REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

CRIMINAL APPEAL NO. 24 OF 2015

GUMATHI LAFTE.....APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(From the original conviction and sentence in Criminal Case No. 637 of 2014 of the Principle Magistrate's Court at Marsabit by T.M WAFULA– Resident Magistrate)

JUDGMENT

The appellant, **GUMATHI LAFTE**, was convicted on the charge of defilement of a girl child contrary to section 8 (1) (4) (sic) of the Sexual Offences Act **.** He was then sentenced to fifteen years imprisonment.

The particulars of the offence were that on 1st August 2014 at Laisamis sub-location, Marsabit County, intentionally and unlawfully caused his penis to penetrate the vagina of **G.K**, a girl aged sixteen years.

At the hearing the Appellant was represented by Mr. Makori Oundu the learned counsel, who relied on grounds the Appellant ha filed in person. The Appellant had raised seven grounds as follows:

1.That the learned trial magistrate erred in law and in facts by failing to note that the prosecution witnesses tendered contradictory and conflicting testimonies,

2.That the learned trial magistrate erred in law and in facts when he failed to observe that the charges (sic) of defilement were not proved beyond reasonable doubt as required under the prescribed law,

3.That he was denied a chance to call his witnesses,

4.That the learned trial magistrate erred in law and in facts in failing to make a finding that when the offence was committed the accused person was a minor hence giving a wrong sentence,

5.That he was denied a fair hearing by being denied the services of a court interpreter,

6.That the trial was illegal, null and void for he was detained at Laisamis police station for more than 24 hours; and

7.That the learned trial magistrate erred in law and in facts in flouting the provisions of section 169 C.PC.

The counsel of the appellant while making oral submissions added another ground namely; that the appellant was tried and convicted without the charge being read and explained to him.

The state opposed the appeal through Mr. Mwangangi, the learned counsel.

The facts at the trial court were briefly as follows:

On the 1.8.2014 at about 1P.M, **G.K** was fetching some firewood. She is aged 16 years though at the time of the alleged incident, she was 9 months old in marriage. She met the appellant on the road and he enquired to know from which tribe she hailed. When she answered him, he pushed her down. She attempted to scream but he slapped her twice. He then proceeded to defile her.

After the prosecution closed their case, the appellant opted to keep mum after the court ruled that he had a case to answer.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO VRS. REPUBLIC [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."

Before I embark on the analysis of the grounds raised herein, may I comment briefly on the charge. It ought to have read:

"...contrary to section 8(1) as read with section 8 (4) of the Sexual Offences Act.."

The way it was drafted cites a non existence section. This offends the rules of drafting of charges. It is the duty of the trial court to ensure a charge read to an accused person is correct in all aspects. Since no prejudice was occasioned, I will leave it at that.

The grounds the appellant has raised can be divided into two broad categories; procedural and evidential grounds. I will start by addressing the procedural ones.

Section 169 (1) of the Criminal Procedure Act provides as follows:

(1)" Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the

language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it"

The trial magistrate did not come out clearly as to why he arrived at his decision. However, in my view this alone cannot form a basis for an acquittal. I will reevaluate the entire evidence to establish whether the evidence on record in spite of the shortcoming, would have been the basis of a conviction. In my view failure to give the reasons may not be fatal. It is however a good practice for it informs parties as to why a decision was arrived at.

It is now settled law that where an accused alleges that his right has been breached the remedy lies in a

civil court for damages and not in an acquittal. This was decided in the case of **Julius Kamau Mbugua v Republic [2010] eKLR** where the court of Appeal on the issue said:

"The alleged unlawful detention does not exonerate the appellant from the serious crime he is alleged to have committed. The breach could logically give rise to a civil remedy – money compensation as stipulated in Section 72 (6). That is the appropriate remedy which the appellant should have sought in a different forum."

My perusal of the court record indicate that when PW1 and PW2 testified on 28.8.2014 the interpretation was in English and Kiswahili. No interpretation was done in Rendille this being the language the appellant had informed the court he understood. The court had previously provided for a Rendille interpreter on 4.8.2014 and on 11.8.2014 when the plea was taken and when the facts were being read. On 29.1.2015 when PW3 and PW4 testified, though the interpretation is said to have been in Rendille, the name of the interpreter is not provided.

It is my finding therefore, that the appellant's complaint on the lack of interpretation to him in a language he understood has merits. This was prejudicial to him.

It was contended that the appellant was tried and convicted without the charge being read to him. When he pleaded guilty to the substantive charge, the alternative charge was not read to him and correctly so. However, when he disputed the facts, the alternative charge ought to have been read to him but this was not done. Since he was not convicted on this charge, no prejudice was occasioned to him by this omission.

The appellant contended that at the time of the trial he was a minor. Although this was not raised during the trial, when it was raised on appeal, I made an order for his examination. At a glance the appellant does not appear to be as young as he wanted this court to believe. An age assessment was done by Dr. Mwanzia on 17.12.2015. His opinion was that at the time he was over 18 years of age. His conclusion was reached after noting that all posterior molars have sprouted and mature and that sockets for posterior molars were adequate.

I agree with the doctor's opinion for the appellant's appearance is that of one in mid twenties. This explains why the trial magistrate did not make any order for age assessment. This ground of appeal has no basis.

The appellant contended that he was denied a chance to call his witness. After he was put on his defence on 29.1.2015, he indicated that he wished to keep quiet and did not have witnesses to call. On this particular day the record says that interpretation was done in English, Kiswahili and Rendille. Sabdiyo a native Rendille speaker and who interpreted during the hearing of this Appeal was present. He cannot be heard to complain that he was denied a chance to call his witnesses.

I wish now to turn to the grounds touching on evidence.

For an offence of defilement to be established, the prosecution must prove partial or complete penetration of the genitalia of the complainant. The evidence of **G.K** is that the appellant had sex with her. The medical evidence was not conclusive as to whether there was penetration. the doctor opined:

" my conclusion was that there was high probability of sexual assault "

This conclusion coupled with the fact that the complainant was married for 9 months left the prosecution case without adequate support on the issue of penetration.

Both the complainant and her mother (PW2) testified that she was examined at Laisamis hospital but Dr David Munga'ara (PW3) testified that he examined the complainant at Marsabit District Hospital. There was no attempt by the prosecution to explain this glaring contradiction. Is there a possibility that Dr.Mung'ara never examined her? We may never know the truth.

If we may pause for a while and assume that the complainant was defiled, it will be necessary to know if the culprit was identified. The complainant said that after reporting to her mother in law they followed the footsteps of the appellant up to the Chinese camp where they found him under arrest. The problem with this evidence is that no explanation was proffered as to what led her to believe the footsteps belonged to the culprit and not any other person. Was there anything peculiar about them? This was not testified to. At the Chinese camp there is no evidence as to how the complainant identified the appellant as her assailant if she indeed did so. The appellant was under arrest on a different complaint. Is there a possibility that the complainant may have settled on him due to a similar allegation against him? More evidence on identification would have been required. The prosecution case as it is, is unsafe for the conviction founded on it to be sustained. I therefore quash the conviction and set aside the sentence meted out by the trial court. Consequently, the appellant is set at liberty unless if he is otherwise lawfully held.

DATED at Marsabit this 9th day of February 2016

KIARIE WAWERU KIARIE

JUDGE