REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 44 OF 2015

(Being an Appeal from Original Conviction and Sentence in Criminal Case No. 324 of 2014 of the Senior Resident Magistrate's Court at Engineer, M. K. Mutegi – SRM)

JOSEPH IRUNGU MAINA.....APPELLANT

-VERSUS-

REPUBLIC.....PROSECUTOR

J U D G M E N T

1. **Joseph Irungu Maina**, the Appellant herein was charged with Defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act. In that on the 3rd day of February, 2012 at [particulars withheld] village in Kipipiri within Nyandarua County, he intentionally and unlawfully did cause his genital organ namely penis to penetrate the vagina of **L.N.K.** a girl aged 9 years. He denied the charges but following a full trial was found guilty, convicted and sentenced to life imprisonment.

2. Aggrieved with this outcome, the Appellant appealed to this court, and had raised five initial grounds of appeal as follows:-

> **"1. THAT the trial magistrate erred in law and in facts in failing to note there was no corroboration of evidence.**
>
> **2. THAT the learned trial magistrate erred both in law and in facts by convicting the Appellant on a single evidence of a girl who was coached to frame the Appellant.**
>
> **3. THAT the trial magistrate erred both in law and in facts in failing to note there was no medical evidence to add weight to the prosecution case.**
>
> **4. THAT the trial magistrate erred both in law and in facts in convicting the Appellant on flimsy and frivolous allegations that thrived on a grudge.**
>
> **5. THAT the trial magistrate erred in law and in facts in dismissing the Appellants defense without advancing any cogent reasons yet the same was sufficient to cause a considerable doubt to the prosecution case." (sic)**

3. Without the court's leave, and on the eve of the hearing of the appeal, the Appellant filed five supplementary grounds complaining *inter alia* that he was not issued with witness statements and evidentiary material prior to the trial (grounds 1 and 2); that certain crucial witnesses were not called and that the charge sheet was defective (grounds 3 and 5) and finally, that penetration was not proved. (ground 4)

4. In written submissions supporting his grounds the Appellant reiterated, that he was not offered adequate facilities for the preparation of his defence as provided under Article 50 (2) of the Constitution. He also raises a complaint, not contained in his grounds, that he was held beyond the constitutional time frame of 24 hours, citing **Albanus Mwasia Mutua -Vs- Republic [2006] eKLR.**

5. Relying on **John Kenga -Vs- Republic, Criminal Appeal No. 1126 of 1984** he complained that persons who were allegedly with the complainant on the date of the offence were not called as witnesses. He further submitted that based on the medical evidence tendered, the complainant was not defiled on the stated dates. Moreover that the charge sheet as framed was defective as it did not disclose a known offence under the Sexual Offences Act.

6. The **DPP** through Mr. Mutinda opposed the appeal asserting that the prosecution evidence offered at the trial proved all the ingredients of the offence.

7. The duty of the first appellate court remains as 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 must then make other material as it may have decided to admit. The appellate court 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."***

8. The prosecution case at the trial was as follows. The complainant **L.N.K.** (**PW1**) was born on 18th March, 2002 and resided at [particulars withheld] with her parents including **P.N.** (**PW2**) in the material period. On 3rd February, 2012 **PW1** returned home from school and went out to herd the family cows. While out in the field at about 2.00pm she was confronted by a local villager, the Appellant. Blindfolding her, he took **PW1** to his home where he defiled her. The victim left the home when it was all over. She hid in a maize plantation where her mother was later to find her cowering. The child reported the preceding events to her mother.

9. **PW1** called neighbour **E.W. (PW3)**. The two women examined the minor and noted what appeared to be evidence of defilement. The child was escorted to the hospital for examination and treatment even as police were notified. The Appellant was arrested by members of the public and handed over to police. The P3 form was duly completed and eventually the Appellant was arraigned in court. In his unsworn defence statement narrated the events of his arrest. He denied the offence.

10. There seemed little dispute that the Appellant resides in the same area as the complainant and that he was arrested by members of public in connection with the offence, which he denies.

11. I find it apposite to deal first with the complaints raised by the Appellant regarding the charge sheet, the alleged failure by the prosecution to furnish him with witness statements and evidentiary material prior to the hearing and alleged detention beyond the period allowed under the Constitution. Starting with the latter, the proper forum to raise the complaint is in a constitutional petition and not an appeal. The decision in **Albanus Mutua** was overturned by the Court of Appeal in **Julius Kamau Mbugua -Vs- Republic (2010)eKLR**

12. Concerning the supply of witness statements and evidentiary material, the record shows that on 20th September, 2012 the court directed that these be supplied to the Appellant. The Appellant did not raise the question again throughout the trial and it can be safely inferred that given his silence on the matter and cross-examination of witnesses, the statements and evidentiary material had been supplied to him.

13. The charge sheet is not defective merely because it cites two Sections of the Sexual Offences Act without the words "as read with" in between the sections. The charge in question is created in Section 8 (1) of the Sexual Offences Act while the penalty is provided in Section 8 (2) of the Act. The Appellant clearly understood the charges facing him and was not in any way prejudiced by the minor discrepancy in the statement of offence. There is no substance in the foregoing complaints.

14. Regarding challenges to the evidence arrayed against the Appellant, this court has reviewed the evidence on record. The evidence by **PW1** was lucid and straight forward. The offence occurred in day time and **PW1** knew the Appellant well as a neighbour. Her evidence is supported by **PW2** and **PW3.** They may not be medical experts but on examining the minor soon after her report to **PW2**, they noted a discharge on her genitalia, which according to **PW3** was "smelly". **PW2** stated the child had no underpants and that she had what appeared to be blood and semen on her genitalia. The fact, emphasized by the Appellant, that the clinical officer, **Peter Nginyo** (**PW4**) said the breach of hymen was not fresh, does not mean there was no penetration on the stated date. There were evident recent bruises on the labia minora when the victim was examined. Absence of spermatozoa does not itself negative penetration.

15. In the case of **Erick Onyango Ondeng' -Vs-Republic NAI CR. Appeal No. 5 of 2013 [2014] eKLR** from **Twehangane Alfred -Vs-Uganda Criminal Appeal No. 139 of 2001, (2003) UGCA 6**, the Court of Appeal, considering Section 2 of the Sexual Offences Act stated that penetration is complete whenever there is partial or complete insertion of the genital organ of one person into the genital organ of the victim. **PW1** gave a very vivid description of this, in her evidence stating:-

> **"He (Appellant) removed his trouser up to his knees. He then removed his "thing of urinating and inserted (it) into my "urinating thing" I felt pain."**

Penetration was proved through the evidence of **PW2** and **PW3**.

16. There was no requirement for the prosecution to call a certain number of witnesses in this case (See Section 143 of the Evidence Act). Besides under the proviso to Section 124 of the Evidence Act, the trial court was entitled to act on the sole testimony of **PW1**, if it believed her, and gave reasons for the belief. Evidently the trial court accepted not only the evidence of **PW1** as truthful, but also found it was corroborated by the testimony of **PW2**, **PW3** and the medical evidence tendered.

17. The child's immunization card (**Exhibit 2)** and P3 form **(Exhibit 1)** indicated as **PW1** and **PW2** testified, that the former was born on 15th March 2002. **PW1** was therefore aged between 9 and 10 years on the date of her defilement. The Appellant's defence merely restated the events of surrounding the date of his arrest. He denied the offence. He did not, as he has suggested in present submissions raise an issue of an existing grudge with any of the witnesses during the trial. The trial magistrate carefully analysed the evidence adduced at the trial. He was entitled to believe and to accept the prosecution evidence, which in my considered view displaced the defence tendered by the Appellant.

18. On my part, having reviewed the record of the trial, I am satisfied that the Appellant's conviction was based on strong and credible evidence. His grounds of appeal must fail, and the appeal is hereby dismissed for want of merit. It is so ordered.

Dated and signed at Kiambu, this 26th day of June, 2018.

C. MEOLI

JUDGE

Delivered and signed at Naivasha, this 13th day of July, 2018.

JUDGE

In the presence of:-

For the DPP : Mr. Koima

Appellant : Joseph Irungu Maina - present

C/C : Quinter Ogutu