REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.166 OF 2016

(An Appeal arising out of the conviction and sentence of Hon. E. S. Olwande – PM delivered on 9th September 2016 in Makadara CMC. CR. Case No.3699 of 2008)

RAY THOMAS OCHIENG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Ray Thomas Ochieng was charged with three (3) counts of **committing an unnatural offence** contrary to **Section 162(a)** of the **Penal Code.** The particulars of the offence were that on 6th September 2008 at [particulars withheld] Estate in Nairobi, the Appellant had carnal knowledge of P S O, D M and C O *(hereinafter referred to as the complainants*) against the order of nature. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was found guilty as charged and sentenced to serve twenty (20) years imprisonment on each count. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that the trial magistrate failed to consider the medical evidence that was adduced which had established that there was no penetration. He faulted the trial magistrate for reaching the verdict of guilty despite the fact that vital and essential witnesses were not called by the prosecution to testify before the court. He was of the view that the evidence that was adduced was contradictory and inconsistent to sustain a conviction to the required standard of proof beyond any reasonable doubt. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

Prior to the hearing of the appeal, the Appellant presented to the court written submission in support of his appeal. He urged the court to find that the prosecution had failed to establish the charges that were brought against him to the required standard of proof. He asserted that he was innocent and was framed by the complainants. On her part, Ms. Sigei for the State opposed the appeal. She submitted that all the ingredients required to establish the charges that were brought against the Appellant were established to the required standard of proof. She urged the court to uphold the conviction of the Appellant and dismiss the appeal.

What are the facts of this case? The complainants were at the material time respectively aged 8 years, 7 years and 9 years. They testified as prosecution witnesses No.1, 2 and 6. According to the complainants,

the Appellant, who was their neighbour at [particulars withheld] Estate in Nairobi, lured them into his house after which he separately undressed them and then had anal sex with them. Each complainant testified that the Appellant enticed them with food items, on separate occasions, to his house after which he had anal sex with them. The incident is said to have taken place on 6th September 2008. The complainants did not inform their respective mothers until a week after the incident. PW3 S K and PW7 J S, the mothers of the complainants testified that they became aware after about a week that the complainants had been sexually assaulted. PW3 testified that when she inspected PW6, she did not notice anything unusual. Similarly too, PW7 testified that when she inspected PW1 and PW2, she did not notice anything remarkable. After a week, and upon coaxing the complainants, the mothers were told what had transpired a week earlier in the house of the Appellant.

A report was made to Makongeni Police Station on 15th September 2009. PW9 PC Joel Kitheka was assigned to investigate the case. The complainants were referred to Nairobi Women Hospital where they were seen by Dr. Muhombe who prepared the three reports. Her anal examination of the three complainants showed nothing remarkable. She noted that the complainants' anal area was normal, had no injuries and had normal sphincter tone. PW3 Dr. Adan Rilwan of Nairobi Women Hospital produced the medical reports on behalf of Dr. Muhombe who was said to be unwell at the time. This is what he said on cross-examination:

> ***"From examinations there was no evidence of sexual assault. The 2 brothers came to hospital on the same day. The sexual assault took place on the same day. There were no injuries around the anus of Dennis. On the buttocks there were inflammation. Inflammation occurs when the body required to initiate by producing cells and leaves marks on the skin. The inflammatory lesions may have been torn anywhere. It could also have been from contact or oils, not necessary sexual assault."***

The three medical reports were produced as exhibits in the case.

The complainants were seen by PW8 Dr. Zephania Kamau based at the police surgery on 19th September 2008. He formed the opinion that the complainants' anal openings were normal and there was no evidence of any physical injuries. He was of the view that the complainants' physical conditions were normal.

When he was put on his defence, the Appellant denied assaulting the complainants. He gave an alibi defence in which he testified that on the material day that he is alleged to have sexually assaulted the complainants, he was at the University of Nairobi undertaking a course in Computer Studies. He attended lectures after which he went to the library to study due to the fact that he was preparing for an examination. He attributed his troubles to the fact that he was unable to raise the bribe of Kshs.50,000/- that police demanded from him. He reiterated that he had been framed with the charges and was innocent.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the said court. In doing so, this court is required to always keep in mind that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect. (**See Njoroge –vs- Repubic [1987] KLR 19**). The issue for determination by this court is whether the prosecution adduced sufficient evidence to sustain the Appellant's guilt on the three counts of committing an unnatural offence contrary to **Section 162(a)** of the **Penal Code** to the required standard of proof beyond any reasonable doubt.

This court has carefully re-evaluated the evidence adduced before the trial magistrate's court. For the prosecution to establish its case, an important element to establish was penetration. According to the complainants, the Appellant separately penetrated their anal orifices after luring them to his house. Thereafter, the Appellant warned them not to tell anyone after bribing them with foodstuff. The complainants did not tell anyone of the sexual assault until after about a week. After the complainants had shared their alleged sexual assault with their mothers, a report was made to the police after which the

Appellants were taken to Nairobi Women Hospital where they were medically examined. Four days after the initial examination, the complainants were again medically examined by Dr. Zephaniah Kamau at the Police Surgery. Both medical examinations failed to reveal any penile penetration in the complainants' anal orifices. In considering these medical evidences, the trial court had this to say:

> ***"When Pw1 and 2 were taken to hospital for examination, nothing significant was noted. According to the doctors the genital and anal region of both Pw1 and 2 was normal. Some inflammation was noted on the buttocks of Pw2 but the doctor opined that the same was not related to sexual assault. The doctor however gave an opinion that there had been sexual assault on the 2 complainants. The basis of this opinion was not explained.***
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> ***However it must be remembered that the medical examination was done several days after the incident and as such any evidence that may have been there may naturally have vanished. All the same there is no medical evidence to corroborate the evidence of Pw1 and Pw2. I find that there is need to examine the evidence of Pw1 and Pw2 in totality to establish whether or not there was any carnal knowledge against the order of nature committed upon them.***
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> ***However in respect to the complainant in count 3 (Pw6) the doctor who first examined him saw him on 8.9.08 which was much earlier before the complainants in counts 1 and 2 were seen. The doctor noted that there was a small laceration on the anal ring. This laceration was not noted by the doctor who filled the P3 form but I do note that the doctor who filled the P3 form examined the complainant in count 3 on 16.9.08. It is possible that by this time the small laceration had healed. That would explain why the doctor did not note it. I find that there is sufficient evidence to prove that there had been carnal knowledge of the complainant in count 3."***

It is evident from the above analysis of the medical evidence by the trial magistrate that there was doubt that the medical evidence adduced by the prosecution supported the complainants' assertion that they had been sexually assaulted. In his evidence before court, the doctor was not certain that the complainants had been sexually assaulted. This court finds that the medical evidence adduced by the prosecution did not corroborate the complainants' collective testimony that they had been penetrated.

Reasonable doubt was raised regarding the truthfulness of the evidence adduced by the complainants. From re-evaluation of the evidence adduced, it was clear to this court that the trial court erred in believing the evidence of the complainants without any medical evidence to corroborate their respective assertions that they had been sexually assaulted. Whereas this court acknowledges that under **Section 124** of the **Evidence Act** a court can convict on the basis of the evidence of a victim in sexual offences if it is satisfied that the victim is telling the truth, in the present appeal, the evidence adduced by the complainants is incredible.

In the present appeal, the alleged victims were children of young and tender years. This court and the trial court are mandated by the law to treat the evidence of such witness with caution and circumspection so as to lessen the danger of miscarriage of justice. As was observed by the court in **Fappyton Mutuku Ngui –vs – Republic [2012] eKLR:**

> ***"Indeed courts should be cautious before convicting on the uncorroborated evidence of minors. There are many reasons for this. In J Heydon Evidence: Cases and material 2nd ed Butterworths London 1984, 84, the reasons were put this:***
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> ***First, a child's power of observation and memory are less reliable than on adult's. Secondly, children are prone to live in a make-believe world, so that they magnify incidents which happen to them or invent them completely. Thirdly, they are also very egocentric, so that details seemingly unrelated to their own world are quickly forgotten by them. Fourthly, because of their immaturity they are very suggestible and can easily be influenced by adults and other children."***

In the present appeal, the trial court should have taken into consideration that since the medical evidence did not support the assertions made by the complainants, then, the most likely event, the complainants

may not have been telling the truth or may have been influenced to say what they testified before the court. That conclusion is not far-fetched since from re-evaluation of the three complainants' evidence there was uncanny semblance in the words that the three witnesses used in the testimonies that leads to the likely explanation that they were coached to give the evidence that they did before the trial court.

Taking into consideration the totality of the evidence adduced by the prosecution witnesses, this court is of the considered opinion that the evidence that was adduced by the prosecution witnesses failed to establish the charges brought against the Appellant to the required standard of proof beyond any reasonable doubt. It may well be that the alibi defence given by the Appellant is true. In the premises therefore, the appeal has merit and is hereby allowed. The Appellant's conviction is hereby quashed. The custodial sentence imposed on him is set aside. The Appellant is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 1ST DAY OF FEBRUARY 2018

L. KIMARU

JUDGE