REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

CRIMINAL APPEAL NO. 126 OF 2017

TITUS MUSYOKA MUINDE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the conviction and sentence by Hon. Gilbert Shikwe (S.R.M.)

delivered on 5th December, 2017 in Kithimani SRM'S

Court Sexual Offences Case No. 51 of 2015.)

JUDGEMENT

1. The Appellant filed this appeal contending the conviction and sentence by Hon. Gilbert Shikwe in Kithimani SRM's Court Sexual Offences Case No. 51 of 2015. He was convicted of defilement contrary to section 8 (1) (2) of the Sexual Offences Act and sentenced to life imprisonment. The grounds upon which the Appellant appeals are as follows:

i. The trial court erred both in law and fact by convicting the Appellant when the case against him had not been proved beyond reasonable doubt.

ii. The trial court erred both in law and fact by convicting the Appellant in the absence of evidence to prove that the complainant was a minor.

iii. The trial court erred both in law and fact by convicting the Appellant on contradictory, inconsistent and patently incredible evidence.

iv. The trial court erred both in law and fact by relying on evidence of witnesses who never testified in the trial.

v. The trial court erred in law by failing to evaluate and analyze the evidence on record consequent upon which it convicted the Appellant on an unsafe evidence.

vi. The trial court erred in law and fact by failing to find and hold that the prosecution evidence did not support the charge facing the Appellant. That the patent inconsistencies thereof created doubts which ought to have been resolved in favour of the Appellant.

2. The particulars of the charge the Appellant faced was that the Appellant on 25th September, 2015 at [particulars withheld] village in Masinga sub county within Machakos County unlawfully and intentionally caused his penis to penetrate the anus of J. M. a child aged 7 years. He also faced an alternative charge of committing an indecent act with a boy contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. Particulars being that the Appellant on 25th September, 2015 at [particulars withheld] village in Masinga sub county within Machakos County unlawfully and intentionally committed indecent act by touching the buttocks of J.M. a child aged 7 years.

3. The evidence on record was that J. M. and the Appellant were herding animals when the Appellant grabbed J.M., covered his mouth, removed his pants and started penetrating J.M.'s anus. Upon returning home J.M. was given food by his mother PW2 but he declined to eat and was crying. He however did not tell PW2 what the issue was. She requested N to inquire from J.M. what the issue was. N then informed her that J.M. had been defiled. Edwin Mutembei (PW3) who is a clinical officer at Masinga sub county hospital examined J.M. on 28th September, 2015. He found his anus to be tender and that he was in pain. M N N (PW4) sensed that J.M.'s body language had changed when he was back from tending goats. She asked him why he was walking in a funny manner and he told her that the Appellant had mounted him

like a goat and bought him chapati thereafter. PW4 then informed PW2 who then took him to hospital. Police Constable Mohamed Izoka received the report from J.M.'s mother on 27th September, 2015 at 6.00 pm. He issued her with a p3 form and took them to Masinga for J.M.'s medical examination. He later visited the scene which he stated was a bush.

4. Put on his defence, the Appellant gave unsworn evidence as follows. That he on 28th September, 2015 woke up early and went to the farm at 9.00 am. He took tea and went to graze cattle a kilometer away and was later arrested that night but does not know why he was arrested.

5. It was the Appellant's Counsel's submissions that there existed patent inconsistencies, contradictions and doubts that the trial court failed to resolve rendering the conviction unsafe. It was further argued that the trial court did not bother to scrutinize and evaluate the evidence tendered consequent upon which it reached findings which are unsupported by evidence. It was submitted that the Appellant was a victim of carelessness and maliciously fabricated claim. That PW1 stated to court that he could not recall the date and year of the alleged act. That he talked about herding cattle back home while at the same time talked about the Appellant trying to get hold of a goat. That N. informed PW1's mother of what had transpired but curiously, the said N was not called to testify. That further, PW2 stated that he was informed of the incident by PW1's father who was not also called to testify. He further submitted that the Clinical Officer did not note any injury to PW1's anus. That the medical examination report did not corroborate PW1's testimony. He stated that another fundamental contradiction is to be found in the testimony of PW2. That he appeared to narrate false events of 23rd September, 2015 while the charge sheet talked of 25th September, 2015. He further took issue that PW5 did not make reference to any investigations in his evidence. He argued that in the trial court's judgment, it was indicated that J N M testified as PW2 and that she was a cousin to PW1 and were together from school. That she claimed to have seen her being strangled. That on the same page, another PW2 is indicated as S C. That the record does not carry the evidence of the two strange witnesses and it is not clear where the trial court got evidence from.

6. The Respondent was on 30th May, 2018 given 30 days within which to file submissions but failed to do so. I have given due consideration to this appeal and bearing in mind that it is a first appeal, I have re considered and re-evaluated the evidence afresh with a view to arriving at my independent conclusion. The Appellant took issue with the fact that one N and PW1's father were not called to testify. In this regard I restate my finding in **Peter Muthiani Masai v. Republic**., **Machakos Criminal Appeal No. 36 of 2017** thus:

"I am guided by the Court of Appeal finding in Keter v. Republic [2007] 1 EA 135 where it was held that: "The prosecution is not obliged to call a superfluity of witnesses but only such witnesses that are sufficient to establish the charge beyond any reasonable doubt."

Further section 124 of the Evidence Act Cap 80 of the Laws of Kenya provides as follows:

"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 reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth."

The trial court conducted voire dire examination and was right to convict the appellant on her evidence having had the opportunity to see her demeanor and made a comment on the same."

7. Despite the few inconsistencies in PW1's evidence which in my view did not materially disturb his testimony, I find that PW1 was very firm on who the offender was and identified the Appellant as the person who committed the act. The said evidence was corroborated by the Clinical Officer who found his anus to be tender. Whether or not medical examination was conducted on the Appellant was in the circumstances immaterial. I further wish to note that the inconsistencies stated by the Appellant did not affect the material in the prosecution evidence or rather cast any doubt as alleged. I note that the trial magistrate mentioned a J N who was not a witness as in this case, however, the same does not change my earlier finding on PW1's evidence which if considered independent of all other witnesses still points to the Appellant as the perpetrator. The defence evidence did not shake that of the prosecution which is quite overwhelming against the Appellant. The complainant was herding animals together with the Appellant whom he knew quite well and there was no issue of mistaken identity. It did not transpire from the evidence that there existed any differences between Appellant and complainant's parents to suggest any frame up. In the end, I find that the prosecution proved its case beyond reasonable doubt. This appeal therefore lacks merit and it is hereby dismissed.

Dated signed and delivered at **Machakos** this **18th** day of **September 2018.**

D. K. KEMEI

JUDGE

In the presence of:-

Nzioka for Ngolya - for the Appellant

Machogu - for the Respondent

Josephine - Court Assistant