this case, the trial magistrate held that owing to the prolonged friendly interaction between the complainant and *"Muche"*; the complainant was in a position to identify the person she was dealing with on both occasions. My analysis of PW1's evidence does not show that there was any prolonged friendly interaction between PW1 and her assailant. . Her evidence was simply that the said *"Muche"* would find her playing, call her to a shop near where he defiled her after which she would immediately dress up and leave.

22. In my view, considering that the offence was committed at night and there was no evidence that there was any source of light at any place where PW1 claims she interacted with her assailant, it is my finding that the circumstances prevailing at the time the offence was committed were not conducive to a correct, clear and positive identification of the victim's assailant.

23. The fact that PW1 identified the appellant at the dock as the person who had defiled her without explaining how she was able to make that identification is not sufficient to form the basis for a safe conviction. In the absence of any evidence that the scene of crime was illuminated by sufficient light and considering that the offence was committed at night, the possibility that the complainant could have mistaken another person for *"Muche''* cannot be overruled. It is my finding that the complainant's evidence on identification amounted to dock identification which has been held to be worthless unless preceded by solid previous identification- ***See: Ajode V Republic [2004] 2 KLR 81***.

24. After evaluating the evidence on record, I have come to the conclusion that the circumstances prevailing in this case were not favourable to an identification that was credible, reliable and one that was free from the possibility of error.

25. It was the duty of the prosecution to prove the charges preferred against the appellant beyond any reasonable doubt. The appellant in his defence denied having committed the offence. He did not have any duty to prove his innocence.

26. For the foregoing reasons, I am satisfied that the prosecution failed to prove beyond any reasonable doubt that it is the appellant who had sexually assaulted the complainant as alleged. The learned trial magistrate casually interrogated the evidence on identification and came to the erroneous conclusion that the appellant was positively identified as the complainant's assailant. For the foregoing reasons, I find merit in the appeal against conviction and it is hereby allowed.

27. The appeal against conviction having succeeded, it follows naturally that the appeal against sentence must also succeed since the conviction on which sentence was anchored must now be quashed. The appeal against sentence is consequently allowed.

28. In sum, the appeal is allowed in its entirety. The appellant's conviction is quashed and the sentence set aside. He shall be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED and SIGNED at NAIROBI this 8th day of October 2019.

C. W. GITHUA

JUDGE

DATED and DELIVERED at KERUGOYA this 11th day of October 2019.

L. W. GITARI

JUDGE