REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIM. APPEAL NO. 149 OF 2016

REPUBLIC…….....PROSECUTOR

VERSUS

PETER KARIUKI NJUGUNA…….....ACCUSED

(Arising from the conviction and Sentence by Hon. S. K. Arome Resident Magistrate in Kiambu CMCRC 3308 of 2014)

JUDGMENT

A. INTRODUCTION

1. Peter Kariuki Njuguna ("Appellant") was presented before the Chief Magistrate's Court in Kiambu in Criminal Case No. 3308 of 2014 charged with a single count of defiling FMK, a child aged six (6) years contrary to section 8(1) and (2) of the Sexual Offences Act No. 3 of 2006. The allegations were that he had defiled the minor on 11/11/2014 at [Particulars Withheld] within Kiambu County by causing his penis to penetrate the anus of FMK.

2. In the alternative, the Appellant faced a charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars are that on 11/11/2014 at [Particulars Withheld] within Kiambu County, he intentionally touched the anus of FMK, a child aged six (6) years with his penis.

3. The Appellant pleaded not guilty to both the main and the alternative charge and the case was set for hearing. After a fully-fledged trial, the Learned Trial Magistrate convicted the Appellant in the main charge and sentenced him to life imprisonment as the law dictates.

4. The Appellant is aggrieved by both the conviction and sentence and has appealed to this Court.

5. I will, first, set out the standard of review and briefly rehash the facts of the case as it emerged from the lower court.

B. THE DUTY OF THE FIRST APPELLATE COURT

6. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. In doing so, I am to be guided by two principles. First, I must recall that I must make appropriate allowance for the fact that I did not have a chance to see or hear the witnesses. This means that I must

give due deference to the findings of the Trial Court on certain aspects of the case. Second, in re-evaluating and re-considering all the evidence, I must consider the evidence on any issue in its totality and not any piece in isolation. This principle constrains me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings as a foil to endorse or reject its findings. See ***Okeno v Republic*** **[1973] E.A. 32**; ***Pandya vs. R*** (1957) EA 336, ***Ruwala vs. R*** (1957) EA 570.

C. <u>THE EVIDENCE PRESENTED IN THE TRIAL COURT</u>

7. The Prosecution's case was presented through four witnesses.

8. FMK, the victim, appeared as PW1. As a child of tender years, the Learned Magistrate conducted a *voir dire* and concluded that he did not understand the nature of oath and should therefore not be sworn.

9. FMK testified that on 11/11/2014, he was playing near their home when the Appellant called him and led him to a place that had trees and asked him to lie on his stomach. The Appellant then, testified FMK, applied some substance on his buttocks and then penetrated him with his penis. FMK testified that he had known the Appellant before and that on this day he had come accompanied by the person who sells bananas to his mother.

10. The victim's mother testified as PW2. She testified that she came back from work on 11/11/2014 at around 7:30pm to find FMK lying on the couch. On being asked to go bath, FMK suddenly burst into tears causing much concern for the mother. Upon much coaxing, interrogation and inquiries, it emerged that he had pain in his rear. Too embarrassed to speak to the mother about what had happened, eventually opened up to S, a cousin to PW2 (and an aunt to FMK), who PW2 called to speak with FMK. It was to S that FMK confided for the first time what had happened.

11. PW2, then, immediately took FMK to Nairobi Women's Hospital for examination and check-up – and then reported the matter to Karuri Police Station.

12. PC Grace Opiyo took the stand as PW3. Her testimony was mainly formal: confirming that PW2 reported to Karuri Police Station and the case was assigned to her. She escorted PW2 and FMK to Karuri Sub-district Hospital where FMK was examined and a P3 Form later filled out by the medical personnel.

13. Finally, Caroline Ndemi, a Clinical Officer who examined FMK at Karuri Sub-district Hospital testified last. She examined FMK on 12/11/2014 one day after he had reported that he had been defiled. By that time FMK had received treatment at Nairobi Women Hospital. Caroline found tenderness on the anal region of FMK and concluded that there was penetration. She wrote treatment notes which she used to fill in the P3 Form. She produced the former which was marked as Exhibit 4 and the latter which was marked as Exhibit 3.

14. With this evidence on record, the Prosecution was forced to close its case even though it would have preferred to call the doctor who first examined FMK and the Police Officer who arrested the Appellant. Nonetheless, the Learned Magistrate was persuaded that a *prima facie* case had been made out and put the Appellant on his defence.

15. The Appellant's defence was a straightforward denial. He testified that he works as a mechanic in Banana and that on 11/11/2014, he was at his place of work when at around 3:00pm one man from their village called him. When he walked to where the man was, it turned out to be a trick as the man was assisted with two others to arrest him. He was then escorted to the hospital where he was forced to undergo some tests. At the hospital, he testified, he met PW2 whom he claimed he did not know before. However, he later on said that PW2 has had issues with him since 2010 with the inference being that she was committed to framing him for things he did not do. He vehemently denied defiling FMK.

16. The Learned Trial Magistrate was persuaded that the evidence on record was sufficient to convict and proceeded to do so. He found the defence contradictory and unbelievable. Conversely, he found the

testimony of FMK to be consistent, honest, and unquestionable.

D. <u>THE ELEMENTS OF THE CRIME CHARGED</u>

17. The charged offence of defilement has three elements **See Fappyton Mutunga; *Dominic Kibet Mwareng –vs- Republic***):

a. Proof of penetration;

b. Positive identification of the Accused as the assailant who unlawfully caused the penetration; and

c. Age of the victim.

18. I will address each of the three elements as they arose in the instant case.

E. <u>PROOF OF PENETRATION</u>

19. Here proof of penetration was tendered through the oral evidence of FMK; the circumstantially corroborative evidence of PW2, the mother; and the medical evidence of PW4.

20. FMK gave clear and straightforward evidence of penetration: the Appellant asked him to lie on his stomach and applied some substance on his buttocks through his anus. FMK then felt something penetrating his anus and it was painful. FMK later said that the pain was from the penile penetration by the Appellant of his anus.

21. FMK's mother was the first to notice that something was amiss: she noticed that FMK had pain in his rear end immediately she came home and directed FMK to go for a shower. Since FMK was too traumatized to tell the mother, she called FMK's aunt (S) to prod FMK to disclose what happened.

22. FMK provided first hand evidence of the penetration. FMK's mother provided circumstantially corroborative evidence of the penetration because FMK reported immediately after assault indicating credibility of the narrative. The doctor who examined FMK and testified in Court also reported her findings that FMK's anus was inflamed which is consistent with the reported sexual assault.

23. It is important to recall that the evidence of these witnesses remained largely unshaken on cross examination. Though a child of tender years, FMK remained resolute and consistent under cross-examination. The Learned Magistrate found these Prosecution witnesses to be credible and truthful and believed them. There is absolutely nothing in the record or in the submissions by the Appellant to cause this Court to impugn that finding.

24. What about the fact that the doctor who examined FMK first at Nairobi Women's Hospital did not testify? The evidence of that doctor would have fortified the Prosecution case proving penetration – but it was not necessary. As analysed above, penetration was already amply proved by the evidence of the three Prosecution witnesses. There is no requirement in law for the Prosecution to call superfluity of witness to prove an element of a crime. As the Court of Appeal stated in ***Keter V Republic [2007] 1 EA 135***, *"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."*

25. In my view, this would be the same answer to the complaint raised by the Appellant that Salome was not called to testify: she was not an essential witness in the case.

F. <u>WAS THE APPELLANT THE ASSAILANT?</u>

26. FMK was quite categorical in his testimony: he pointed to the Appellant and stated that it was he who had defiled him. He remained consistent under cross-examination. Despite his tender years, he was clear why he knew the Appellant: he had accompanied the person who used to sell bananas to his mother and

who had brought some bananas on the day the defilement occurred. FMK's version remained consistent throughout. The defilement occurred before darkness and in broad daylight so the conditions were quite conducive for FMK to see his assailant well enough.

27. One of the issues the Appellant raises on appeal is one of identification. He complains that the Learned Trial Magistrate should not have convicted on the evidence of a single identifying witness who is a minor.

28. In his judgment, the Learned Trial Magistrate correctly cited and quoted Section 124 of the Evidence Act as amended by Act No. 5 of 2003 and Act No. 3 of 2006 as sufficient response to this complaint. That section 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, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth. (Emphasis added)

29. Interpreting this section, the Court of Appeal has now, in ***Mohamed v Republic [2006] 2 KLR 138,*** authoritatively said of this provision that:-

> By legal notice No. 5 of 2005 which introduced the proviso to Section 124 of the Evidence Act, Parliament drastically qualified Section 124 of the Evidence Act to enable a court in a sexual offence case to convict on the sole evidence of a child of tender years if satisfied that the child was telling the truth so that corroboration was no longer required as a matter of law making it now settled that the courts shall no longer be hamstrung by requirements of corroboration where the witness of a sexual offence is a child of tender years if it is satisfied that the child is truthful.

30. In the instant case, the Learned Trial Magistrate was persuaded that FMK was telling the truth and was capable of doing so despite his tender years. There is nothing in the record of the proceedings that causes me to doubt this factual finding by the Learned Trial Magistrate.

31. The Appellant has also raised another important issue: that no direct nexus was established in evidence between FMK, his father who pointed out the Appellant to the Police for arrest, and the arresting officers. He is right that no direct evidence was led to show this direct link. It is left for inference that FMK who testified that he knew the Appellant before described or mentioned him by name to his parents who, in turn, informed the Police of his identity. The obvious reason for this failure is that the arresting officers were not called to testify. This was because the Prosecution was forced to close its case after it sought an adjournment several times to procure the testimony of these officers.

32. In my view, though, this evidence was not essential for the case against the Appellant to be established beyond reasonable doubt. The evidence on record – from the direct evidence of FMK to the circumstantially corroborative evidence of PW2 and the Clinical Officer who examined FMK – are, to my mind, sufficient to unmistakably establish the Appellant as the assailant.

33. It would, of course, have fortified the Prosecution case had the Arresting Officer been available to testify. However, his absence, in these specific circumstances, do not inspire any reasonable doubts or dilute the Prosecution case unacceptably.

34. In the Ugandan case, ***Alfred Bumbo and others versus Uganda***, Criminal Appeal No. 28 of 1994, the Supreme Court of Uganda had this to say about the failure of the arresting officer to testify:

> While it is desirable that evidence of a police investigating officer and of arrest of an accused person by the police, should always be given, where necessary, we think that where other evidence is available and proves the prosecution case to the required standard, the absence of such evidence would not, as a rule, be fatal to the conviction of the accused. All must depend on the circumstances of each case whether police evidence is essential, in addition to prove the charge.

35. In this case, following this persuasive Ugandan decision, I hold that the evidence of the arresting officer was not essential to establish the charges against the Appellant

36. What do we make of the fact that FMK did not state the time the assault happened? In my view nothing turns on this complaint by the Appellant. Both FMK and PW2 are quite clear that it was between 5:30pm (when FMK came home from school) and 7:30pm (when PW2 came back home from work). The period of two hours is certainly enough for the assault to have occurred.

37. The time the assault occurred is also important for the issue of identification: it was in broad daylight and certainly before nightfall. This means that FMK had the opportunity and the circumstances were certainly favourable for positive identification. It is important to remember here that FMK's evidence is actually one of recognition.

38. The Appellant testified in his defence that this was a frame-up job: he did not assault FMK and all the evidence is concocted since he has had "problems" with PW2. The Learned Trial rejected this defence as incredulous. He gave two reasons for rejecting this defence theory. First, the Learned Trial Magistrate demonstrated the internal inconsistencies with the story itself: on the one hand the Appellant claimed he did not know PW2 and only met her in the hospital; on the other hand, the Appellant claims she knows PW2 and that she concocted this story in order to revenge for the grudge she bears towards him.

39. Second, the Learned Trial Magistrate cited the consistency of the Prosecution witnesses – and especially the testimony of FMK. The Learned Trial Magistrate, who saw and heard the witnesses was categorical that FMK struck him as a truthful witness. In addition, FMK's evidence on cross-examination remained unshaken.

40. I have absolutely no reasons whatsoever to disturb these findings by the Learned Trial Magistrate.

G. <u>WAS THE AGE OF THE COMPLAINANT CONCLUSIVELY PROVED?</u>

41. The law is quite clear that to sustain a conviction for defilement, age of the victim must be conclusively proved. Hence, in ***Hilary Nyongesa Vs Republic*** Mwilu J. (as she then was) stated that:-

> "Age is such a critical aspect in Sexual Offences that it has to be conclusively proved…And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim."

42. In this case, the age of the victim is stated in the charge sheet as 6 years old. FMK testified that he is 7 years old. The mother produced a baptismal card showing that FMK was born on 10/02/2008. The P3 form assigns 6 years as the age of FMK at the time of examination. The Learned Magistrate performed voir dire upon confirming that FMK was a child of tender years – and indeed, concluded that FMK could not take oath as he did not understand the nature of oath. All these evidence, which is on record, conclusively establishes the age of FMK as one below twelve years old – which is the threshold for the offence of defilement under section 8(2). It is, therefore, my finding that this element of the crime was also proved. There is no requirement, as the Appellant argues, for the Prosecution to prove the age of the victim through scientific evidence. At times, even the oral evidence by a parent can be enough. Here, though, in addition to the oral testimony of both the victim and the parent, we have a baptismal card. There was ample evidence that FMK is a child who is less than twelve years old. In my view, therefore, there is no question that this element of the crime was established beyond reasonable doubt.

H. <u>CONCLUSION</u>

43. After carefully reviewing all the evidence presented in the trial court and having the benefit of re-analysing the evidence a third time against the complaints raised by the Appellant, I find that the Trial Court, in its judgment, showed that it applied its mind in the proper manner to all the material issues which were under determination – including its reasons for its acceptance of the Prosecution narrative and rejection of the testimony of the Appellant.

44. The Learned Trial Magistrate who heard and saw the witnesses formed the opinion that the narratives by the Prosecution witnesses and especially FMK and FMK's mother were truthful and credible. He also formed the opinion that the Defence theory that the mother was trying to frame the Appellant was improbably and incredible. Looking at the totality of the circumstances, it is my finding that it was safe to reject the Appellant's story. The Appellant's story is so improbable that it cannot reasonably possibly be true.

45. It is, therefore, my finding and holding that the conviction was safe and should be upheld.

I. <u>APPEAL AGAINST SENTENCE</u>

46. The circumstances upon which an appellate court will interfere with a sentence lawfully imposed by a trial Court are circumscribed. It will only do so if it is evident that the trial Court acted on wrong principles or overlooked some material factor or the sentence is illegal or is manifestly excessive or lenient as to amount to a miscarriage of justice. Lastly, an appellate Court can interfere with sentence a Trial Court has imposed a sentence that is demonstrably unfit in the given circumstances. It is not enough that the appellate Court would have imposed a different sentence if it was sentencing in the first place. See: ***R v Jagani & Another [2001] KLR 530***.

47. In this case, none of these factors are present. The Learned Trial Magistrate addressed herself to all relevant factors and it cannot be said that he acted on any wrong principles. Further, the sentence imposed is the mandatory sentence imposed by law. Consequently, I will leave the sentence imposed intact.

J. <u>DISPOSAL AND ORDERS</u>

48. In the end, therefore, this Court, after re-considering and re-evaluating all the evidence and the entire trial court record concludes as follows:

a. For the reasons stated above, the appeal is dismissed and the conviction is hereby affirmed.

b. The sentence imposed by the Trial Court of life imprisonment is affirmed.

49. Orders accordingly

Dated and delivered at Kiambu this 3rd day of February, 2017.

JOEL NGUGI

<u>JUDGE</u>