REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 26 OF 2015

JAMES KARIUKI MUNENE.....…….APPELLANT

-VERSUS-

REPUBLIC…….....RESPONDENT

(An appeal from the conviction and sentence of the Principal Magistrate's Court (D. Nyaboke) at Wang'uru, Criminal Case No. 638 of 2014)

JUDGMENT

1. The appellant **James Kariuki Munene** was charged with the offence of defilement of a girl contrary to ***Section 8 (1) (4)*** of the **Sexual Offences Act No. 3 of 2006** vide Wanguru Principal Magistrate's Court Criminal Case No. 638 of 2014. The particulars are that on 17th November, 2014 in Kirinyaga County intentionally caused his penis to penetrate the vagina of A.M.I. a child aged 12 years. The appellant James Kariuki Munene was also charged with an alternative 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 the 17th November, 2014 at in Kirinyaga County intentionally touched the vagina of A. M. I. a child aged 12 years with his penis.

2. After a full trial before D. Nyaboke, Resident Magistrate, the accused was found guilty and convicted on the charge of defilement and sentenced to serve twenty (20) years imprisonment. The appellant was aggrieved and filed this appeal.

3. The appellant raised five grounds of appeal which can be summarized as follows:

(i) That the learned trial magistrate erred in law and facts in failing to consider that the circumstances of identification were not favourable.

(ii) That the learned trial magistrate erred in law and facts by convicting the appellant on defective charges.

(iii) That the trial magistrate erred in law and facts by relying on a doubt-ridden evidence of prove.

(iv) The learned trial magistrate erred in law and facts by failing to observe and consider the crucial witnesses were not avoided.

(v) That the constitutional rights of the appellant under Article 49 (1) (7) (1) of the Constitution were violated.

4. When the appeal came up for hearing the appellant chose to proceed by way of written submissions which he filed in court. The appeal was opposed by the learned State Counsel D. D. Sitati on behalf of the State on the grounds that the prosecution case was overwhelming leaving no room for doubt and all necessary components required of a defilement case were proved beyond any reasonable doubt. He urged the court to dismiss the appeal.

5. In his submissions the appellant James Kariuki Munene urged the court to find that conviction and sentence were both insecurely based and resolved every doubt in appellant's favour. That it is only morally just that this appeal be allowed, the conviction quashed and sentence set aside.

6. The facts of the case are that the complainant A. M. I. is a girl aged 12 years having been born on 19th June 2002 as per the birth certificate serial No.[Particulars Withheld] which was produced in trial court as exhibit 3. On 17th November, 2014 the complainant A. M. (P.W.3) had at around 7.00 p.m. gone to look for her brother M. As she was looking for her brother she met with the accused who told her that he knew where M was and would assist to look for him. The accused led her to where there were bushes and removed her short and pant. The accused removed his trouser and lay on top of her. He put his penis in her vagina. The accused used force and threatened to leave her in the bush if she did not allow him to finish. The accused then took her home and told her to keep quiet or he would kill her. In the meantime, her mother F.M.I. (P.W.1) had reached home from work at 9.00 p.m. and found the complainant missing. Upon being taken home by the accused the complainant told the house help what had happened. She then told her mother what had happened. The mother took complainant to Kimbimbi sub-district hospital the next day. She also reported the matter at Wang'uru Police Station. The complainant was issued with a P3 form, exhibit -2- which was filled by **Dr. Kenneth Munyi**. The doctor found that the complainant had a minor bruise on the right side of the entry of the vagina approximately 0.5cm in length. The hymen had an old tear. The appellant who was identified by the complainant as the person who defiled her was arrested at Brethen School and charged with defilement.

7. The appellant James Kariuki Munene gave unsworn statement and told the court that on the material day he was at work at Brethen School where he works as a cleaner. He used to work upto 10.00 p.m. That he had never seen the complainant and that the charges were a fabrication.

8. This being a first appeal, I have re-evaluated the evidence on record as required. This was so held in **Okeno -V- Republic (1972) E.A. 36**.

9. The prosecution relied on the evidence of the complainant A. M. (P.W. 3) her mother F.M.I. (P.W. -4-) and Doctor Kenneth Munyi (P.W. -2-) who examined the complainant and filled a P3 form.

10. The complainant (P. W. -3-) after *voire dire* examination was allowed to give unsworn evidence. The appellant was given a chance to cross-examine her which he did. It was her testimony that she had gone to look for her brother when at around 7.00 p.m. she met the appellant. According to the complainant she knew the appellant and she could identify him as she had seen him on the road and had seen him before at the shop near Brethen School. The appellant admitted that he used to work at Brethen School. It is therefore not far-fetched for the complainant to say she had seen him near that school. The complainant gave details of how the appellant defiled her. He then escorted her home warning her not to tell anybody. When she reached home she informed the house help then informed her mother. The prosecution proved that the complainant A. M. was aged twelve years at the time. The birth certificate shows that she was born on 19th June, 2002. The trial magistrate found that the evidence of the complainant was consistent and was convinced by her evidence that she was able to identify the appellant. The trial magistrate found no reason to doubt her.

11. P.W.1 on her part told the court that when she came home on the material day at about 8.00 p.m. the complainant was not at home. The house help told her she had gone to look for her younger brother. The complainant came home while looking terrified. According to P.W.1 the complainant told her how she met the appellant and he offered to help her look for her brother but instead defiled her. Her testimony shows that the complainant knew the person who defiled her. In cross-examination P.W.1 told the court that where appellant used to work was two gates from where he lives and she used to see him. She told

the court that it is the complainant who said he is the one who took her. Her evidence shows that the identity of the defiler was not in dispute.

12. P.W.2 Doctor Kenneth Munyi examined the complainant and filled the P3 form. The positive findings were that he found a minor bruise. The complainant was treated on 18th November, 2014 and the P3 form was filled on 19th November, 2014. The treatment notes and P3 form were produced as exhibit 1 and 2 respectively. The doctor testified that the allegation was sexual assault. His testimony that there was a bruise corroborates the evidence of the complainant that she was defiled.

13. P.W. 4 Acting Inspector Joseph Ngari was the investigating officer.

14. The appellant raised the ground that the trial magistrate failed to consider that the circumstances did not favour positive identification. His submission was that no evidence was led as to any source of light. When the appellant cross-examined the complainant, she stated that she had left home at 4.00 p.m. This was confirmed as her statement to the Police was read in court. She further said she had seen the appellant on the road. The trial magistrate considered the issue of identification and stated as follows in his judgment:-

> ***"I say this because the prosecution witness 3 convinced me on the 2nd issue, that she was able to identify the accused positively. According to her she had seen him prior to the offence and even on the material date they seem to have talked before accused led her to the bushes. I further note the prosecution witness 3's assertion which I have no reason to doubt that at the time the accused offered to assist her look for her brother it was still light outside and she could see him clearly. I have no doubt that the accused was properly identified."***

It is very clear that the trial magistrate addressed the issue of identification. The complainant met the appellant when there was light. Such circumstances favour positive identification.

15. The State submitted that the identification of the appellant was proved to the required standard. At page 18 contrary to the submission by the appellant that it was dark the complainant stated that she met the accused when there was still light and she could see him. It should be noted that the appellant was assisting her to look for her brother. They must have been together before he defiled her. It is not expected that he could have defiled her in broad day light and in the open. If he defiled her in darkness it is very clear from the evidence that the complainant had met him when there was light and properly recognized him and identified him as a person he had seen before.

16. On the ground that the charge is defective the appellant submits that he was charged under ***Section 8 (1) (4)*** of the **Sexual Offences Act** which does not exist. Indeed the charge sheet shows he was charged under ***Section 8 (1) (4)*** of the **Act**. Contrary to the submission by the appellant the provision exists in the Act dealing with offence of defilement of a child between the age of 16 and 18 years. The charge as submitted by the state is not defective. The only issue is that the subsection dealing with the child of 12 years is ***Section 8 (3)*** of the Act. The charge was properly drafted as required under ***Section 134*** of the **Criminal Procedure Code** disclosing the statement of offence and the particulars necessary for giving the appellant information as to the nature of offence. The appellant knew the charge, heard the evidence and actively participated in the proceedings. He was not prejudiced in any way. The complainant testified. Her age was proved with production of birth certificate. Her age was never in dispute. ***Section 382*** of the **Criminal Procedure Code** provides:

> ***"Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complain summons or warrant, charge, production, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error or omission or irregularity has occasioned a failure of justice."***

I find that this provision cures the defect. There was no failure of justice. The appellant actively

participated in the proceedings. A proper sentence was passed. The appellant has not demonstrated that he was prejudiced. From the record, his rights were not frustrated in any way.

17. He submits that it was a technicality. No miscarriage of justice was occasioned.

18. The appellant submits that the evidence was doubt-ridden. The trial magistrate found that the charges were proved beyond any reasonable doubt. The evidence of the complainant was corroborated by medical evidence as adduced by Doctor Munyi (P.W.2). He was a doctor and registered with Medical Practitioners and Dentists Board vide No. 47319. The appellant did not challenge his credentials when he was given a chance to cross-examine him. I find that the prosecution proved that he was a qualified doctor. He gave evidence that the complainant was treated as per the treatment notes exhibit -1-. On his part he did a physical examination of the complainant and noted his findings on the P.3 which are in line with the treatment notes. The fact that the appellant never challenged the evidence based on what is is raised in his submissions shows that he did not dispute that the witness was qualified and had the necessary expertise to fill the P. 3 form. The appellant squandered the opportunity to interrogate his experience and he cannot raise at this stage. The other witnesses gave well corroborated evidence. The trial magistrate found that the testimony of the complainant was corroborated. The charge was proved beyond any reasonable doubts which was the required standard in the case.

19. The appellant faults the prosecution for not calling the house help as a witness. Failure to call the house help did not occasion any injustice. There is nothing to show that she would have given adverse evidence to the prosecution case. P.W. -1- and P.W. -3- testified that P.W. -1- disclosed to the house help then to her mother. From the record there is nothing to show she had more to say than what P.W. -1- told this Court. It can only be speculation. As well submitted by the appellant ***Section 143*** of the ***Evidence Act*** provides that no particular number of witnesses shall be required to prove any facts. The State submits that traditionally a person who may seem to be a witness may not necessarily be considered as one by the prosecution because their evidence may lack intrinsic value to the prosecution's case or may not have been available in time to testify without unreasonable delay. The fact was proved by P.W. 1 and P.W. 2.

20. The appellant submits that the trial magistrate erred by failing to consider that his fundamental rights were violated when he was kept in custody for more than twenty four hours in violation of ***Article 49 (1) (F) (i)*** of the **Constitution**. It is now well settled that the remedy lies elsewhere and not in this appeal. The violation if at all it was there was not a bar for the appellant being tried for this offence. It does not render the trial being declared a nullity. It will entitle the appellant damages in a civil suit if proven.

21. The defence of the appellant was that the charges are fabrication. He did not state why the complainant and P.W. 1 would fabricate evidence against him. There were no alleged grudges. In the circumstances, the magistrate was entitled to find no merit in the unsworn statement of defence which I find contained mere denials.

22. From the record, it is clear that the trial magistrate considered all the evidence adduced before him. The age of the child given in the particulars of the charge was proved. The evidence laid before the trial magistrate proves that there was penetration. The identity of the perpetrator was proved beyond any reasonable doubts. The appellant was properly convicted. The sentence of 20 years was the bare minimum provided under ***Section 8 (3)*** of the **Sexual Offences Act** in view of the age of the child. I therefore find no merit in this appeal and it is dismissed.

Dated and delivered at Kerugoya this 17th day of March, 2017.

L. W. GITARI

JUDGE

17.3.2017

Coram: L. W. Gitari J.,

Appellant – present

M/S Muthoni State Counsel for State.

M/S Naomi Court Assistant

Interpretation English/Kikuyu

ORDER: Judgment read out in open court in the presence of M/S Muthoni for State, M/S Naomi Murage, court assistant and the appellant.

L. W. GITARI

JUDGE

17.3.2017