REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 119 OF 2015

MUOVE ITUTE……..APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(Appeal against the conviction and sentence in Machakos Chief Magistrates Court Criminal Case No. 1168 of 2013 by L. Mbugua (C.M.) delivered on 30th July, 2015)

JUDGEMENT

1. The Appellant was charged with the offence of 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 the Appellant on 30th September, 2013 in Machakos District within Machakos County, intentionally and unlawfully caused his penis to penetrate the vagina of L. N. a girl aged $4^1/_2$ years.

2. He faced an alternative charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant on 30th September, 2013 in Machakos District within Machakos County, intentionally and unlawfully touched the vagina of L. N. a girl aged 4 ¼ years using his penis.

3. Brief facts are that J K W (PW2) who is L. N.'s mother was attending a funeral while L. N. was leaving school. PW2 went home to check on L.N. but only found her bag and school shoes. She inquired from Tobias Mutisya Itute who informed him that L. N. had been called by the Appellant. PW2 went in search of L. N. and on calling her out, the Appellant emerged from a bush as L.N. headed home. L. N. informed PW2 that the Appellant had called her, removed her pants and put his penis into her vagina. PW2 noticed L.N. was in pain and rushed her to hospital. She reported the matter to the police and was issued with a p3 form. She also handed over L.N.'s sweater and inner pant to the police. Muithi Mutisya (PW3) who is Kalama location chief received a call informing him of the incident. He advised that the matter be reported to Machakos Police Station. He together with the Assistant chief, Athanus Wambua (PW4) went to the scene where they arrested the Appellant and handed him over to the police. Corporal Priscillah S. Nyamu (PW5) received the report, recorded PW2 and L.N.'s statements and received a sweater and inner pant that L.N. had on the material day. She stated that the sweater had grass and produced the sweater and inner pant as P. Exhibit 2 and 3. She also produced L. N.'s birth certificate as P. Exhibit 4. John Mutunga (PW6) a medical officer at Machakos level 5 hospital was called to produce a p3 form on behalf of Dr. Moki whose handwriting he stated he was familiar with. He stated that the examination revealed that L.N.'s vagina had bruises, was swollen and was bleeding. He then produced the p3 form signed on 3rd October, 2014 as P. Exhibit 1 and post-rape care form as P. Exhibit 5.

4. The Appellant was put on his defence where he gave unsworn statement that the charges were framed by Wisdom Muoka who is his cousin. That Wisdom was educated by the Appellant's father but Wisdom and the Appellant's father disagreed over land and that he had vowed to fix the Appellant.

5. The Appellant was consequently convicted of the main charge and sentenced to life imprisonment. He filed this appeal against the said conviction and sentence on the following grounds that can be summarized as follows:

a) He was not properly recognized and identified.

b) His defence was not considered.

c) The age of L.N. was not established.

d) The case was not proved beyond reasonable doubt.

6. It was the Appellant's Counsel's submission that it was alleged that L.N. was aged 4 ½ years but neither her birth certificate nor age assessment report were produced to ascertain her age. To show the importance of proving the age of a complainant, the Appellant's learned

counsel cited **Julius Kioko v. Republic., Machakos Criminal Appeal No. 60 of 2014**, **Kaingu Elias Kasomo v. R., Criminal Appeal No. 504 of 2010** and **John Otieno Owar v. Republic [2011] eKLR**. It was further submitted that the trial magistrate failed to consider that the there was no witness called to link the appellant to the offence. That despite indicating that L.N. was not competent to give sworn statement, the prosecution did not bother to have her testify and the case was closed without her evidence. That there was no direct evidence of any person that witnessed the alleged offence therefore PW2's evidence was purely hearsay. It was further submitted that the prosecution failed to call L.N. and Tobias Mutisya Itute and that the trial magistrate should have drawn an adverse inference for such failure. The learned counsel in this regard cited **Bukenya and other v. Uganda [1972] EA 549** and **Fredrick Kiruhi Wairimu v. Republic [2017] eKLR**. He further submitted that no evidence was tendered linking the Appellant directly to the offence and cited **Republic v. Kennedy Musee Sammy [2017] eKLR** in reliance. The Appellant's counsel submitted that the trial magistrate relied on extraneous matters to convict the appellant. He argued that nowhere in the proceedings did PW2 state that she confronted the Appellant who informed her that he was under any influence. That the trial magistrate indicated in the judgment that the Appellant was caught red handed whereas such does not appear in the proceedings. It was argued that there was no corroborating evidence and it was in the circumstances unsafe to convict the Appellant. The Appellant's counsel relied on **Julius Kioko v. Republic** (supra) where the court made a similar finding. It was also submitted that the prosecution witnesses did not adduce sufficient evidence to positively identify the Appellant. It was his submission that there was no DNA or any other medical tests conducted that connected the Appellant to the alleged defilement. Citing **Samuel Maina Mwangi v. Republic [2014] e KLR**, the learned counsel submitted that the trial magistrate was in error in failing to consider the Appellant's defence that he had been framed.

7. The learned counsel for the Respondent on the other hand submitted that age was established by PW5 whose evidence was that L.N. was born on 20th November, 2008 and was about 4 years. That her birth certificate was further produced as P. Exhibit 4. It was submitted that according to PW6's evidence, L.N. had bruises, swelling and bleeding in her vagina and an inference was made that there was penetration within the meaning of section 2 of the Sexual Offences Act. It was submitted that this was a case of recognition as opposed to identification of a stranger since PW2 knew the Appellant prior to the alleged act therefore wrongful identification does not arise. To support that argument the Respondent cited **Anjononi & others v. R [1981] eKLR**. It was submitted that in his defence, the Appellant alleged that the whole case was a frame up because of domestic differences but no parent will willfully subject her daughter to inhuman acts in order to frame up someone. It was submitted that section 143 of the Evidence Act does not obligate the prosecution to call a particular number of witnesses in the absence of any provision of law to prove any fact.

8. This court has given due consideration to the appeal herein factoring in its duty as a first appellate court to reconsider and re-evaluate the evidence afresh so as to arrive at its independent conclusion. The ingredients forming the offence of defilement are age of complainant, proof of penetration and positive identification of the assailant. Applying the test, L.N.'s birth certificate was produced by PW5 as P. Exhibit 4. It follows therefore that L.N.'s age was appropriately established by the prosecution. The said certificate revealed that she was 4 $^{1}/_{2}$ years of age.

9. It emerged from the evidence of PW6's evidence that L.N.'s vagina had bruises was swollen and was bleeding. This was an indication that she was penetrated. Section 2 of the Sexual Offences Act provides that penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person. This was emphasized in **George Owiti Raya v. Republic [2013] eKLR** where it was held that there can be penetration without going past the hymen membrane.

10. On the last aspect, the Appellant contended that L.N. was not called to testify. It is noteworthy that the trial court noted in the voire dire examination that L.N. was not better placed to testify considering that she did not understand the meaning of an oath. The trial court then let PW2 testify as an intermediary. Section 31 of the Sexual Offences Act permits the use of an intermediary to convey testimony of a vulnerable witness. In the circumstances, the trial court cannot be faulted. The complainant's mother (PW2) went in search of the minor and saw the Appellant emerge from a nearby bush with the complainant who alerted her that the Appellant had defiled her and she rushed her to hospital where the defilement was confirmed. The Appellant further contended that a crucial witness was not called to testify. It is to be noted as correctly submitted by the Respondent that the prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt. The failure to call that witness is thereby not fatal. Weighing the prosecution evidence vis a vis that of the Appellant's, it is clear and I find that the prosecution's case was not shaken by that of the Appellant. In the circumstances, I am not inclined to interfere with the trial magistrate's findings. Accordingly, I find the Appellant's appeal lacks merit and is thus dismissed. The conviction and sentence by the trial court is hereby upheld.

Dated signed and delivered at Machakos this 20th day of September 2018.

D. K. KEMEI

JUDGE

In the presence of:-

Nagwere for Kimeu - for the Appellant

Machogu - for the Respondent

Josephine - Court Assistant