REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NYERI

CRIMINAL APPEAL NO. 89 OF 2015

STEPHEN KIBUKU GICHUKI…….. APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

(Appeal from the judgment of the Hon.V.O. Chianda SRM Mukuruweini delivered on 3/12/2015 in PMCCr. Case No.193 of 2015)

JUDGMENT

1. On Count I the appellant was charged with the offence of attempted defilement contrary to **Section 9(1) (2)** of the **Sexual Offences Act, 2006;** the particulars of the charge were that on the 12/06/2015 within [particulars withheld] in Mukuruweini Sub-County within Nyeri County he intentionally attempted to defile **SWM** a girl aged four (4) years;

2. The alternative charge was Committing an Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act; that the appellant, on the same day at the same place as stated above, intentionally touched the private parts of **SWM** a girl aged four (4) years with his member;

3. The appellant was charged and was convicted on the alternative charge of Indecent Act with a child and was sentenced to a term of twenty (20) years;

4. Being aggrieved by the conviction and sentence the appellant filed a Petition of Appeal on 9/12/2015 raising the following grounds of appeal which are summarized hereunder:-

i. The trial magistrate erred in basing his conviction on prosecution evidence that was doubtful and inconsistent;

ii. There was no descriptive first report given to his arresters.

iii. The prosecution had not proved its case to the required standard;

iv. The trial magistrate erred in rejecting the appelant’s sworn defence that was not shaken by the prosecution’s evidence.

v. The sentence of 20 years had no justification.

5. At the hearing of the appeal the appellant appeared in person and chose to rely on his written submissions; Ms. Gicheha appeared for the State and made oral presentations; hereunder are the respective parties submissions;

APPELLANTS SUBMISSIONS

i. The appellant contends that there were discrepancies in the evidence of the prosecution witnesses; that **PW1** told the trial court that he removed her clothes but he did not remove any of his clothes; that something was done to her with a **"Kanyunyu"** inside the church toilet**;** and he posed a question as to how the **"Kanyunyu"** could have been used without him removing his clothes;

ii. PW2's evidence was not consistent in that she wanted the court to believe that she was the first person **PW1** met after the incident yet she is not mentioned as such in **PW1's** evidence; the evidence of **PW1** was that the first report was made to her mother and not **PW2**; the name of **"Maina"** was mentioned by **PW1** as the person who had committed the heinous crime; yet when a report was made to the police no such mention was made nor did the name ***'alias Maina'*** appear on the Charge Sheet;

iii. That there are also contradictions as to the names of the persons to whom the first report was made to; there was also a contradiction in the manner the report was made; **PW3** the mother of the complainant never mentioned that she received a report from **PW2** and instead stated that she had received a call from **PW4** who relayed the message;

iv. On identification the appellant contends that it was only the victim who identified him; that there was no one else who witnessed the incident or pointed a finger at him; that it was **PW3** and not the complainant who pointed to a path that ultimately led to his homestead as there were no other homes along the path; that he never fled from the jurisdiction after the alleged act;

v. On penetration PW7 who examined **PW1** testified and produced the P3 Form noted that the hymen was intact and that there were no abnormalities or bleeding; that this evidence watered down that of **PW3** who had stated that upon examining the private parts of **PW1** the area appeared to have some white fluid; that the evidence of **PW5** mentioned that white substance was found on the floor toilet; but it was not extracted for analysis; **PW6** the investigating officer testified to seeing semen on the floor of the toilet but this was not reflected in his witness statement nor did he pass this information to **PW8** the arresting officer; therefore the evidence of these witnesses ought not to be relied upon;

vi. On his defence; the appellant contends that the trial court rejected his defence of ***alibi*** which was not challenged by the prosecution; that the trial court did not analyze the evidence adduced by the prosecution witnesses; that if it had done so it would have found that it was tainted with glaring doubt and would have found in his favour;

vii. The appellant urged this court to analyze all the evidence adduced and come up with a different view from that of the trial court; and prayed that his appeal be allowed in totality; and that the conviction and sentence imposed be set aside.

RESPONDENTS SUBMISSIONS

6. Counsel in response submitted that;

i. The fact that he did not remove his clothes does not mean that he did not commit the offence; it was enough that he removed his genitalia and put it on the minor's;

ii. The evidence of **PW2** was consistent and brief on what happened and that she informed **PW1's** mother; the evidence of **PW2** and **PW4** led to the mother knowing about the incident;

iii. The evidence of **PW5** and **PW7** who examined the complainant exonerated the appellant of the offence of defilement; the fact that the medical report did not confirm penetration does not mean that the evidence is contradictory;

iv. That the fact the name **"Maina"** was not included in the Charge Sheet does not mean that the prosecution did not prove its case to the desired standard; the evidence of **PW1** through to **PW8** was consistent and water tight and the defence did not shake the prosecutions' case;

v. The appellant raised the defence of ***'alibi'*** that he was at home and that he only knew about the incident when the crowd and the sub-chief arrested him; that the trial court considered this defence and found it to be a mere denial and that it had no merit; and found that the appellant committed an Indecent Act on the minor;

vi. Counsel prayed that the conviction and sentence be upheld.

ISSUES FOR DETERMINATION

7. After taking into consideration the rival submissions of both parties and upon reading the Record of Appeal this court has framed the following issues for determination;

i. Whether the appellant was positively identified;

ii. Whether the prosecution evidence on record was inconsistent and contradictory so as to render the conviction unsafe;

iii. Whether the prosecution proved its case on Indecent Act to the desired threshold.

iv. Whether the trial court erred in disregarding the appellants' defence;

v. Whether the sentence was harsh and excessive in the circumstances;

ANALYSIS

8. This being the first appellate court it is incumbent upon it to reconsider and re-evaluate the evidence and arrive at its own independent conclusion always keeping in mind that it did not have an opportunity to see nor hear the witnesses. Refer to the case of **Okeno vs Rep (1972) EA 32.**

Whether the appellant was positively identified;

9. The appellant contends that the fact the name **"Maina"** was not included in the Charge Sheet means that the prosecution did not prove identification to the desired standard;

10. The minor told the court that the assailant told her that his name was Maina; that he was armed with a panga and had threatened to cut her to pieces if she cried;

11. The evidence of **PW2** was that she was the first person to meet the minor on that material date; that this was about 2.00pm in the afternoon which is indicative of the fact that the incident occurred during the day and that the conditions were therefore favorable for identification; the evidence on record states that the minor provided the name of the assailant as "Maina" to both **PW2** and **PW4**; and **PW2** went on to state that this Maina was also known as Kambiku and was a person known to her as she had previously worked with him in the same location.

12. The evidence of Susan Mukami Wanjohi (**PW5**) who was the Assistant Chief Kiharo as recorded by the trial court was that on the material date at about 3pm she received a call concerning defilement of a child; she proceeded to the scene accompanied by APC Simon Ndirangu and George Githinga; after interrogating the minor they proceeded to the appellants house; they found two men in the house, one being the appellant who was holding a panga;

13. The evidence of **PW5** was that the minor was asked to identify the defiler out of the two persons found in the house and that she pointed out the appellant '**two times'** and positively identified the

appellant as the person who had indecently assaulted her; **PW5** went on to add that the appellant was a notorious person in the village and was in the habit of carrying a panga and threatening people with it when inebriated;

14. The trial court in its judgment made the following finding on identification;

> **" The complainant not only directed witnesses led by the chief Susan Mukami towards the general direction in which the accused had fled after the act but positively identified him before a crowd that had gathered.**
>
> **This happened only a short while after the incident and the issue of human frailties regarding memory of mis- identification does not arise.**
>
> **In the same vein, the complainant being a 4-year-old appeared sincere and lacking a mental ability to frame the accused."**

15. The incident is said to have occurred prior to 2.00pm which means that it was in broad daylight and therefore this court is satisfied that the conditions were favorable for identification; the evidence of **PW1** was that the appellant told her his name and that he was armed with a panga and had threatened to cut her up; the evidence of **PW5** who received the first report was that she was given the name of the appellant and where he resided; that when they went to arrest the appellant at his house they found him armed with a panga; that the appellant had gained notoriety of walking around with a panga and threatening people when he was drunk;

16. In the light of the above this court concurs with the findings of the trial court that the evidence adduced by **PW1** on identification was credible and implicated the appellant as the assailant; further this court finds no reason to interfere with the trial courts finding that the minor positively identified the appellant;

17. This ground of appeal is found lacking in merit and it is hereby disallowed.

Whether the prosecution evidence on record was inconsistent and contradictory so as to render the conviction unsafe;

18. The appellant contends that there was inconsistency and contradictions in the prosecution evidence as to who received the first report; this court has carefully perused the evidence of **PW2** which was that she was the first person who met the distressed minor; that she interrogated the child and then took her to **PW4's** shop and reported the matter to her; **PW4** confirmed that the minor was brought to her shop by **PW2**; **PW3** the mother of the complainant mentioned that she received a report from **PW2.**

19. The evidence of **PW5** who was the Area Assistant Chief was that she was called but she doesn't mention the name of the caller; the report she received contained the name of the defiler and his residence; she called the police and requested them to accompany her to the scene of crime; thereafter the team visited the home of the appellant.

20. This court finds that the evidence of **PW2** was consistent and brief and to the point on what happened and that she was the one who informed **PW1's** mother; this court is satisfied that the name of the appellant featured in all the reports that were made and that there were no contradictions in the manner the reports were made;

21. This court finds no inconsistency or contradictions in the evidence of the prosecution witnesses so as to render the conviction unsafe; this ground of appeal is found lacking in merit and it is hereby disallowed.

Whether the prosecution proved its case on Indecent Act to the desired threshold.

22. PW1 stated that they were in the church toilet with the appellant; whilst there the appellant took off her panties, applied saliva on her and did something to her with his ***'Kanyunyu'***; the evidence of **PW2** was that the minor told her that Maina had hurt her and the exact words used were;

> ***'……amenigusa na kachuchu yake……'***

23. That upon examining the minor the medical officer **(PW7)** found that there was no broken hymen nor signs of bruises or bleeding and made no finding of defilement; he tendered into court the P3 Form as an exhibit **(PExb.1);**

24. The trial court in its judgment made the following observation;

> **"The P3 form Pexh.1 revealed no bruises, bleeding or broken hymen suggesting that no penetration took place.**
>
> **In the premises the court finds the medical evidence insufficient to support the main charge and acquits the accused thereof, but convicts him on the alternative count of indecent assault under Section 215 C.P.C."**

25. This court is satisfied that from the narrative of the ordeal on how the appellant removed her pantie and the use of the words **"amenigusa na kachuchu yake"** by **PW1**, that this was a sufficient description of the ordeal by a child of such tender years and the finding by **PW7** that the hymen was intact and that there were no bruises or presence of bleeding this goes to prove indecent act;

26. This court finds no reason to interfere with the trial courts finding that the appellant engaged in an indecent act;

27. On age; the age of the victim is a crucial factor as it determines the sentence to be imposed. Age can be proved by medical evidence and it can also be proved by either a Birth Certificate or a Notification of Birth; in this instance neither of the forgoing was produced but there was the medical evidence of **PW7** who was a medical officer based at Nyeri Provincial Hospital who gave the estimated age of the Complainant as being four (4) years at the time the offence was committed and also at the time of the medical examination. The P3 Form was produced by this witness and this court has had occasion to peruse the P3 Form and confirms that the age of the Complainant indicated therein as being four (4) years.

28. This court is satisfied that a medical officer was a professional who could determine the age of a victim of defilement; and that in the absence of the Birth Certificate the medical evidence tendered by **PW7** was sufficient proof of the age of the Complainant.

29. This court is satisfied that the prosecution proved that **PW1** was a child of tender years within the meaning of the Children's Act;

30. This court is satisfied that the prosecution proved its case to the desired threshold; this ground of appeal is found lacking in merit and is hereby disallowed.

Whether the trial court erred in disregarding the appellants' defence of alibi.

31. The appellant raised the defence of ***'alibi'*** and stated that he was at home and that he only knew about the incident when the crowd and the sub-chief arrested him;

32. The trial court is found to have considered this defence and found it to be ***'a bare denial of wrong doing'*** and that it had no merit;

33. The trial court is found to have considered the evidence of the prosecution witnesses in its judgment; and is found to have properly directed its mind to all the issues; and having weighed the appellants

defence of ***alibi*** as against the prosecutions the trial court was satisfied that it did not displace the prosecution's case; and found that the appellant committed an Indecent Act on the minor; the trial court is found to have arrived at a correct conclusion;

34. This court is satisfied that the trial court took into consideration the appellants defence and gave sound reasons for rejecting it.

35. This ground of appeal is disallowed as it is found lacking in merit.

Whether the sentence was harsh and excessive in the circumstances;

36. The appellant contends that the sentence imposed of twenty (20) years has no justification;

37. This court has noted that the trial court did not enquire from the prosecution whether the appellant was a first offender and therefore failed to take this factor into consideration before it passed sentence;

38. The trial magistrate did not set out the details of Section 11(1) of the Sexual Offences Act in his judgment before passing sentence; the section provides as follows;

> **Section 11(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."**

39. The minimum sentence prescribed for persons found guilty of Indecent Act with a child is ten (10) years; this court will proceed to treat the appellant as a first offender and for those reasons this court finds that in the circumstances of the case the sentence to be harsh and excessive; therefore there is good reason to interfere with the sentence imposed;

40. This ground of appeal is found to have merit and it is hereby allowed;

FINDINGS

33. For the reasons stated above this court makes the following findings;

i. The appellant was positively identified by the complainant.

ii. There were no inconsistencies and contradictions in the evidence of the prosecution witnesses; the conviction is found to be safe;

iii. The prosecution is found to have proved the key elements of the offence of Indecent Act to the desired threshold.

iv. The trial court is found to have taken into consideration the appellants defence and gave sound reasons for rejecting it.

41. The sentence is found to be harsh and excessive in the circumstances.

DETERMINATION

34. The appeal on conviction is found lacking in merit and is hereby dismissed; the conviction on the alternate charge is hereby affirmed;

35. The appeal on sentence is found to have merit and is hereby allowed; the sentence of twenty (20) years is hereby set aside and substituted with a sentence of ten (10) years with effect from 3/12/2015.

Orders Accordingly.

Dated, Signed and Delivered at Nyeri this 9th day of February, 2017.

HON. A. MSHILA

JUDGE