REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 22 OF 2017

JOSEPH KARIUKI MUTAHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against sentence from the judgment of the Hon.R.O.Oigara Principal Magistrate,

Mukuruweini delivered on 21st April, 2017 in P.M.Criminal Case No.3 of 2017)

JUDGMENT

1. The Appellant **Joseph Kariuki Mutahi** was charged with the offence of defilement of a girl contrary to **Section 8 (1)(3)** of the **Sexual Offences Act;** the particulars of the charge are that on the night of 3rd and 4th January, 2017 at [particulars withheld] town in Mukurweini sub-County within Nyeri County, the appellant intentionally caused his member to penetrate the genital organ of **BWW** a child aged twelve (12) years.

2. The alternative charge was that of Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act; that on the same date and at the same place hereinabove mentioned the appellant intentionally touched the private parts of **JWM** with his member.

3. The prosecution called seven (7) witnesses to prove its case and after the trial, the Appellant was found guilty, was convicted on the main charge and sentenced to twenty (20) years imprisonment;

4. Being aggrieved by the conviction and sentence, the Appellant filed a Petition of Appeal and listed four (4) grounds of appeal which are summarized ***inter alia*** as;

(i) The complainant did not provide the registration numbers of the alleged vehicle that took her to the lodging;

(ii) Crucial witnesses were not called by the prosecution to testify;

(iii) Section 8(1) (3) of the Sexual Offenders Act does not exist; the prosecution did not prove its case;

(iv) The trial court rejected his defence without considering that it was not displaced by the prosecution's case.

5. At the hearing hereof the appellant was unrepresented and relied on his written submissions whereas the prosecuting counsel for the state was Ms. Gicheha who made oral presentations; hereunder is a summary of their respective submissions;

APPELLANTS SUBMISSIONS

6. The trial magistrate erred in invoking Section 124 of the Evidence Act without considering the evidence on identification as to the person who took the complainant for a tour and there are contradictions in the evidence of **PW1** and **PW4** on identification; **PW1** says that the appellant was not known to her previously whereas her mother **(PW4)** stated that he was a neighbor;

7. **PW6** gave evidence that the complainant was taken to Mukuruweini hospital for examination on the 14/01/2016 yet the Charge Sheet reads that the offence was committed on the 14/01/2017;

8. The prosecution case was riddled with contradictions and inconsistencies and that it was unsafe to base a conviction;

9. Section 8(1)(3) of the Sexual Offences Act is non-existent; the words **"as read with"** are missing; therefore the alleged offence was not clearly stated to the appellant and affected the conduct of his defence; that he was convicted on a non-existent provision of the law and on a defective Charge Sheet;

10. **PW5** never produced any supporting evidence or document to prove that the appellant had hired lodging room No.6; the essential witnesses were not called by the prosecution to testify like the guard whom the appellant is said to have paid to keep watch over the car; and Agatha and the headmaster were also not called to testify;

11. **PW1** did not give evidence on the registration number of the car that was used nor did she indicate the colour; no visible injuries or lacerations were found on the complainant's private parts consistent with defilement; the prosecution failed to prove its case beyond reasonable doubt as required by law;

12. The trial court rejected his sworn statement of defence and alibi defence which was not displaced by the prosecution evidence and it raised reasonable doubt as to his involvement; that the appellant had no duty to prove his innocence as the burden of proof never shifts from the prosecution; given that the prosecutions case was riddled with doubts the trial court ought to have found in his favour rather than rejecting his defence; case law referred to **Peterson Gatheru wachira vs R Cr.App No.319 of 2011 CA Nyeri;**

13. The appellant urged this court to analyze the whole evidence adduced by the prosecution and to arrive at a different conclusion; and to allow the appeal in its totality and to set aside the sentence imposed;

RESPONDENTS SUBMISSIONS

14. In response the stated submitted that the child who was defiled was a minor aged 12 years; she was taken to a lodging and the offence committed there; **PW1's** evidence was consistent how they met at the roadside; the appellant told her to get her clothes and that he would take her for a tour; he took her to a lodging in Gakindu and arrived there at 8.00pm and he paid for room no.6; the appellant had sexual intercourse with her the whole night;

15. It was not in dispute that **PW1** was able to identify him as he was not a stranger; the evidence of **PW5** corroborates that of the minor that the appellant had booked room no.6; he was well known to **PW5** and he was the only lodger that night; she confirmed that she took soap and tissue to the room; she also confirmed finding the minor outside room no.6; and minor told her she wanted to enter the room to rest; the evidence of **PW1** and **PW5** places the appellant at the scene of crime;

16. The sexual encounter was confirmed by the doctor who examined the minor; there were tears and lacerations on her genitalia; perforation found on her labia minora and her hymen was broken; the doctor's opinion was that the minor had been defiled;

17. On the defective charge that reads as Section 8(1)(3) of the Sexual Offences Act the fact that the words **"as read with"** was not fatal to the charge or proceedings and the same is curable; the facts of the charge are properly stated; the facts were read to the appellant and he understood the charge and tendered his defence to it; the sentencing was under Section 8(3) which was within the age bracket of 12 years; there was no prejudice occasioned to the appellant;

18. The appellant contends that the evidence of **PW5** was inconclusive; **PW5** was an attendant at the lodging where the offence took place; the room was booked but no receipt issued; her evidence was that the appellant was personally known to her and she was able to identify him; her evidence was consistent with that of **PW1**; she confirms having seen PW1 early in the morning; and having taken soap and tissue to the room; and that the appellant was the only person who had booked a room; she had no reason to lie and also the lack of a receipt ought not to discredit her evidence;

19. On his defence being rejected counsel submitted that the prosecution rebutted his alibi defence; that the appellant had narrated how he had travelled to Nyeri to see a friend; he produced receipts from Namuga Sacco showing he had booked a return ticket on the same date; he called **DW2** to corroborate the evidence on his alibi and stated that he arrived home at 10.00pm;

20. The prosecution rebutted this evidence by calling the manager of Namuga Sacco; who told the court that their offices close at 7.00pm and that no receipts are issued after that time; receipts that were produced by the appellant show that he had used motor vehicle registration no. KAS 526L and that this trip was from Mukuruweini to Nyeri Town; Receipt no.2 shows that he had used motor vehicle registration no.894K for his trip from Nyeri to Mukuruweini; the manager confirmed that the first vehicle belonged to the Sacco but the second one was unknown; that the receipts produced by the appellant Nos.73789 and 73799 were receipts from the same cash book; the serial numbers from Mukuweini office and Nyeri office are very different; that the receipts appeared to have been doctored;

21. Counsel submitted that the appellants defence was a lie and didn't displace the prosecution's case; and prayed that the appeal be dismissed and the conviction and sentence be upheld.

ISSUES FOR DETERMINATION;

22. After taking into consideration the submissions of both the Appellant and Prosecuting Counsel this court finds the following issues for determination;

(i) Whether the omission of the words **"as read with"** rendered the Charge as defective;

(ii) Whether the prosecution proved its case to the desired threshold;

(iii) Whether the trial court disregarded the appellants defence without giving sound reasons.

ANALYSIS

23. This court being the first appellate court it is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion bearing in mind that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified. Refer to the case of **Okeno vs Republic (1972) EA 32.**

Whether the omission of the words "as read with" rendered the Charge as defective;

24. The appellants contention was that his conviction was based on a defective Charge Sheet; this was due to the failure to specifically state in the Charge the words **'as read with';**

25. The record indeed shows that the Charge Sheet reads that the appellant was charged under Section 8(1) (3) of the Sexual Offences Act; but the omission of the words **"as read with"** in between the two sections does not mean that the offence that the appellant was charged with was not disclosed; the Charge and the contents of Statement of Facts were set out in clear and unambiguous terms and sufficiently disclosed and established the nature of the offence that the appellant was faced with as required by Section 134 of the Criminal Procedure Code; the appellant knew the exact offence that he was alleged to have committed and faced with; the record also shows that the appellant followed the entire proceedings and appreciated the evidence tendered against him; and that he was able to cross-examine all the prosecution witnesses; and was able to ably defend himself;

26. This court is satisfied that the particulars on the Charge Sheet clearly stated that the child was aged twelve (12) years which places it within the provisions of Section 8(3) of the Sexual Offences Act; and finds nothing on the court record that demonstrates that the omission of the words **"as read with"** did occasioned any miscarriage of justice or prejudice to the appellant; he was always aware of the nature of the charge against him and the particulars and the essential elements of the offence had been disclosed to him.

27. The ground of appeal on the charge sheet being defective is found lacking in merit and is disallowed;

Whether the prosecution proved its case to the desired threshold;

28. The key ingredients for the offence of defilement are age of the minor, penetration and identification;

29. **On identification** From the evidence on record this court notes that the Appellant was a person well known to the minor as he was a neighbor; that the incident started at 5.00pm on the 3rd January, 2017 and went on till the 4th January, 2017; she spent a great length of time with the appellant both day and night and that she was clearly able to see her assailant; she gave a narrative of what transpired on that day with precision;

30. **PW4** who was her mother confirmed that the appellant was a neighbor;

31. **PW5** was an attendant at the lodging where the offence took place; she testified that the room was booked but no receipt issued; her evidence was that the appellant was personally known to her and she was able to identify him; her evidence was consistent with that of **PW1**; she confirms having seen **PW1** early in the morning; and having taken soap and tissue to the room; and that the appellant was the only person who had booked a room; she had no reason to lie and also the lack of a receipt ought not to discredit her evidence;

32. Both **PW1** and **PW5** were under no misapprehension that it was the appellant who was with **PW1** on that material day at the lodging at Gakindu.

33. This court is satisfied that the appellant was a person well known to the minor and that he was positively identified by recognition.

34. **On the age of the complainant**; this court is alive to the fact that the age of the victim is a crucial component for purposes of sentencing and that it must be either assessed or proved by documentation.

35. Upon perusal of the court record the trial court is found not to have addressed this key ingredient in its judgment; this court notes that the trial court conducted a voire examination and the minor stated that she was aged 12 years; her mother **PW4** also corroborated the age of the minor as being 12 years; **PW7** produced the minors Birth Certificate **'PExb.1'** which confirmed that the minor was indeed twelve (12) years of age when the incident occurred;

36. Upon re-evaluating the evidence this court is satisfied that the prosecution proved the age of the minor.

37. **On penetration**; **PW1** stated clearly what had happened on the material day; her narrative on record is as follows;

> **"We went to bed. As we went to bed he requested me to be his wife. He did it three times. Immediately we went to the room we had it and later and in the morning. He inserted his 'organ' into mine. (The witness gestures area where organ was inserted) her genitalia. He ordered me to keep quiet. I felt pain."**

38. **PW2** told the court that she was the one who met the minor who had come job hunting at her hotel; upon enquiring and doing her own investigations subsequently reported the matter to the school and to the police; she took the minor to Mukuruweini Hospital where she was examined the clinical officer **(PW6)** testified that upon examining the minor he found that the hymen was broken and there was perforation

of her labia minora; but found no presence of sperm; ; the doctor's opinion was that the minor had been defiled; this evidence corroborates the evidence of **PW1** on penetration; he produced the duly filled P3Form and PRC Form as evidence; and confirmed that the minor had been defiled.

39. This court is satisfied that the prosecution proved all three key ingredients of its case to the desired threshold.

40. This ground of appeal is found lacking in merit and it is hereby disallowed.

Whether the trial court disregarded the appellants defence without giving sound reasons.

41. The appellant's last ground of appeal was that his alibi defence was not considered; that he had boarded a matatu from Mukuruweini to Nyeri to visit a friend who was helping him seek employment at a security firm; he produced receipts from Namuga Sacco showing he had booked a return ticket on the same date; he called **DW2** to corroborate the evidence on his alibi and stated that he arrived home at 10.00pm;

42. The prosecution rebutted this evidence by calling the manager of Namuga Sacco; who told the court that their offices close at 7.00pm and that no receipts are issued after that time; that the receipts that were produced by the appellant show that he had used motor vehicle registration no. KAS 526L and that this trip was from Mukuruweini to Nyeri Town; Receipt no.2 shows that he had used motor vehicle registration no.894K for his trip from Nyeri to Mukuruweini;

43. The manager confirmed that the first vehicle belonged to the Sacco but the second one was unknown; that the receipts produced by the appellant Nos.73789 and 73799 were receipts from the same cash book; yet the serial numbers from Mukuweini office and Nyeri office are very different; and that the receipts appeared to have been doctored;

44. The trial court is found to have analyzed the appellants alibi defence and made a finding that;

"The defence by the accused and his witness was demolished by the able prosecution".

45. All in all this court is satisfied that the alibi defence did not displace the prosecution's case; that the appellant was positively identified by the minor and **PW5** by way of recognition; and that the evidence of **PW1** and **PW5** places the appellant at the scene of crime on that material date;

46. The trial court properly arrived at its conclusion; this ground of appeal has no merit and the same is disallowed.

FINDINGS

47. In the light of the forgoing this court makes the following findings;

(i) The omission of the words **"as read with"** does not render the Charge Sheet as being defective;

(ii) The prosecution is found to have proved its case to the desired threshold; the conviction is found to be safe;

(iii) The trial court gave good reasons for disregarding and rejecting the appellants defence of alibi;

DETERMINATION

48. The appeal is found to be lacking in merit and is hereby disallowed.

49. The conviction and sentence are both hereby upheld;

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 19th day July, 2018.

HON.A.MSHILA

JUDGE