REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL CASE NO. 163 OF 2014

BETWEEN

WYCLIFFE ATEKA ANYEMBE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against original conviction and sentence in Butere PM Court's Criminal Case Number 63 of 2014 delivered in 28.04.2014 by Hon. E.S Otiende, SPM)

J U D G M E N T

Introduction

1. The appellant in this case was tried, found guilty and convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. Upon conviction the appellant was sentenced to life imprisonment as provided under the Act.

2. The appellant had been charged that on the 31st day of January, 2014 at [particulars withheld] village, Masaba Sub-location in Butere District within Kakamega County intentionally caused his penis to penetrate the vagina of M.A. a child aged 3 years. In the alternative, the appellant was charged with committing an indecent act with a child contrary to Section 11(1) of sexual Offences Act, No.3 of 2006. He denied both the main and alternative charges.

The Appeal

3. Being dissatisfied with both conviction and sentence, the appellant brought this appeal on grounds that the prosecution evidence is marred with rumours, contradictions and anticipations (sic). That the evidence adduced by the prosecution was uncorroborated, fabricated, malicious, discredited and lacking in probative value. That the prosecution did not prove its case against the appellant beyond any reasonable doubt; that the complainants age was not proved nor was the appellant medically examined to ascertain whether he was the one who committed the offence against the complainant, finally the appellant complained that the trial court did not consider his defence. Thereby reaching a wrong conclusion which led the trial court to impose a harsh sentence.

4. The appellant therefore prays that the conviction be quashed the sentence set aside so that he can go home.

The Duty of this Court.

5. This is the appellant's first appeal the appellant is entitled to a thorough reconsideration and evaluation of the evidence on record, with a view to determining whether or not the findings made by the learned trial Magistrate can stand. In this regard this court has to remember that it had no opportunity of seeing and hearing the witnesses who gave evidence during the trial. This therefore means that if any ground of appeal turns on the demeanor of a witness, this court would have no reason to differ from the findings of the trial court which had the opportunity to see and hear witnesses. Generally see **Mwangi – vs – Republic [2006] 2KLR 28, Mark Oiruri Mose vs – Republic [2013]eKLR** and the celebrated case of **Pandya vs. R[1957] EA 336.** For the above reason, I now proceed to set out the evidence.

6. The prosecution called 5 witnesses in its attempt to prove the charge against the accused person. From their evidence, the prosecution case is that on the day in question, the complainant, M.A was in the company of her elder sister at their home. M.As elder sister testified as PW5. As M.A was going to the pit latrine, the appellant herein beckoned her and when she got to where he was, he took her by the hand and led her to his house on the pretext that he was going to give her some githeri. At the house, the appellant served the complainant with githeri and some bread but soon after that he took her to his bed and defiled her.

7. While the incident was still going on inside the appellant's house, PW5 went to the house looking for M.A, but PW5 found the door shut. She pushed the door open only to find the appellant and M.A in bed. Both quickly got up when they saw PW5 but PW5 had been able to notice that the appellant's trousers had been rolled down while M.A's dress had been pulled up.

8. M.A quickly told PW5 that the appellant had been doing bad manners to her, meaning the appellant had defiled her. M.A bled from her private parts but when PW5 took her home, they both had a bath and did not report the incident to anybody. M.A. and PW5 also kept quiet about the incident even when their mother saw blood on M.A's panty as she (mother who testified as PW2) washed the panty on 01.02.2014. It was not until o3.02.2014 that PW5 told PW2 about the incident involving M.A and the appellant.

9. On getting this information, PW2 rushed M.A to hospital for examination and treatment. M.A was examined by PW3, Thedeus Nyongesa Toili, a clinical officer working at Mabole Health Centre. On examination, PW3 established that M.A had been defiled. She had a foul smell from the vagina and her hymen was partially broken, though there was no active bleeding M.A was put on medication and PEP. PW3 produced the P3 form- PExhibit 2 and the treatment notes as PEXh.3 respectively.

10. PW2 also reported the incident to Manyala Police Patrol Base and later to Butere Police Station. PW4 number 87353 police constable (w) Habiba Mohamed received the report. She is the one who investigated the case and also charged the appellant. PW2 also produced M.A's birth certificate which showed the M.A was born on 25.05.2010 and was thus 3 years old at the time of the incident. At the close of the prosecution, the appellant was called upon to defend himself.

Defence Case

11. In his defence, the appellant who gave an unsworn testimony, denied committing the offence and attributed his troubles to a fall –out between himself and PW2 SAN, mother to M.A he claimed that he used to work for PW2's family but one morning when he went to work, he was not received well by PW2, on allegations that he had told PW2's husband about a boy child PW2 had come with. When he married her husband. The appellant also testified that PW2 was not pleased by the fact that her husband was financing a succession cause involving the appellant's family, and upon which land PW2's family was living. The appellant and PW2 were related and he produced documents – DEXh1 to show that a dispute between him and PW2 had been reported to the area assistant, it was the appellant's contention that PW2's family was fearful of being evicted by the appellant.

Issues for Determination

12. From the evidence on record by both the prosecution and the appellant the issues that arise for determination are the following;-

a) Whether M.A's age was proved (see ground 5 of petition of appeal)

b) Whether the evidence on record supported the case against the appellant (grounds 3,4 and 5 of the petitioner of appeal)

c) Whether it was necessary to take the appellant through a medical examination to prove if he was the complainant's molesters- see ground 6

d) Whether the learned trial Magistrate failed to consider the appellant's defence and the consequences of such failure.

e) Whether the sentence meted out to the appellant was harsh in the circumstances.

Analysis and Determination

a) Whether M.A's age was proved

13. PW2, M.A's mother testified and told the court that M.A who was her 4th child was born on 25.05.2010. She also produced the child's Birth certificate which was marked as Pexhibit 1. With such evidence given by the mother of the child, the trial court did not need any other evidence as argument to prove M.A's age. It was there in black and white. The court does not also require any other argument to convince it that at the time of the incident 01.02.2014, the child M.A was 3 years, but doing her fourth year. In this regard, it is my considered view that M.A's age was proved as not only untrue but it is also scandalous. ground 5 of the Petition of appeal therefore fails

b) Whether the evidence on record supported the charge against the appellant

14. The appellant contends that the evidence on record does not support the charge against him. This court has carefully reconsidered and evaluated the evidence afresh and the inevitable conclusion. I have reached is that the appellants contention has no basis,. The reasons for saying so are as follows; the court took M.A through a detailed voir dire examination and at the close of it, the trial court concluded that the child, even though aged only 3 years was intelligent enough to understand and answer the questions put to her, though she could not understand the sanctity of an oath. She gave unsworn evidence at the end of which the appellant cross examined her. M.A cried more than once during her evidence in chief but in between her sobs, she stated in part;-

"I was coming from the toilet then Anyembe(accused) called me. I went to him and he gave me githeri. He gave me the githeri in his house. I ate the githeri. He then gave me bread and I ate. He then shut the door. I was inside the house with him. He did "bad manners" (Tabia mbaya) to me inside his house ……."

15. PW5 Noreen Nerima aged 7 years and an older sister to M.A testified after being taken though a detailed voir dire examination. She gave sworn evidence after the trial court satisfied itself that she was capable of appreciating the sanctity of an oath and stated in part of her evidence in chief.

"I know the accused. He is Anyembe. He stays near our home. Our houses are on opposite sides. He lives alone. I recall a certain day, I was at home. I saw R lying on Anyembe's bed, and Anyembe was lying on top of her. They were in Anyembe's bedroom. M.A told me that Anyembe had done "tabia Mbaya" to her (bad manners). When I went and they saw me, they got up quickly. Anyembe had lifted MA's dress to her chest. Anyembe had rolled down his trousers. They saw me and got up quickly. They dressed up then R told me they were doing "tabia Mbaya". Anyembe said they were just lying in bed.

16. During cross examination, PW5 stated the following, among other things.

> "M.A was going to the latrine. You called her and told her to go with you so that you could give her githeri. I remained behind. I did not see you…….. When I came to your house the door was shut but not locked. I did not knock the door, I pushed the door and entered. When I got there, you had finished doing. "tabia Mbaya" R told me that you had done "tabia Mbaya". My mother did not coach me on what to say. I have only said what I know."

17. In her judgment the learned trial Magistrate considered the twin issues of whether the complainant was defiled and whether it was the appellant who had defiled her. On the issue of whether it was the appellant who had defiled M.A the learned trial Magistrate said.

> "……. the complainant did not explain exactly what the accused did to her. Due to her young age, and possibly because of the trauma she must have gone through, she would not explain further and would break down and cry whenever she was asked for more information. She summarized it all in one term. "tabia Mbaya" which when directly translated means bad manners. This is a common euphemism used by young children to mean sexual intercourse.

18. Be that as it may the complainant's elder sister, PW5 corroborated the evidence of the complainant and her evidence infact gave more details on what transpired, PW5 stated that when she went into the house of the accused on the material day she saw accused on top of the complainant and his trousers had been pulled down. This makes it clear that the accused was defiling the complainant."

19. The learned trial Magistrate went on to say that the appellant was well known to both M.A and PW5 and that they were not mistaken about his identity, and that during the hearing M.A had pointed to the appellant as the one who had defiled her.

20. I have myself sifted through the testimony of both M.A and PW5 and I am satisfied that what they told the trial court was true. The appellant while cross examining PW5 suggested, that PW5 had been coached by her mother as to what to tell the court. In my humble view the answers by PW5 to the random questions put to her by the appellant during cross examination do not support the appellant's theory. The appellant is thus placed squarely at the scene of crime.

21. In his defence, the appellant suggested that the reason why PW2 manufactured a case against him was because she was angry when the appellant told PW2's husband about PW2's son. He also alleged that he had been framed because of a dispute over the land upon which PW2's family was settled. I have considered this whole story by the appellant, but I do not find it worthy of belief. The same is therefore rejected. Grounds 3,4 and 5 of the Petition of appeal, therefore fail the issue number (d) above is covered under these findings.

> c) Whether it was necessary to take the appellant through a medical examination to prove that he is the one who defiled the complainant.

22. Whereas the complainant's question may be valid, I do not think that much turns on it. The evidence is clear as daylight that the appellant lured M.A to his house, gave her some githeri before defiling her on his bed where PW5 found them in the act. M.A told PW5 that the appellant had done bad manners to her and M.A's ordeal some days later. I therefore dismiss ground 6 of appeal. In any event some considerable time had passed by the time the offence was detected and it is unlikely that a medical examination of the appellant's genitalia would have revealed anything.

> d) Whether there was penetration

23. Section 2 of the Sexual Offences Act No.3 of 2006 defines penetration to mean " the partial or complete insertion of the genital organs of a person into the genital organs of another person." In the instant case, PW3 Thadeus Nyongesa Toili, (Todi) a clinical officer working at Nabole Health Centre testified that when he examined M.A on 04.02.2014 at about 7.45am, he found out that M.A had a foul

smell from her vagina. He also found out that her hymen was partially broken but without evidence of active bleeding. According to Toili, the injuries on M.A were 4 days old. Toili also stated that due to lapse of time laboratory tests carried out at the facility did not yield anything positive such as the presence of spermatozoa.

24. Further, there is evidence that M.A bled during the ordeal as the pant she was wearing was blood stained. When PW5 found her in the appellant's house. So in light of the definition of the term penetration under the Sexual Offences Act, there was penetration though only partial. I find no other explanation in the circumstances of this case why a child of M.A's age should have a broken hymen and why she should have a foul smell enacting from her vagina.

e) Whether the sentence meted out of the appellant was harsh in the circumstances.

25. Section 8(2) of the Sexual Offences Act prescribes that " A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life." The charge sheet and the evidence on record show that M.A was clearly under eleven years when the heinous crime against her was committed. She was born on 25.05.2010 and was defiled on 31.01.2014. It therefore my finding that the learned trial Magistrate could not have imposed any other sentence and she clearly stated so when she noted in part before sentencing the appellant.

> "I have read the victim impact Assessment Report and considered the submissions in mitigation. However, Under Section 8(1) of the Sexual Offences Act only one sentence is available and that is life imprisonment."

26. In the circumstances of this case, the court has no reason to interfere with the said sentence as the same was neither illegal nor excessive in the circumstances. Accordingly ground 8 of the appeal is dismissed.

Conclusion

In conclusion I am satisfied that the appellant's appeal on both conviction and sentence has no merit and is hereby dismissed in its entirety. Right of Appeal within 14 days

Orders accordingly

Judgment delivered read and signed in open court at Kakamega this 19th day of January2017

RUTH N. SITATI

JUDGE

In the presence of;-

……Present in person……..….for Appellant

……Mr. Oroni (present)……..for Respondent

……Mr. Polycap..…….……Court Assistant