REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 62 OF 2016

(Being an Appeal from Original Conviction and Sentence in Criminal Case No. 52 of 2015 of the Chief Magistrate's Court at Naivasha before E. Kimilu – SRM)

SAMUEL MUYA NJUGUNA.....APPELLANT

-VERSUS-

REPUBLIC.....PROSECUTOR

J U D G M E N T

1. **Samuel Muya Njuguna** was charged with Defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act. In that between 21st and 23rd day of August, 2015 at **xxx** grazing field Maai-Mahiu in Naivasha Sub-County within Nakuru County, he intentionally and unlawfully did cause his genital organ namely penis to penetrate the genital organ, namely anus of **D.M.N.**, a boy aged 11 years. He denied the charges. At the close of the trial, he was found guilty, convicted and sentenced to life imprisonment.

2. He was aggrieved by the result and appealed to this court. He raises five amended grounds of appeal as follows:

> **"1. THAT the trial magistrate erred in law and facts by convicting the Appellant without the proof of penetration.**
>
> **2. THAT the trial magistrate erred in law and facts in by not considering that the Appellant was detained in police station for more than 24 hours as stipulated in the Constitution.**
>
> **3. THAT the trial magistrate erred in law and facts when she convicted the Appellant by not considering that the alternative charge was added and so the charge were read afresh and he was not given a chance to recall the witnesses.**
>
> **4. THAT the trial magistrate erred in law and facts by admitting evidence of the clinical officer who was standing in for the other by not stating to court the duration they have served together.**
>
> **5. THAT the trial magistrate erred in law and fact by convicting Appellant who was not issued with witness statements."**

3. On the first and fifth grounds the Appellant challenges the production through a witness other than author, of the medical evidence. He submits that the said evidence did not support penetration. He stated regarding the second ground that he was held beyond the constitutional period before arraignment. The third ground faults the trial magistrate for failing to ask him to plead to the alternative charge introduced in the course of the trial. That he was not given the opportunity to demand recall of witnesses as prescribed in Section 214 of the Criminal Procedure Code.

4. Finally, he asserts that he was not supplied with witness statements and other evidence prior to the trial and that his right to fair trial under Article 50 of the Constitution was violated.

5. The DPP through Mr. Mutinda opposed the appeal and reiterated the evidence on record.

6. Grounds 2, 3, 4 and 5 of the appeal being legal in nature can be tackled together before dealing with the challenge to the evidence. The allegation that the Appellant was kept in police custody for a longer period than allowed under Article 49 of the Constitution was not raised at the trial and in any event the proper place to raise such an issue is in a Constitutional Petition – See **Julius Kamau Mbugua -Vs- Republic [2010] eKLR** which overturned the *dicta* in **Albanus Mutua -Vs- Republic [2004] eKLR** which the Appellant herein relies on.

7. The prosecution did amend the charges to introduce an alternative count, on 23rd June, 2016. The charge was read to the Appellant who

pleaded thereto. It is true that he ought to have been informed of the right to recall any witness he desired as provided under Section 214 of the Criminal Procedure Code. However the omission by the trial court in this case does not vitiate the trial. The main count remained the same as before, and is the one upon which the Appellant was convicted. This amendment was minor and did not affect the main charge.

8. The Court of Appeal addressed itself to such a failure in the case of **Josphat Karanja Muna -Vs- Republic [2009] eKLR** stating that it would not interfere unless the omission to comply therewith was shown to have caused prejudice:-

> **"On non-compliance with Section 214 of the Criminal Procedure Code, we observed that as far as the Appellant is concerned, the substituted charge at page 5 of the record did not introduce any new matter into the main charge that would have necessitated recalling of witness. All the substituted charge did was to introduce an amended name of the complainant …. That the spirit of Section 214 is to afford an accused person opportunity to recall and cross examine witnesses where the amendments would introduce fresh element or ingredient into the offence with which an accused person was charged. It certainly was not meant to be invoked every time an amendment is made even if such an amendment is only to introduce a correction of the name or of a word. Here the name Ben Chege Gikonyo was amended to read Ben Cheche Gikonyo. We do not accept that the non-compliance with the provisions of Section 214 of the Criminal Procedure Code resulted into injustice to the Appellant."**

9. Thus in my view no injustice resulted from the amendment complained of. Regarding the production of the **P3** forms by a clinical officer other than its author, the record of proceedings of 16th March, 2017 and 23rd June, 2016 show that the said author **Dorcas Osoro** was ailing and subsequently succumbed to her illness. A colleague who had worked with her, **PW4**, presented the P3 form after an application by the DPP, and to which the Appellant said he had no objection. Nothing turns on that ground therefore.

10. There is no standard period of time a substitute witness ought to have worked with the author of a P3 form to become competent to produce the same. All that is required is the witness's familiarity with the handwriting and signature of the author. Besides, in this case the author having passed on, Section 33 (b) and 77 of the Evidence Act applied and allowed production of the evidence through another person.

11. Concerning the supply of witness statements and evidential material, the record of the trial shows that the court granted the Appellants plea to be supplied with the former, on 23rd September 2015. The Appellant did not raise the matter again except on 11th November, 2015 when he asked for time to photocopy statements and exhibits. Therebefore only the minor had testified and been cross-examined by the Appellant without demur.

12. The case was adjourned after the minor's testimony, upon the Appellants request on 25th November, 2015. The trial subsequently proceeded without him raising the question again. Notably, he cross-examined all the witnesses who testified. There can be no merit in the present ground claiming that he did not receive the statements of witnesses or evidentiary material. This seems to me an afterthought.

13. Before dealing with the Appellant's only ground challenging the trial evidence, it is apt to restate the duty of the first appellate court at this stage, as was stated in **Pandya -Vs- Republic [1957] EA 336** as follows:-

> ***"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 demeanor, 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 demeanor 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."***

14. The prosecution case was that in August 2015, the minor **D.M.N. (PW1)** was aged 11 years. He resided at Maai Mahiu with his parents. He herded goats in the area referred to as **Amogas**, relative to a nearby petrol station of similar name. He saw the Appellant also herding his cows and goats in the area and knew him. On 21st August 2015, the complainant was herding his goats in the same area as the Appellant. The Appellant persuaded the minor that sexual intercourse with him would not be painful and having taken him to a quarry close by, defiled him. He threatened him with death if he revealed what had happened.

15. He defiled him again on 22nd and 23rd August, 2015 using threats and even promise of a cash reward. Some days after the last incident his mother **J.K.N. (PW2)** noting the minor's inability to sit comfortably and withdrawn conduct, questioned him. The minor revealed that he was in pain and had a running stomach, and that he had been defiled by the Appellant. On 30th August 2015, the boy was taken to Naivasha District Hospital and the matter reported to police. **PC Raphael Lolit (PW3)** arrested the Appellant in the grazing field where the offence had occurred as the Appellant grazed his herds.

16. In his unsworn defence statement the Appellant stated that he was a shepherd at Maai Mahiu in the material period. He grazed flocks from different homes. He claimed that he did not know the victim or his mother, that he was a religious person. He denied the offence, stating that he was arrested from the pasture field on 5th September, 2015.

17. The evidence of **PW1** on penetration is compelling, and is supported by the mother's testimony regarding the changes she noted, leading her to question the young boy closely. **PW1** gave consistent evidence on the three incidents of defilement while out in the field where the Appellant was found on the date of arrest. He gave reasons why he did not report to his mother, who nonetheless noted that **PW1** had become withdrawn, had trouble sitting and had become incontinent.

18. The victim was known to the Appellant prior to the offence, but in any event had three encounters with him. Apparently, the Appellant a resident of Maai Mahiu was known also to **PW2** prior to this, being a local herdsman.

19. The trial magistrate evaluated with care the evidence of the minor regarding penetration noting that the Appellant used a lubricant to aid the assault. The absence of anal tears, she noted, was due to this, and the fact that, by the time the minor was examined, 12 days had lapsed since the first assault. That notwithstanding, the complainant could not sit or walk property, was withdrawn and incontinent. The latter fact is consistent with the assault.

20. Besides, humanbite marks were noted on the minor's backside during medical examination, confirming the evidence by **PW1** that the Appellant had bitten him while forcing him to bend over during the assault. The **P3** form records painful defecation and presence of faecal matter at the anal orifice, a confirmation of incontinence. This is what the learned trial magistrate observed in her judgment:-

> **"The medical evidence presented corroborated victim testimony that victim had been penetrated on his anal region. The victim's mother and investigating officer as well confirmed victim was in pain and not able to walk or sit comfortably……..his character changed drastically."**

21. The Appellant's submission on the question of penetration appear to ignore the provisions of Section 124 of the Evidence Act which states:

> **"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:**
>
> > **Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."**

22. Although the trial magistrate, correctly sought and found corroboration on the issue of penetration from the evidence of **PW2** and the medical reports, it was open to her to convict the Appellant, based only on the testimony of **PW1** which she believed. Because of the manner in which the offence was perpetrated, and the lapse of time before **PW1's** examination, it is not surprising that no actual tears were noted in the anal area. However, the minor's evidence and that of his mother was strong proof of penetration.

23. As the trial magistrate noted, the offence occurred on three separate occasions in day time, and the Appellant was known to the victim. There can be no question of mistaken identity, or frame up, there being no known previous grudge between the witnesses and the Appellant.

24. Reviewing the testimonies on record for myself, I find that **PW1's** evidence was lucid, detailed and consistent. He could not possibly have made up the evidence as the Appellant seemed to suggest. He gave a lucid account on the Appellant's use of persuasion, manipulation and threats to induce him to submit to the three instances of defilement. Ditto his mother, **PW2. PW1** was aged 11 years in the material period per his birth certificate and assessment in the **P3** Form (**Exhibit 1 and 2a respectively**). The Appellant's defence was a mere denial that was obliterated by the prosecution evidence tendered.

25. Clearly, the Appellant an adult shepherd, preyed on **PW1** by means of persuasion, threats and promises of money as narrated by **PW1,** and in the deserted grazing fields, took advantage to defile his victim on several occasions. In my considered view, the Appellant was convicted on strong and credible evidence which displaced his unlikely denials, including claims to be religious man. Little wonder to **PW2** was aghast during her evidence that the Appellant wore a turban signifying allegiance to *Akorino* faith. His appeal to this court lacks merit in every aspect and must fail. I accordingly dismiss it.

Delivered and signed at Naivasha, this 3rd day of May, 2018.

In the presence of:-

Mr. Koima for the DPP

Appellant – present

C/C – Japheth and Kamau

C. MEOLI

JUDGE