REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HCCRA NO. 106 OF 2015

(FORMERLY NAKURU CRIMINAL APPEAL NO. 103/14)

(Being an appeal against conviction and sentence in Naivasha Chief Magistrate's Criminal Case No. 1548 of 2013 – E. Kimilu Ag. P.M.)

PETER CHEGE KAMAU…… APPELANT

-VERSUS-

REPUBLIC…… RESPONDENT

J U D G M E N T

1. The Appellant herein was charged with Defilement of a boy contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act. In that on the 1st day of July, 2013 in Naivasha Municipality within Nakuru County, intentionally and unlawfully he did cause the genital organ namely penis to penetrate the genital organ namely anus of **J. M. M.** a boy aged 7 years old. He pleaded not guilty. The prosecution called four witnesses being the victim's mother **M.M.M. (PW1)**, the Complainant **J.M.M. (PW2)**, a clinical officer who examined the minor, **Joseph Nakuro (PW3)** and the investigating officer **Fred Orongo (PW4)**.
2. The sum total of the prosecution case was as follows. In the material period, the Complainant his mother and two siblings in Naivasha County popularly known as "kanjo".

   On 1/7/13 the mother did not spend the night at home and was apparently away until the next morning**.** The Complainant was sharing the bed with his two siblings when a person he could not see came into the house and carried him outside, to a dark corridor where he undressed him.

3. Uttering threats of death to subdue his victim, the said person defiled the Complainant. He then ordered him to return to his house and to lock the door. On the next day the Complainant reported the incident to **PW1** who decided to ask a neighbor to examine the child. Upon confirming **PW2's** report, she proceeded to make a report to police. The minor was examined and treated by **PW3** who also completed the P3 form confirming penetration. He also examined the appellant on 11/7/13. Eventually, the Appellant was arrested and charged.

4. In a brief unsworn defence statement, the Appellant told the trial court that he was a resident of 'Kanju' estate and a casual labourer. He stated that he had travelled to Kinamba area on 1/7/13. He denied that he committed the offence charged. He was found guilty, convicted and sentenced to life imprisonment.

5. Unsurprisingly, nine of the ten amended grounds of appeal he has filed challenge the identification evidence upon which the conviction was based. In the ninth ground the Appellant

complains that his alibi defence was not considered.

6. In written submissions, the Appellant took issue with the evidence of voice identification by **PW2,** pointing out that there was no evidence that the witness was familiar with the voice of the Appellant. He also highlighted the fact that the physical description and the name "jungle" which **PW1** claimed he was given by **PW2** was in not in the evidence of **PW2**, who according to the Appellant had no opportunity to identify his molester at night. He discounted the evidence of the investigating officer to the effect that the complainant observed the assailant under the illumination of street lights. For these arguments he relied on the case of **Mbelle -vs- Republic (1984) KLR 626.**

7. With regard to the alibi defence given at the trial the Appellant faulted the trial court's approach to the same. He cited the decisions of the Court of Appeal in **Sekitoleko -vs- Uganda(1967) EA 531** and **Republic -Vs- Turnbull (1976) 3 ALLER 550** as to the correct treatment of an alibi defence in a trial. On behalf of the DPP, Mr. Koima opposed the appeal. He supported the identification evidence tendered through **PW2**. He further submitted that the offence ingredients of age and penetration had been proved through medical and other evidence.

8. I have considered the evidence tendered during the trial and the submissions in respect of the appeal. The duty of the first appellate court is to evaluate afresh the evidence adduced at the trial and to draw its own conclusions thereon (**See Okeno -vs- Republic 1973 E.A 32).** In my considered view, the fact of the sexual assault leading to penetration of the minor on the material date was well established through medical evidence. Equally, the age of the Complainant was proved. The findings of the trial magistrate on these aspects cannot be faulted.
9. However the sticking point upon which the appeal turns, is whether the Appellant was identified correctly as the person who took the Complainant out of his bed and proceeded to penetrate him on the material night. Obviously, **PW1** the mother of the Complainant was not home on the said night and only learned about the incident on the next morning from the Complainant.

10. Regarding the identity of the assailant, **PW1** told the court that **PW2** described the assailant to her. She stated in her evidence in chief that:

> **"At the hospital the boy (Complainant) said that whoever did it said if he discloses of the incident he will be killed. He told me it was Majei who did it. I had not known the said Majei……boy told me the man was in dreadlocks and also nicknamed jungle…..He is the one at the dock. He is a neighbor but I had not known him. He lives in the 3rd house from mine"**

11. In Cross-examination she reiterated the name "Majei" as the name of the perpetrator given by the boy. **PW2** was a 7 year old and thefore gave unsworn evidence. Regarding the identity of the Assailant he stated in his evidence in chief after describing what the attacker did and said to him that;

> **"I heard his voice and knew him. I knew it was Peter Chege. I do not know him by any other name. At home he is called Majei. I had seen him many times before. I had heard him speak to another man outside when they were dividing items. I heard him speak only (once). I did not see him in the dark. I told my mother about it….I do not know who pointed accused to police. After arrest I did not go to see him. I know where accused lives near our home……I did not notice his physique or physical features."**

12. Thus from the evidence of PW2, all he told his mother was that his attacker, whose voice he recognised was **Peter Chege *alias* Majei**. He did not indicate that he identified the Appellant because of his dreadlocks hairstyle. The defilement occurred in a dark corridor and **PW2** clearly said he could not observe the physical features of his molester. Thus **PW4's** evidence is clearly an embellishment of **PW2's** evidence – the victim denied observing the defiler in the dark scene of the offence.

13. In dealing with these pieces of evidence, the trial court stated in its judgment that;

> **"The attacker told him (Complainant) not to scream since if he dares he would strangle him. As there talking in the dark he recognised his attacker's voice as Peter Chege who is also known as Majei. He knew him because of his hairstyle. He had dreadlocks"(sic)**

14. This evidence was attributed to **PW2** incorrectly, as he did not at any point describe the assailant as one who wore a dreadlocks hairstyle or that the said features enabled identification on the material night. This evidence came from **PW1** who did not witness the assault and therefore the trial court erred in attributing it to the Complainant.
15. What the Complainant told the court was that he identified his attacker by voice. On this evidence the trial magistrate had this to say:

> **"The voice evidence adduced leaves no doubt that the victim knew accused person very well. He had seen him on several times prior and he had even heard him talk outside their house when he was sharing things with another person. There cannot be a mistaken identity. Proper recognition has been established." (sic)**

16. Although it is true that **PW2** said he had known the accused having seen him "many times before" he said that he only heard him speak on one occasion. **PW2** was able to narrate to the court the words spoken by the molester on the material night including the threats to his life. His mother's evidence on identification was confined to visual identification of the assailant. Although she repeated the words that the assailant had spoken, as told by **PW2**, she did not state that the son identified the attacker by voice.

17. The trial magistrate did not address her mind to these matters in her endeavour to satisfy herself that identification was without error. In **Karani -vs- Republic (1985) KLR 290** the Court Appeal said that voice identification may on many occasions amount to identification by visual recognition. The court however cautioned that:

> **"Care has to be taken to ensure that the voice was that of the Appellant, that the Complainant was familiar with the voice and that he recognised it and that there were conditions in existence favouring safe identification"**

See also **Choge -vs- Republic (1985) KLR 1; Mbelle -vs- Republic (1984) KLR 626.**

18. In the instant case, the Complainant admitted that he had only heard the Appellant speak on one occasion. He did not say how close he was at the time to the Appellant and how long he listened to the voice. Secondly, the Appellant was not addressing him but another person. It cannot be said with certainty in the circumstances that the Complainant knew and was familiar with the voice of the Appellant.

19. The Complainant was allegedly carried out of his bed, while asleep by someone in the darkness. That person took him to a dark corridor. It is unlikely that the said intruder would have spoken loudly lest he wake up the Complainant's siblings who shared a bed with the Complainant, or other tenants. A seven year old, suddenly scooped from his bed at night by an unkown intruder and taken to a dark alley would be frightened. It is natural. The obtaining circumstances and state of the victim in my view do not favour positive identification.

20. Had the learned trial magistrate addressed her mind to these matters, she would no doubt have come to a different conclusion regarding the identification of the Appellant. Her finding that the Appellant had been positively identified also led to the dismissal of the Appellants alibi defence.

Firstly, there was no cogent evidence that the Appellant went under ground after the offence as the court stated. The Appellant's alibi defence was not dislodged by the doubtful identification evidence tendered.

21. Besides, as stated in **Sekitoleko -vs- Uganda (1967) E.A 531** and also in **Osiwa -vs Respublic (1989) KLR 469 as well as in Ssentale -vs- Uganda (1968) E.A 365,** an accused person who pleads on alibi defence does not assume the burden of proving it. The onus lay with the prosecution to prove their case to the required standard. Apart from the evidence of PW1 & PW2 no attempt was made to collect and have samples from the Complainant and the Appellant examined to prove sexual intercourse between them.

22. On my part, having reviewed the identification evidence relied on by the prosecution, I am not persuaded that the conviction of the Appellant was safe in this case. I do therefore quash the conviction and set aside the life sentence imposed. The Appellant is to be set at liberty unless otherwise lawfully held.

Delivered and Signed this **13th** day of **May** 2016.

In the presence:

Appellant present In person

For the DPP Mr. Koima

Court Clerk Mr. Barasa

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C. Meoli

JUDGE