REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NYERI

CRIMINAL APPEAL NO. 87 OF 2014

PETER MURAGE MBEERE ………. APPELLANT

VS

REPUBLIC ……………………….. RESPONDENT

(Appeal from the judgment of the Chief Magistrate's Court at Nyeri (Hon.C.Mburu R.M.) delivered on 28th October, 2014 in Criminal Case No. 42 of 2013)

JUDGMENT

1. The appellant, **Peter Murage Mbeere**, was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act.** The particulars of the charge were that on 3rd October, 2013 in Nyeri County within the Central Province unlawfully and intentionally defiled **MWW** a girl aged 10 years.

2. In the alternative, the appellant was charged with Indecent Act with a child contrary to **Section 11(1)** of the **Sexual Offences Act, 2006;** that at the same place and on the same day hereinabove mentioned the appellant committed an indecent act by intentionally touching **MWW's** private parts with his member.

FACTS

3. The facts of the case as recorded by the trial magistrate; after conducting a voire dire examination the trial court satisfied itself that the minor understood the need to tell the truth; she then gave unsworn testimony and told the trial court that on the 3/10/2013 she was outside playing with her friend S when the appellant who was a person well known to her and who was tending his cattle nearby called her to his house; he took her into his house and undressed himself and also undressed her; he then put his **'urinating thing**' inside her **'urinating thing'**; thereafter the appellant threatened to slash her mother and aunt with a machete presumably if she reported the incident to them; she later reported the incident to her mother; the complainant was examined at the Nyeri Provincial General Hospital and the matter was reported to the police and a P3Form was issued;

4. The appellant was arrested and subsequently charged in court; was tried and convicted on the main charge and was sentenced to life imprisonment.

5. Being aggrieved by both conviction and sentence, the appellant filed a Petition of Appeal and Amended Grounds of Appeal as are summarized here-under;

i. That there was no evidence of a first report having been made; the trial court erred in convicting him on the evidence of PW1, PW2 and PW3;

ii. That essential witnesses were not called to testify;

iii. That the prosecution did not prove its case beyond reasonable doubt;

iv. That the trial magistrate erred in rejecting his defence.

v. That the sentence was not legal.

6. The appeal proceeded for hearing and the appellant relied on his written submissions; whereas Ms Gicheha made oral presentations; hereunder is a summary of the parties respective submissions;

APPELLANT'S SUBMISSIONS

7. (i) That the appellants contention was that he was convicted on a defective Charge Sheet; he indicated that he was charged under the provisions of Section 8(1)(2) but convicted and sentenced under the provisions of Section 8(1)(3) and that such Sections were non-existent in the Sexual Offences Act; the sentence given by the trial court was under Section 8(3) which was clearly under the wrong provisions of the law;

ii. The prosecution failed to call crucial witnesses; in particular S Wwho ought to have been called as she was with **PW1** on the material date; it also failed to call one P and **PW2's** sister in law; reliance was placed on the case of **Bukenya & Others vs Uganda (1972) EA 549** where the court held;

> **"… that the prosecution has a duty to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent."**

iii. The trial court based his conviction by relying on the inconsistent evidence of **PW1**, **PW2** and **PW3**; that the evidence of **PW1** was uncorroborated; and that the trial court wrongly invoked the provisions of Section 124 of the Evidence Act;

iv. That the medical report was unsafe evidence; the hymen was not freshly broken; no act of penetration was proved; the prosecution failed to prove its case ;

v. The trial court rejected his alibi defence that the family wanted him jailed so that they can take away his things;

vi. The appellant prayed that his appeal be allowed in its totality.

RESPONDENT'S SUBMISSIONS

8. In response Counsel opposed he appeal on the following ground;

i. The appellant contended that the evidence of PW1 was uncorroborated and that the trial court wrongly invoked the provisions of Section 124 of the Evidence Act; Counsel in answer submitted that where the victim is a minor under the Evidence Act the evidence need not be corroborated; if the trial court believes that the minor is telling the truth it can convict; that the evidence of **PW1** was consistent; she narrated vividly what had happened to her and her evidence was not shaken in cross examination; and the trial court informed itself that she was telling the truth and properly invoked the Section;

ii. On whether the Charge Sheet was defective due to the fact that the appellant was sentenced under Section 8(3); and that the sentence was therefore not proper; Counsel submitted that the appellant was charged under the correct provisions that is Section 8(1) (2); that the minors age was indicated on the Charge Sheet; that the Section cited in the judgment was a typographical error; otherwise the sentence was proper;

iii. The appellant gave unsworn testimony; and denied having defiled the minor; and that he was framed so that his property can be taken away; that the trial court considered his defence and found it untenable safely arrived at its decision;

iv. Counsel prayed that the appeal be dismissed for lack of merit and the lower courts finding be upheld.

ISSUES FOR DETERMINATION

9. (i) Whether the Charge Sheet was defective;

ii. Whether the prosecution failed to call crucial witness;

iii. whether the prosecution proved the key ingredients of the offence to the desired threshold;

iv. Whether the trial court rejected the defence of alibi without giving sound reasons;

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

ANALYSIS

10. This being the first appellate court it behoves this court to re-evaluate the evidence on record and to reach an independent conclusion. Refer to the case of Okeno vs R (1972) EA 32.

Whether the Charge Sheet was defective;

11. The appellant submitted that the Charge Sheet was defective due to the fact that he was sentenced under Section 8(3); and that the sentence was therefore not proper; upon perusal of the Charge Sheet this court notes that the Charge Sheet contains the correct provisions and the prescribed punishment of the Sexual Offences Act that is Section 8(1) (2); and that the particulars of the offence contains a correct reference to the minors age which is indicated as 10 years; therefore at the time of taking plea the appellant had full knowledge of the nature of the offence he was facing;

12. This court is satisfied that the defect in the Section cited in the trial courts judgment does not occasion any failure of justice that is prejudicial to the appellant; the defect is found to be a typographical error and is curable;

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

Whether the prosecution failed to call crucial witness;

14. The appellants complaint is that essential witnesses; being the children known as S and Pand PW2's sister were not called to testify;

15. Section 143 of the Evidence does not provide for the number of witnesses the prosecution ought to call to prove a fact; the choice and number is left to the discretion of the prosecution to determine; from the evidence on record it is evident that the evidence of these so called crucial witnesses would not have been a crucial source of evidence as they were not eyewitnesses; their evidence would have been a duplication of **PW1, PW2** and **PW3's** evidence would not have proved any of the ingredients of the offence; and for those reasons no negative inference shall be drawn by this court for this omission by the prosecution;

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

Whether the prosecution proved the key ingredient of penetration beyond reasonable doubt;

17. The key ingredients of the offence that the prosecution was tasked with proving was that of identification of the assailant; the age of the complainant and the act of penetration;

18. On identification; the trial court's duty was to examine the evidence on identification and make a finding; it is noted that the trial court addressed this issue fully in its judgment and asked itself the question whether or not the appellant was the perpetrator and its answer was;

> **"…. The accused called her to his house and defiled her.More so, I find that the complainant and the accused were neighbours. This was confirmed by the evidence of Pw2 and Pw3 the minors' parents and the evidence of PW5 the Investigating Officer who arrested the accused at his home. All this goes to show that the accused person committed the offence and was positively identified as the perpetrator."**

19. This court notes that the trial court did not make a proper finding that the appellant was positively identified by way of recognition; this court is therefore tasked with re-examining the evidence adduced and to make a finding on identification.

20. The minor in her evidence stated that the appellant was well known to her before the incident; she referred to him as **" Paul's grandfather";** that on that material date the appellant singled her out from the other children and led her to his house where he undressed her and defiled her; in cross-examination her evidence on identification was not challenged by the appellant and remains uncontroverted; the evidence of the minor's parents corroborated that of the minor in that the appellant was a neighbor and a person well known to all of them.

21. The trial court noted in its judgment incident is said to have occurred in broad daylight and that the minor was thus able to identify the appellant; this court is satisfied that the conditions were favourable for positive identification; from the evidence adduced by the minor this court is satisfied that the appellant was a person well known to her and that identification was by way of recognition.

22. The prosecution is found to have proved identification to the desired threshold;

23. On the issue of age; **PW1** stated that she was in class 3 and she was aged 9 years; **PW2** the mother of **PW1** testified that the minor was her daughter and was ten (10) years of age and produced the Birth Certificate **(PExb.2)** to prove that the minors age; this evidence and this document was not challenged by the appellant under cross-examination; the witness **Dr. Consolata Kinuthia (PW4)** a medical officer at Nyeri Provincial Hospital produced the P3Form **(P.Exb.I)** which also indicated the minors' age as being 10 years; this court makes reference to the case of **William Odhiambo Siara vs R [2014] eKLR Kisumu Criminal Appeal No.77 of 2012**; where it was held that such documents are admissible as corroborating evidence;

24. This court finds no reason to interfere with the trial courts finding that the prosecution established the age of the minor to the desired threshold.

25. On penetration; The appellants contention was that the minor was examined immediately after the incident; that the medical report was unsafe evidence; the hymen was not freshly broken; in the absence of blood and fresh tears no act of penetration was proved; the prosecution failed to prove its case; that the trial court also wrongly invoked the provisions of Section 124 of the Evidence Act;

26. The State submitted that there was a sufficient evidence to support the fact that there was penetration; and that the trial court correctly invoked the provisions of Section 124.

27. The trial court in its judgment made the following observations and findings;

> **"According to the P3Form produced as evidence, the complainant was examined on the 9th October, 2013 and conclusions drawn were that there was a broken hymen though not freshly broken. The report also revealed that the complainant had been defiled before though there**

was no presence of any discharge or blood.

…..In this case the complainant named the accused as the one who defiled her. No one witnessed the incident. The complainant gave a detailed account of what transpired. She remained unshaken during cross-examination. I shall therefore safely invoke Section 124 of the Evidence Act regarding corroboration of evidence of a minor in sexual offences cases and proceed to find that the evidence can safely be used to convict the accused person;

28. The evidence of the minor on record was that the appellant did the act of penetration and stated that;

"He put his urinating thing inside my urinating thing"

29. This court has considered the age of the minor and finds that for lack of a better word the **'urinating thing'** is a sufficient description by the minor of the appellants member which had caused the act of penetration; the evidence of **PW4** made a finding on defilement; the absence of a freshly broken hymen or fresh tears notwithstanding it is a well-established principle of law that the evidence of a minor in sexual offences cases requires no corroboration provided the tial court is satisfied that she is a truthful witness;

30. This court is satisfied that the trial court correctly invoked the provisions of the proviso to Section 124 of the Evidence Act and finds no reason to interfere with the trial courts finding that penetration had taken place;

<u>Whether the trial court rejected the defence without giving sound reasons;</u>

31. The appellants contention was that the trial court did not take his defence into consideration; the record shows that the trial court gave this issue due consideration and stated;

"I find the evidence by the accused person untenable."

32. The record shows that the appellant gave an unsworn statement of defence and stated that they wanted to take away his things; upon re-valuating this evidence this court notes that the appellant did not put the above allegations that the minors parents concocted the charges as they wanted to take his property to **PW1, PW2** and **PW3** during cross-examination; by making these allegations at such a late stage demonstrates that the defence was an after-thought;

33. This court is satisfied that the trial court considered the appellants defence and upon weighing it against the evidence tendered by the prosecution found it to be untenable and that it does not displace the prosecutions' case;

34. The ground of appeal is found lacking in merit and is hereby disallowed.

<u>Whether the sentence was legal and or harsh and excessive in the circumstances;</u>

35. The appellant was sentenced under the provisions of Section 8(3) of the Act to serve a life sentence; which he contends is defective;

36. This court notes that the appellant was charged under the provisions of Section 8(1) and (2) of the Sexual Offences Act; the

37. The case of **Wanjema vs Rep [1971] EA 493** lays down the principles as to when an appellate court may interfere with a sentence imposed by a trial court. The principles to be taken into consideration by the appellate court are that it must satisfy itself that the trial court overlooked material factors; or took into account immaterial factors; or acted on a wrong principle; or in the circumstances of the case the sentence was harsh and excessive.

38. In this instance the trial court convicted the appellant after finding him guilty of the offence; before sentencing the appellant was called to mitigate; it is also noted that the trial court did take into consideration the fact that the appellant was a first time offender; the sentence is as provided by the law and is found to be legal;

39. From the record this court has noticed the appellants advanced age (80 years) and in those circumstances the substitution of a sentence of ten (10) years would still be equivalent to a life sentence; that advanced age of the appellant is the only reason found that warrants interference with the sentence imposed by the trial court.

40. This court is satisfied that there are good reasons that warrant interference with the sentence imposed; this ground of appeal is hereby allowed.

FINDINGS

41. For those reasons this court makes the following findings;

i. The Charge Sheet is found not to be defective; the defect in the Section cited in the judgment is curable.

ii. The prosecutions failure to call S, P and **PW2's** sister in law was not prejudicial to the prosecutions' case;

iii. This court finds that the appellant was positively identified; and that the prosecution proved its case to the required and desired threshold.

iv. There are good reasons that warrant interference with the sentence imposed.

DETERMINATION

42. The appeal on conviction is found lacking in merit in its entirety and is hereby dismissed; and conviction is hereby affirmed;

43. The appeal on sentence is found to have merit and is hereby allowed; the life sentence is hereby set aside and substituted with a term of ten (10) years with effect from 28/10/2014;

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 2nd day of March, 2017.

HON.A. MSHILA

JUDGE.