REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 70 OF 2013

JAMES MASAMBAGA::APPELLANT

VERSUS

REPUBLIC::RESPONDENT

(Being an appeal from the conviction and sentences in Criminal Case No. 1902 of

2010 by the Hon. G. Adhiambo, Senior Resident Magistrate on 4th April, 2013)

JUDGMENT

The appellant herein James Masambaga, was charged with the offence of defilement in with in violation of Section 8(1) as read with Section 8(2) of the Sexual Offences Acts, No. 3 of 2006. He faced an alternative charge of indecent acts with a child Contrary to Section 11(1) of the Sexual Offences Act, No. 3 of 2006. Upon his entering pleas of Not Guilty the case (Criminal Case No. 1902 of 2010, Kapsabet), proceeded to full trial. In a judgment read out on 3rd April, 2013, the learned trial magistrate found appellant guilty on the main count of defilement. He was subsequently sentenced serve 35 years imprisonment.

Being aggrieved of the conviction and sentence, the appellant has now lodged an appeal before this court. In his petition of appeal filed herein on 16th April, 2013, the appellant has listed the following grounds: -

(i) That the learned trial magistrate erred in both law and facts by convicting him without observing that he was not served with prosecution witness statements to enable him cope with the case.

(ii) That the trial court convicted him without considering that he was denied the right of being diagnosed so as to prove if he had committed the offence.

(iii) That the trial court convicted him without considering that he was not given enough time to defend himself.

(iv) That he was convicted on contradictory evidence of PW1, PW2 and PW3.

The appellant later filed an amended grounds of appeal in which he now raised a total of four grounds: -

- That the trial court failed to find that the charges preferred against him are defective.

- That he was convicted despite the fact that crucial witnesses never testified.

- That the court relied on contradictory statements of the prosecution witnesses and incredible documentary evidence.

- That the court erred in rejecting his honest and truthful defence.

In his oral submissions in court, the appellant submitted that on the health card of the minor (page 7), the name of the father of the minor is shown to be J. K who was appellant's neighbour. That this man had earlier told him that he had stayed with the mother of the child after the child had been born and was already in school. He wondered how then the name would have been entered as the father. He also wondered how the child would have been seen on the same day while the child had been born at home. He challenged the immunization care as not being truthful as it does not even have a stamp on it. Same can therefore not be proof of age of the minor. He summed up that the card cannot be work of a Clinical Officer and should be disregarded.

He went on that for the offence of defilement, age of the child ought to be proved. Also penetration and identification. That there ought to be medical proof that the child was 8 years. He claimed that their families had bad relations resulting in this case.

On penetration, he maintained that he broke into the house because he did not find the keys, and that he only called the child to ask for the keys. Also that the child never stated anywhere that she felt pain or bled and that her hymen would not be broken without her bleeding. He also maintained that there was lack of corroboration between the evidence of the child, her mother and the police officer.

For the doctor, he maintained that he filled the P3 form falsely as no spermatozoa was detected.

On his defence, he maintained that the trial court never gave any regard to the evidence of his witnesses. And that there was no proof of defilement. He asked that he be set free.

On the side of the state, Ms. Kegehi maintained that the prosecution had given credible, consistent reliable and corroborated evidence. That both PW1 and her mother corroborated the fact that she was 8 years old at the time, a fact also contained on the P3 form. And the same date appears on the health card, which only had an error to note that she was born at home. On the other issues raised by the accused as to paternity of the child, appellant never raised these with mother of the minor.

Counsel narrated the evidence of the minor (page 18) on the issue of penetration, that he put his thing into her and she felt pain, as corroborated by the Clinical Officer (page 32), that her hymen was broken and there was redness of external genitalia. That the doctor explained that spermatozoa could not be found as 4 days had passed. And on identification, counsel submitted that PW1 had testified that she knows the appellant (page 18) as Masambaga, and he was placed at the scene of crime. That a child of 8 years is incapable of giving consent. And that overall, the court considered his defence and found same to be a mere denial.

On sentence, counsel maintained that the sentence meted out was illegal as at 8 years, charge ought to have been under Section 8(2) and not Section 8(3) and the sentence ought to have been life sentence. Counsel urged for enhancement of the sentence to life imprisonment and that the appeal be dismissed.

I have carefully considered the very lengthy submissions of the appellant and those of the prosecution side. I have also considered the written submissions of the appellant. In my view, the following issues have arisen for determination in this appeal: -

(i) The age of the minor (complainant).

(ii) Proof of the offence of defilement i.e. penetration.

(iii) Whether it is accused who defiled the minor, if at all;

(iv) Whether the trial court gave regard to the defence of the appellant.

(v) Legality of the sentence meted out against the appellant.

I will deal with them in the same order. On the issue of age of the complainant, the appellant submitted that the health card of the complainant showed her father as J who was his neighbour. And that the said J had earlier told him that he had started staying with the mother of the child after the child had been born and was already in school. He wondered how then the health card could bear J name as the father. He also wondered how the child could have been seen at the hospital on the same day and yet she had been born at home.

I have perused the court records and also the relevant exhibits produced by the prosecution side. It is clear that the learned trial magistrate, upon realizing that the complainant was of tender years, had on 8th February, 2012, subjected the complainant to voire dire inquiry. In the process, she stated that she was now 10 years old and in class 3. The court would not have carried out this process if the child was not of tender years. The mother of the child, PW2 J C, also in her testimony, confirmed that the child was in fact 8 years old as at the time the P3 form was filled. She further produced the child health card showing that she was born on 2nd December, 2001. With these pieces of evidence, there is no doubt in my mind that the prosecution produced sufficient evidence to prove that the complainant (PW1) was in fact a child tender years having been born on 2nd December, 2001.

On appellant's submissions on how come the name of J K appears on the said card as the father of the child, with respect, the submissions of the appellant were misplaced. Misplaced because they were based on new evidence that was not part of the trial i.e. the allegation that the said J had told the appellant that he had started staying with the mother of the child after she had been born. Appellant had also never called the said J to confirm these statements on oath during trial. Being raised only at this stage of appeal, I am not convinced that the appellant has raised any sufficient ground that could challenge the prosecution's case that the complainant was indeed a child of tender years.

The appellant has raised issues relating to the authenticity of the health card produced (Exh-3). First that the child, born at home could have been seen in hospital the same day. I have perused the said exhibit on this point. The said exhibit clearly shows that the complainant was born at home on 2nd December, 2001 and first seen in Hospital on 12th December, 2001, not the same day. And to me, the fact that the card does not bear any stamp, cannot be taken to mean that the card is not authentic.

Secondly, on the issue of whether the minor was defiled, I have considered the evidence of the complainant (PW1) during trial. In her testimony, she gave a graphic detail of how the accused called her into the wooden house and asked her to sit on his thighs. He had then asked her to remove her pants before he proceeded to defile her. The evidence of this witness remained totally unshaken even in the face of the cross-examination by the accused. And according to PW2, her mother, this incident would probably not have been known were it not for the fact that the complainant had developed stomach pains the following day, making her now tell her mother what the appellant had done to her. And on examination on 10th May, 2010, her hymen was found to be broken. She was also found with hyperaemic labia. The clinical officer who examined her had concluded that this was proof of penetration. In effect therefore, the prosecution produced both oral and opinion evidence to prove the act of penetration. I am on my part, convinced that this fact of penetration was sufficiently proved by the prosecution side.

So was it the accused who defiled the complainant? There is no doubt as to the fact that the complainant and the appellant are well known to each other. They are neighbours. Even the appellant in his defence severally referred to the minor by her name, M. This incident allegedly took place in broad daylight at about 1.30p.m. Appellant in his defence, also has admitted having met the complainant at the material time and telling her that he could not find the keys to the wooden house. This squarely placed the appellant at the scene of crime only with the complainant at the material time.

I do not see how the complainant, then only 8 years old, could simply decide to lay false claims against

the appellant in that manner. She was subjected to cross-examination by the appellant, but her evidence that it was the appellant who defiled her remained to totally intact. The appellant in his defence has alleged that he had always had differences with the complainant. He did not however, give the nature of these differences or the origins of the same. I ask myself how he would end up with such differences with an 8 year old child as for the child to falsely accuse him (if at all). And had there been such differences, I would have expected the appellant to raise these issues both with the child and her mother (PW2) during trial. He failed to do so, only raising same late at the defence stage. Because of this, I am not convinced that the minor complainant merely and maliciously accused the appellant as claimed. To the contrary, I am convinced that all the evidence point to one fact. That it was the appellant who defiled the complainant herein on 6th May, 2010.

On the issue of whether the trial court gave due regard to the defence of the appellant, I have perused the proceedings herein. At pages 52 running through to 53 of the proceedings (Judgement), the trial magistrate clearly analysed the defence of the appellant, both the testimony of the appellant and that of his 2 witnesses. The court proceeded to make appropriate findings on the same. It is therefore not correct to submit that due regard was not given to the defence of the appellant.

Finally, on the legality of the sentence, as already noted above, the prosecution duly established that the complainant was aged 8 years at the time of this incident. Indeed the appellant had been charged with defilement in violation of Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. Section 8(2), states: -

> **"A person who commits an offence of defilement with a child aged 11 years or less shall upon conviction be sentenced to imprisonment for life."**

Having convicted the appellant however (on the main count), the trial magistrate went on to sentence the appellant to serve 35 years imprisonment. This was clearly contrary to the law which gave a mandatory sentence of imprisonment for life.

The state duly filed and served Notice to Enhance sentence on both the court and the appellant. She said notice was also severally brought to the attention of the appellant i.e on 19th January, 2017, and 9th February, 2017. Accused chose to proceed with the appeal notwithstanding the possibility of the sentence being enhanced. He finally confirmed same during his submissions on 16th March, 2017.

Section 354(3)(a)(ii) dictates as follows: -

> **"In an appeal from a conviction;**
>
> > **"……. (the court) may alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence, or ……"**

The above provision mandates this court to reduce or increase the sentences meted out by the trial court. In this case as stated above, the sentence that was meted out was not according to law. I am convinced that this court would be acting in the interest of justice by correcting this illegality in the sentence.

The appellant has otherwise raised a number of issue in his written submissions filed on 10th March, 2015. First, that the elements of Section 43 of the Sexual Offences Act was not observed. This is a section that deals with intentional and unlawful acts. Section 43 (1)(c) defines an intentional and unlawful act as one which is committed in respect of a person who is incapable of appreciating the nature of an act which causes the offence. In the present case, the complainant was of tender years (8 years). In law, she was incapable of consenting to any sexual act. I do not therefore agree that this section was not satisfied.

Secondly, the appellant has submitted that a number of vital witnesses were not summoned to testify. The appellant has otherwise first not mentioned such witnesses who were not summoned. The appellant has apparently related this to whether it is safe to convict based on the evidence of 1 witness. I have on this

ground perused the proceedings very carefully. It is clear that there was no independent witness to this incident. Apparently, only the complainant and the appellant were at the scene at the time. In effect therefore, the only material witness of the prosecution was the complainant. In the judgment of the trial court, (page 49), the learned trial magistrate duly warned herself of the dangers of conviction based on the evidence of 1 witness. The court proceeded on to analyse and make a finding on the evidence of the witness. It is therefore not correct to state that the court did not warn itself. It is otherwise noted that where the prosecution lacked a witness to corroborate the evidence of PW1 for lack of an eye witness, the findings on the P3 form corroborated the evidence of PW1 that she had indeed been defiled.

The accused has further submitted that Mama M, father of the child and one M never testified. This may be so and it would be a matter of conjecture to even imagine the nature of evidence they would have probably given. As it stands, the determination of the trial court was based on the evidence tendered in court, and rightly so. Since the persons mentioned by the appellant did not testify it is not possible for this court (and indeed the trial court) to consider the probable nature of evidence, if at all, that they had. In any case, appellant had the option of calling these potential witnesses as his own witnesses. He did not do so.

This being an appeals court, this court cannot interfere with the finding of the lower court unless:-

- **It was based on no evidence.**

- **It was based on a misapprehension of evidence.**

- **The judge was shown demonstrably to have acted on wrong principles in reaching the finding it did.**

This court is guided by these principles in Sumaria & Another -vs- Allied Industies Limited (2007) 2KLR. I have perused the judgment of the lower court. The same was based on evidence submitted. I also do not see any incident where the learnt trail magistrate misapprehended the evidence. Neither did the magistrate wrongly apply any legal principle in arriving at the judgment. In total therefore, I do not find any merit in this appeal as to make this court set aside or overturn the decision of the lower court in this matter. I accordingly therefore order as follows: -

(i) That the appellant's appeal herein be and is hereby wholly dismissed i.e. Criminal Appeal No. 70 of 2013, Eldoret High court, James Masambaga -vs- Republic.

(ii) Pursuant to Section 354 (3)(11) of Criminal Procedure Code, the appellant herein James Masambaga is hereby sentenced to imprisonment for life.

DATED, SIGNED and **DELIVERED** at **ELDORET,** this 14th day of June, 2017.

D. O. OGEMBO

JUDGE

Judgment read out in open court in presence of: -

1. Ms. Kainga for the State and

2. The Appellant in person.

D. O. OGEMBO

JUDGE