REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 205 OF 2015

VINCENT KIPKURUI SANG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal arising from judgment of the Resident Magistrate Hon. F. Muguongo delivered on 10th September 2015 in NAKURU Cr. Case No. 156 of 2014.)

JUDGMENT

1. The appellant was charged with **Defilement** Contrary to Section 8(1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the 2nd of July 2014 in Njoro Sub County within Nakuru County, unlawfully and intentionally committed an act by inserting his male genital organ (penis) into the vagina and anus of **MC** a child aged 4 years which caused penetration.

2. He also faced an alternative charge of **indecent act** with a child contrary to **Section 11** of the **Sexual Offences Act No. 3 of 2006**. The particulars being that on the 2nd of July 2014 in Njoro Sub County within Nakuru County, unlawfully and intentionally had an indecent act with a child namely **MC**a child aged 4 years by touching her private part namely vagina and anus.

3. The case proceeded for full trial, the prosecution called 7 witnesses in support of their case while the appellant gave unsworn defence without calling any witness. By the judgment delivered on 10th September 2015 the trial magistrate found the appellant guilty and convicted him of the offence of defilement. He was sentenced to life imprisonment.

4. The appellant being aggrieved and dissatisfied with the conviction and sentence, filed this appeal through a Petition of Appeal dated 14th September 2015 challenging the conviction and sentence on six grounds and later filed amended grounds set out hereunder:-

> i. That the learned trial magistrate erred in law by declaring the star witness PW1 a vulnerable witness but failed to follow the procedure laid down under Sections 31(40), 31(a) to (e) and 32 of the Sexual Offences Act No. 3 of 2006 thus prejudicing the appellant.
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> ii. That the learned trial magistrate erred in points of law and facts by holding that the case for the prosecution was proved against the appellant whereas the age of the complainant was not properly ascertained to justify the charges or the sentence passed.
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> iii. That the learned trial magistrate erred in points of law and facts by holding that the case for the prosecution was proved against the appellant whereas penile penetration was not adequately proved.
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> iv. That the trial magistrate erred in points of law and facts by failing to realize that the identification of the Appellant was erroneous, the case was riddled with material contradictions which were enough to displace the prosecutions narrative.
>
> v. That the learned trial magistrate erred in law by failing to critically analyse and give objective analysis to the appellants defence.

5. The state opposed the appeal on both conviction and sentence. He submitted orally on 10th July 2019 while the appellant relied on his grounds of appeal and his submissions filed.

APPELLANT'S CASE

6. The appellant submitted that the ingredients of defilement (that is age, penetration and proper identification of the perpetrator) were not

proved by the prosecution; that his case was prejudiced and his constitutional right as enshrined in **Article 50(1) (2) (k**) of the **Constitution 2010** violated as the trial magistrate failed to follow the procedure laid down under **Section 31 (a) to (e), 31(4)** and **32** of the **Sexual Offences Act**. He submitted that after the complainant being declared vulnerable witness, he was denied a chance to cross examine her; he submitted that the trial court should have called an intermediary and allowed the appellant to cross examine the complainant through him.

RESPONDENT'S CASE

7. Mr. Limo for the state submitted that the appellant was positively identified by the complainant since the incident occurred at 5 p.m. and while the complainant was admitted in hospital she informed her father that the person who had defiled her he looks like him and with the help of the mob the appellant was arrested and he confessed of having defiled the complainant.

8. He submitted that the prosecution produced medical records being the Post Care Rape form and P3 form by the medical doctor and the same were collaborated by the complaint and that the trial magistrate considered the appellant's defence as at page 22 & 23 of the proceedings; that the court keenly analysed defence of the accused and the said ground cannot therefore stand.

ANALYSIS AND DETERMINATION

9. I first wish to point out that my duty, as the first appellate court is to re-evaluate evidence adduced in the lower court and arrive at an independent determination. This I do with the knowledge that unlike the trial court, I never got the opportunity to take evidence first hand and make observation on demeanour of witnesses; I will therefore give due allowance. The duty of the first appellate court is set out in the case of **OKENO VS REPUBLIC [1972] EA 32** where it was stated as follows:-

> **"The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 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 findings and conclusions; 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] EA 424.)"**

9. Further, in **Pandya -Vs- Republic [1957] EA 336** Court of Appeal for Eastern Africa**:-**

> **"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanour which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."**

10. I have perused the lower court record and find from evidence that there is no doubt that the child's anus was penetrated. This was confirmed by medical evidence adduced in court. There is also no doubt that the child was aged 4 years, this was confirmed by child health card produced in court.

11. What I find to be in issue is whether the **assailant was positively** identified. Evidence adduced show that the child and her family did not know the appellant prior to his arrest. This is confirmed by PW7, who said that while admitted in hospital the family of the child did not know who defiled her. The child described the person as being brown like his father.

12. What is on record is that *voire dire* examination was done on the child and found that she did not understand the meaning of taking oath. She proceeded to give unsworn evidence.

13. PW2, the child's grandmother said appellant pleaded with her to tell the mob not to beat him and PW2 told him to confess whether he defiled the child first.

14. PW2, the child's grandmother testified that she asked to admit the offence if he committed the offence, about 50 people were beating him. Her evidence was not however subjected to cross-examination.

15. In the case of Oloo vs Republic, 2009 KLR 416, the court held as follows:

> **"Corroboration of the evidence of a child of tender years was only necessary where such a child gave unsworn evidence. In law the evidence of a child of tender years given on oath after voire dire examination required no corroboration but the court had to warn itself that it should in practice not base a conviction on it without looking and finding corroboration for it".**

16. The trial magistrate recorded that the child identified the appellant in court. However as observed above her evidence was not subjected to cross-examination. Evidence on record confirm that the child and family had not seen or known the appellant before the incident. Apart

from saying that the assailant was brown like her father; the child never gave any unique physical features she saw on the appellant's appearance. No other evidence of identification was adduced. In the absence of any other evidence on identification of assailant, and in view of the fact that the child was seeing the appellant for the first time, I find it unsafe to convict the appellant.

17. **FINAL ORDERS:**

1) Appeal is allowed.

2) Conviction and sentence imposed against the appellant are set aside.

3) Appellant to be set free unless lawfully held.

Judgment dated, signed and delivered at Nakuru this 9th day of October, 2019.

RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola/Jenifer - Court Assistant

Appellant in person

Chigiti Counsel for State