REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 24 OF 2016

PETERSON KINYUA MURIUKI… ……..…….APPELLANT

-VERSUS-

REPUBLIC…….....…….…….…….....RESPONDENT

(An appeal from the conviction and sentence of the Principal Magistrate's Court (M. Kivuti) at Baricho, Criminal Case No. 420 of 2015 delivered on 22nd June, 2016)

JUDGMENT

1. The appellant **Peterson Kinyua Muriuki** was charged with the offence of defilement contrary to **Section 8 (1) (3) of the Sexual Offences Act No. 3 of 2006** before Baricho Principal Magistrate's Court Criminal Case No. 420 of 2015. The particulars of the charge alleged that on 14th January, 2015 in Kirinyaga West District within Kirinyaga County, intentionally caused his penis to penetrate the vagina of E N M a child aged 15 years. After a full trial, the appellant Peterson Kinyua Muriuki was found guilty of the offence and was convicted. A sentence of twenty (20) years was imposed on him.

2. The appellant Peterson Kinyua Muriuki was aggrieved by the conviction and sentence and filed this appeal which was admitted on 25th July, 2016. The appeal raised the following grounds:

> ***(i) That the trial magistrate erred in both law and facts by not considering that the case was not proved beyond reasonable doubt (the facts did not support the charges) as required in criminal cases.***
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> ***(ii) That the trial magistrate erred in both law and facts by not considering that identification was not proved to the required standard as identification parade was not conducted despite the complainant not having known the appellant before by name and not given any description of the appellant.***
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> ***(iii) That the trial magistrate erred in both law and facts by not considering that complainant was examined 13 days after the alleged offence had occurred despite offences of this nature requiring that they be examined within 24 hours. She failed to note that time had lapsed and no examination could have made any conclusive finding.***
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> ***(iv) That the trial magistrate erred in both law and facts by not considering that the complainant had earlier visited Kiburu dispensary and did not disclose any such case to the medical officer who attended her and could have defiled after her visit to the dispensary.***
>
> ***(v) That the trial magistrate erred in both law and facts by not considering that penetration was***

not proved to the required standard.

(vi) That the trial magistrate erred in both law and facts by not considering that there were contradictions and inconsistencies in the case that could not warrant a conviction.

(vii) That the trial magistrate erred in both law and facts by not considering that P.W. 1 was not a truthful witness and her testimony could not be relied on as she confessed to have lied before to her grandmother and the other testimony could also be fabrication.

(viii) That the trial magistrate erred in both law and facts by not considering that there was missing link between the injuries and the age of the injuries, the P.3 as exhibit was not the author and was not in a position to explain the same, the test done was for pregnancy and not defilement.

(ix) That the trial magistrate erred in both law and facts by not considering that there was no eye witness, she relied on single evidence of P.W. 1 and failed to worn herself of using such evidence as required by law.

(x) That the trial magistrate erred in both law and facts by convicting me based on hearsay.

(xi) That the trial magistrate erred in both law and facts by not giving me a fair hearing by not complying with chapter 50 of the constitution, he never asked me which language I understood but assumed that I understood English/Kiswahili thus denying me my constitutional right to a fair hearing.

(xii) That the trial magistrate erred in both law and facts by failing to take into account that prove of date of the incident was crucial as the complainant was in the last month of attaining 16 years which is crucial in sentencing.

(xiii) That the trial magistrate erred in both law and facts by failing to explain fully to the appellant the provision of section 211 of CPC yet at the time he was in person.

(xiv) That the trial magistrate erred in both law and facts by failing to note that the prosecution never called a crucial witness who is mentioned in the proceedings (the councilor) to confirm that indeed the complainant made a visit to his office that day as she alleges or it is just a fabrication his testimony would have been crucial if he had denied that the complainant never visited his office it could have changed the whole case.

(xv) That the trial magistrate erred in both law and facts by not considering my defense.

3. The state did not oppose the appeal. In his submission Mr. Sitati the prosecution counsel submitted that he did not oppose the appeal for the reason that from the evidence on record, there is no doubt that the complainant was defiled which was a crucial evidence and that she was a minor aged fifteen years. That what was not proved to the required standards was identification of the perpetrator. That the evidence, neither the Police knew the appellant as there was no description. That the appellant presented himself to the Police and that is why he was arraigned in court. That it can only be assumed that the appellant was identified which the law does not allow. That the conviction was not safe. That the court may allow the appeal. The Court will nonetheless consider the appeal on merits.

4. The appellant filed submissions through his learned counsel Ikahu Nganga who also highlighted them in court. It was submitted that two crucial witnesses were not called. These were the area councilor and one Lydia Wamuyu. That failure to call them was intentional to conceal material facts against the appellant. It was also submitted that the medical evidence to corroborate the testimony of the appellant, what was done was a pregnancy test which cannot corroborate the evidence of the complainant that she was defiled. That the doctor agreed that a test done two weeks after would not give credible evidence of defilement. Counsel further submitted that the appellant who was a boda boda rider was arrested when he

went to drop a person at the Police Station. That the complainant could not explain how she had identified him. The complainant was picked from school and identified the appellant without any identification parade being conducted. There was no independent evidence to show that it is the appellant who defiled the complainant.

5. The main grounds which arise for consideration in this appeal are identification, failure to call crucial witnesses and want of corroboration of the complainant's evidence by medical evidence.

6. On the issue of identification, I have considered the evidence which was adduced before the trial court. The complainant E N M testified on oath and told the Court that on 14th February, 2015 as she was walking on the road she met the appellant who was riding a motor bike from the opposite direction. The appellant gave her a ride on his motor cycle and took her to the councilor's office. Later she met the appellant who offered her a ride home but instead took her to a different direction to Mugumo area. The appellant took her into a homestead, stepped out of the motor cycle and pulled her forcefully holding her right hand. He led her to the house where he defiled her. He then dropped her 150 metres from her home. It was the testimony of the complainant that he had seen the appellant before. Later on 17th March, 2015 while in class at [particulars withheld] Secondary School she was called by the Principal who told her to go and meet her grandmother at the gate. The grandmother informed her that Kinyua was arrested. She went to Baricho Police Station and identified the appellant. In cross-examination she told the court that she did not know the appellant by name. According to P.W. 5 Jane Losusu of Baricho Police Station who was the investigating officer, on 17th March, 2015 the appellant who was a motor cycle rider dropped a passenger at Baricho Police Station. The OCS was alerted and the accused was arrested. The complainant was called and she went and identified the appellant.

7. The testimony of the complainant shows that she was with the appellant for quite some time and it was in broad daylight. The complainant was sixteen years old. She is intelligent enough and she could not have failed to recognize a person she knew by name and whom she had seen before. The trial magistrate did address the issue of who the perpetrator was. She found that the appellant was known to the complainant, P.W. 2 and 3 as is a motor cycle operator in the area. The appellant did admit in his defence that he operates a boda boda and is indeed the secretary of boda boda operators. The trial magistrate found that the complainant gave a narration of the circumstances surrounding the incident. She observed her demeanor and found that she remained consistent even on cross-examination. She found the evidence by the prosecution overwhelming. She stated as follows:

> ***"I have no doubt from the evidence adduced by the prosecution that the accused was the perpetrator and his actions were premeditated."***

Though this being the first appeal court from the decision of the trial court as is required to analyse the evidence and make its finding, it should not overlook the fact that the trial magistrate had an opportunity to see the witnesses and observe their demeanor. This Court should leave room for that. This was held in the case of **Okeno -V- Republic (1972) E.A. 32** which held that the 1st appeal court has a duty to re-evaluate the evidence and re-consider the evidence and come to its own independent finding bearing in mind that it did not have the advantage of seeing or hearing the witnesses testify. The trial court had the advantage of observing the demeanor of witnesses and hearing them give evidence, this court this Court to give allowance for that.

From the evidence of the complainant she met the appellant in broad daylight. Circumstances favoured a positive recognition of a person she knew by name and had seen him before. The trial court could only caution herself on relying on the evidence of the complainant if the circumstances did not favour a positive identification on recognition. The circumstances of this case favoured a positive identification on recognition. I have considered the evidence of the complainant. She testified that she was sent at 4.00 p.m. As she was going there she met the appellant riding a motor cycle. This was during the day. The complainant left the house where appellant took her at 7.00 p.m. As such the complainant was with the appellant in broad day light. He was a person she had seen before. A girl of sixteen years could not have mistaken the assailant. I find that the circumstances favoured a positive identification. The trial magistrate was right in relying on the evidence of the complainant. I find that the perpetrator was

properly identified by the complainant contrary to the submission by the state counsel. The fact that the complainant identified the appellant was not shaken during cross-examination. It was not even put to her that the appellant was not the perpetrator. I find that the appellant was properly identified as the one who defiled the complainant. The trial magistrate was right in relying on the evidence of the complainant. She had the opportunity to see the demeanor of the complainant. She found that she gave a true and vivid account of the incident. Looking at the P.3 form which was issued long before the appellant was arrested, it was indicated that the complainant was sexually assaulted by a known person. This shows that there was no doubt on the identity of the perpetrator. I find that the appellant was known to the complainant and was properly recognized and identified as the person who committed this offence. Where the complainant knew the appellant before, identification parade would not have had any probative value. The complainant had no reason to frame the appellant. The allegation by the appellant in his defence that he was framed because he was a witness in a criminal case in this court against one Margaret Kawrira and that he testified in early 2015 was a sham and was properly rejected by the trial magistrate. The case remains a mystery with no shred of particulars. The appellant did not give the number of the criminal case and did not tell the court how the case was connected to the complainant in the present case. I am satisfied that the complainant knew the person who defiled her and there is no doubt on his identity.

8. The evidence is corroborated as P.W. 2 E M M confirmed that she had sent the complainant to Kibirigwi. She further told the court that the complainant informed her that it is Kinyua who defiled her. Similarly P.W.3 testified that the complainant told her that the person who defiled her was Kinyua who is a motor cycle rider. P.W. 5 Jane Losusu the investigating officer testified that the complainant told her that she was defiled by the appellant. It is clear from the testimonies of these witnesses that the perpetrator had been known by the complainant and his identity was not in dispute or in doubt. In his defence, the appellant stated that when he went to the Police Station he was told that a report was made that he had defiled the complainant. There was no other suspect. The trial magistrate observed the demeanor of the complainant and found that her evidence was true. I find that the evidence on identification of the appellant was overwhelming.

9. I have considered the case of **Joseph Gatimu Muriithi -V- Republic Criminal Appeal No. 51/2014**. I find that the facts relating to the identification of the perpetrator are distinguishable from the present case. The authority though persuasive to this court, is of no probative value. I find that the appellant was identified as the perpetrator of this offence.

10. The second issue is on medical evidence. It is submitted that P.W.4 Doctor Makori did a pregnancy test. That this raised doubt as to how such test would be used as key medical evidence against defilement. The complainant was a sixteen year old girl. This was proved with the production of birth certificate exhibit 1 and is a fact not in dispute. Where defilement is alleged on such a girl, who said she was a virgin a pregnancy test cannot be stated to be useless. A positive pregnancy test is relevant and useful to corroborate penetration. However, this was not the only examination done on the complainant. P.W. 5 Doctor Makori Obed who testified on behalf of doctor Wahome following a successful application by the prosecution and which was not opposed by the defence, under **Section 77 of the Evidence Act** produced the P3 form exhibit 3. He testified that on examination there were pus cells in the urine. A high vaginal swab was done. There was a whitish discharge from the vagina and inflamed aspect from external parts of the vagina. The hymen was broken. Pregnancy test was negative. The findings were defilement because of the vertical tear on the hymen and the inflammation of the vagina. The P.3 form was filled on 27th January, 2015. He testified that a post rape case form was also filled on 27th January, 2015 indicating the same injuries. The P.C.R Form was produced as exhibit 4 and laboratory test results as exhibit 2. This evidence proved beyond any reasonable doubts that the complainant was defiled. The medical evidence corroborates the evidence of the complainant as required. **Section 124 of the Evidence Act** requires corroboration of the evidence of children. The prosecution discharged its burden of proof with the medical evidence. Furthermore, the trial magistrate in her judgment gave reasons for believing the complainant. It is unreasonable for the appellant to ask for eye witness to corroborate her testimony. The nature of this offence is not one which you expect to get eye witnesses. I find that the medical evidence is sufficient. The fact that the hymen was torn and the vagina had injuries coupled with the presence of infections, confirm that there was penetration. There is proof beyond any reasonable doubts that the complainant was defiled. The submission by the defence that examination after two months

cannot give credible evidence is not true. The doctor stated that a broken hymen can be seen even two weeks later.

11. The 3rd issue raised was failure to call witnesses. It is trite law that no particular number of witnesses is required to proof a case. The appellant submits that the area councilor was not called. I find that evidence of P.W.2 is sufficient to proof that P.W 1 had been sent to the councilor's office. The evidence could not have added any value. P.W. 1 did not say the councilor witnessed the incident. There is sufficient evidence by P.W. 2 why she had left home. The 2nd person Lydia Wamuyu. From the record, it does not show that she played any role. All the complainant said was that she went to her house and asked her for rat poison. The complainant testified that she was feeling mentally disturbed over the ordeal. This is expected in a child aged sixteen years and from what she stated, the ordeal traumatized her. Though the defence states that she lied to her grandmother and is not reliable. I do not agree that she was unreliable. She told the court that it was out of fear of her grandmother who had already picked a stick to discipline her that she lied that she was late at the crusade. A sexual offence demeans, embarrasses, hurts and in this case it mentally disturbed the complainant, to some victims it is not easy to disclose to a close relative. From her testimony it is clear that she went through difficult moments even attempting suicide before she was able to disclose what happened. These cannot be taken against her. I find that witnesses who were not called were not crucial, the prosecution called sufficient witnesses who were able to proof the charge against the appellant.

12. The defence raised various grounds but highlighted these three. The defence alleges that P.W.1 did not disclose her attendance at Kiburu. This is not so. She did indicate she went there because of headaches. She was traumatised and hence the kind of behavior seen. The appellant did not highlight the ground on language. I would point out that the appellant was not prejudiced. He followed the proceedings. He was represented by counsel. Witnesses who testified were cross-examined. The record shows that it was indicated that the interpretation was English/Kiswahili. The court of Appeal has held that where there was no indication on record of the language used during trial, the appellants were able to follow the proceedings of the court even cross-examine witnesses therefore they were not prejudiced. Thus was held in **Mwendwa Kilonzo & another -V- Republic 2013 eKLR** thus:

> ***……we have come to the conclusion that the appellants did follow the proceedings before the learned trial magistrate conducted in the language they understood, though that was not noted on the record. As we have stated, they did not complain to that court; they cross examined witnesses and their statements in defence were taken down. They did not raise the issue of language as a challenge either in the trial court or in the High Court where one of them had a lawyer. And there was always a court clerk on hand whose role is to provide the interpretation required."***

The appellant gave his defence in Kiswahili as captured in the proceedings. The accused understood the proceedings and he never raised a complaint. There was no prejudice. The record shows that the court gave a ruling on case to answer. The appellant indicated that he wished to give unsworn defence. There was no prejudice. Though the trial magistrate did not expressly quote **Section 211 Criminal Procedure code,** it is clear that what the magistrate did is what is required under the Section. Failure to quote the Section was not fatal. There was no prejudice. He stated that he wished to give unsworn statement which appears as an answer.

From the record the trial magistrate gave a ruling that a *prima facie* case had been established to warrant him to be put on his defence. In **Benson Kamau Mwangi -V- R. (2010) eKLR** it was held that failure to record that **Section 211 Criminal Procedure Code** has been complied with is not fatal so long as the record shows there was compliance with the section. It is clear from the record there was compliance.

From the foregoing I find that based on the evidence presented before the trial magistrate, the conviction of the appellant was proper. The appellant was identified as the person who defiled the complainant, medical evidence corroborated her evidence that she was defiled and prosecution called sufficient evidence to proof the case. I find that the appeal is without merits. The appellant was sentenced to serve 20 years imprisonment. This was the minimum provided for the offence. The complainant was born on

11th February, 1999 as shown on the birth certificate which was produced before the trial court. At the time the offence was committed she was 15 years old. I see no reason to interfere with the sentence. I dismiss the appeal.

Dated and delivered at Kerugoya this 10th day of May, 2017.

L. W. GITARI

JUDGE

10.5.2017

Coram: L. W. Gitari Judge,

Mr. Omayo for the State

Appellant present

Mr. Miano holding brief for Mr. Ikahu for Appellant

Court Assistant Naomi Murage

ORDER: The judgment has been read out in open Court.

L. W. GITARI

JUDGE

10.5.2017