REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 17 OF 2014

JAMES KAMAU KIHIU ……...……...APPELLANT

-VERSUS-

REPUBLIC ……...RESPONDENT

(Appeal from the original conviction and sentence in Criminal Case Number 92 of 2011 in the Senior Principal Magistrate's Court at Kerugoya – HON. J.A. Kasam (Ag.SRM)

JUDGMENT

JAMES KAMAU KIHIU, the appellant herein was charged with the offence of defilement Contrary to **Section 8 (1)** of the **Sexual Offences Act NO. 3 of 2006.** The particulars of the offence were that on 14th June 2008 in Kirinyaga East District, he committed the offence against one **TWG** a child aged 6 years. The trial court found the appellant guilty of the said offence and convicted him sentencing him to life imprisonment. Aggrieved of the conviction and sentence he filed this appeal and has cited nineteen grounds in his supplementary record of appeal against the judgment and sentence of Honourable J. A. Kasam, Senior Resident Magistrate in Kerugoya Senior Principal Magistrate's court criminal case NO. 92 of 2011.

The appellant through Mr Kimani pointed out and highlighted some of the grounds of appeal and summarized the others. I will consider them as raised/highlightened before me.

The appellant in his first ground took with issue with the trial court for not allowing the appellant a chance to have the trial against him start denovo on account of the transfer of the magistrate who had taken evidence of prosecution witnesses and concluded that the appellant had a case to answer. The magistrate who took over rejected the plea by the appellant to have the case start denovo. The appellant contends that he had a right under **Section 200 (3)** of the **Criminal Procedure Code** to have the case against him start afresh when Honourable Hannah Ndungu the trial magistrate, was transferred. He urged me to find that his rights as the appellant was breached when the succeeding magistrate Honourable D. M. Ochenja –Senior Principal Magistrate declined to have the case begin afresh. According to the appellant this was a fatal omission by the succeeding magistrate and the same rendered the proceedings against the appellant incurably unlawful.

The appellant on his 2nd ground faulted the trial court for not establishing the age of the complainant at the trial saying that a birth certificate was not produced to prove the age of the minor. Mr Kimani contended on behalf of the appellant that it was crucial to establish the age of the complainant beyond reasonable doubt given the charge that faced the appellant.

The appellant has further faulted the trial court for failing to note that PW3 was unreliable witness as he appeared untruthful in his evidence before the trial court. He gave an example where the said witness was

saying in examination in chief that he was 15 years old and in class 7 only to contradict himself under cross examination by saying that he was actually 18 years old and in form 1 in Tokoni Secondary school. The appellant also gave other accounts of evidence adduced by the said witness showing that he was an inconsistent witness who should not have been relied by the trial court. The appellant particularly took issue on the apparent conduct of the said witness when he found the appellant with a zip opened having rushed to find out why the complainant was calling for help. The appellant contends that the witness should have raised an alarm to attract the attention of villagers if what he told the trial court was true.

The appellant further pointed out that the evidence of PW1, PW3 and PW4 (the mother to the complainant) were inconsistent in material particulars especially on the sequence of events on the material date. According to the appellant, PW3 gave a different sequence of events by stating that on 14th June 2008 when he was approaching home, he heard screams "release me" coming from the direction of store and he went to check out. According to the appellant, the mother was informed on 16th June 2008 about the incident by PW3 yet the complainant stated that mother (PW4) was informed the same day. The appellant has faulted the reasons why the child was not taken for treatment immediately or why a report was not made until 18th June 2008. The appellant submitted that the reasons for the delay were not given at the trial and the same as a cover up aimed at fixing him.

The appellant has also faulted the trial magistrate who convicted him for the manner in which proceedings were recorded, pointing out that the learned magistrate was too casual in her approach to the extent that she wrongly described PW2 (who was actually the clinical officer) as if he was PW3 (DANIEL MUHORO) the witness who found the appellant with an zip open. The appellant has further pointed out the misdescription of PW4 as a witness who had been recalled for cross examination by appellant when in the actual fact it was PW2 (clinical officer) who was being recalled. The appellant contended that the misdescription made it hard for the trial court to evaluate the evidence properly as it would appear from the proceedings that there were two PW4's.

The appellant has also faulted the trial court for failing to warn itself about relying on uncorroborated evidence of a minor aged 6 years old.

On ground 13 of his supplementary affidavit, the appellant contended that his defence was not taken into account by the trial court and that the same was dismissed without due considerations to the issues raised.

The appellant also opined that the father of the complainant ought to have been called to testify as it was necessary to establish the truth on what the mother of the complainant told the court.

The appellant on ground 18 of his supplementary affidavit submitted that the complainant must have been coached to testify because a child of 9 years could not have remembered vividly an event that took place 3 years prior to the date of giving evidence. The appellant also contended that conviction of the appellant was irregular as the court did not state whether he was being convicted on principle charge or the alternative.

Finally the appellant contended that the case against him was not proved beyond reasonable doubt and that the trial court erred by shifting the burden to him. According to the appellant, the torn hymen was not conclusive enough that penetration had taken place.

That state through Mr Sitati strenuously opposed this appeal arguing that the five witnesses called by the prosecution sufficiently proved the prosecution case. On the issue of **Section 200 (3)** of the **Criminal Procedure Code,** Mr Sitati argued that the plea by the appellant to begin the case afresh after the trial magistrate was transferred was rejected on sound grounds and the appellant was granted 14 days right of appeal against the rejection, but he did not appeal. He submitted that the appellant was granted a chance to recall an important witness who was the clinical officer and therefore he should not raise any issue at this stage about being denied the right to begin the case denovo when a new magistrate took over the proceedings.

On the issue of the age of the minor, the state submitted that the age was sufficiently proved by the minor

who said she was 6 years old and the clinical officer who filled the P3. He relied on the authority of **WAHOME CHEGE –VS- REPUBLIC (2014)** to buttress his arguments that there are more ways of proving the age of a victim other than a birth certificate. The case of **FAPPYTON MUGUGU –VS-REPUBLIC (2012) e KLR,** was also cited.

In response to the fourth ground of appeal concerning reliability of PW3, **DANIEL MUHORO GITHII,** Mr Sitati submitted that there was no contradictions in his evidence in regard to his age. Mr Sitati contended that the said witness told the court that he was aged 15 years old when the offence took place but at the time of giving evidence in court he was 18 years old. The state further submitted that the evidence of PW1 and PW3 were consistent in what he considered material particulars. He pointed out that when PW1 screamed PW3 went to find out and found the appellant with his zip opened at the store (the scene of crime) and both witnesses account of what took place were consistent. The state further submitted that PW 1 clarified in her evidence that the mother was not present at the time but came later after the incident.

On ground five of the appeal, the state responded that the misdescription of witnesses by the trial court is a human error which was a technicality that did not affect the substance of the case or prejudiced the appellant in any way. The same according to the state did not influence the outcome of the case.

In response to twelfth ground of appeal on the claims that the trial magistrate did not warn herself on relying on evidence of a minor (PW1), the state pointed out that **Section 124** of the **Evidence** now does not place a burden of corroboration to the evidence of a minor. The state submitted that the evidence of a minor on its own is sufficient to found a conviction in law. Mr Sitati further submitted that at the time the trial took place, three years had lapsed and it was in order to take witnesses through their statements in order to refresh their memory before testifying and that they were perfectly in order to do that. Furthermore the state submitted that, the appellant was responsible for the lapse of time because he is the one who kept on asking for adjournments and for a retrial.

In response to the appellant's contention that his defence was casually dismissed, the state was of contrary opinion stating that the trial considered the defence put forward well and properly evaluated the same before dismissing it. The state further submitted that on the issue of choosing not to call the victim's father to testify, they properly exercised their discretion on who to summon to testify and decided not to call the father as he was not there when the incident occurred and his evidence in their assessment was not likely to add value to their case which according to Sitati was sufficient and adequate in so far as establishing the fact beyond reasonable doubt that the appellant committed the offence.

I have considered both the submissions ably made by Mr Kimani advocate for the appellant and Mr Sitati for state. I must commend both counsels for very sound legal arguments they put forward on behalf of their respective clients which I found moot in this appeal . Indeed this appeal is unique in view of unique set of circumstances. The trial giving rise to the conviction which is now the subject of this appeal is in itself a retrial after the earlier trial against the appellant (criminal case NO. 694/08) was set aside by this court and a retrial ordered . The appellant was also dissatisfied with the outcome of the retrial and he is here once again.

In his first ground, the appellant has raised the provisions of **Section 200 (3)** of the **Criminal Procedure Code** that he claims was not adhered to by the trial court. From the proceedings I have established that there were four changes of trial magistrates who handled the case during the trial. Honourable H. N. Ndungu, Senior Principal Magistrate began the trial and took the evidence of all the prosecution witnesses and upon assessing the evidence pursuant Section **211** of the **Criminal Procedure Code** placed the appellant on this defence. Thereafter the defence delayed for one reason or the other and this saw the trial magistrate being transferred before taking the appellants defence. Honourable D. M. Ochenja Senior Principal magistrate took over from Honourable H. N. Ndungu and the appellant through his counsel applied for case to start afresh notwithstanding the fact that the prosecution had closed its case and he had been found to have a case to answer and accordingly placed on his defence. The succeeding trial magistrate overruled him and ordered the case to proceed from where the other court left. The case proceeded and the appellant applied to have the clinical officer re-called for cross examination and the

same was allowed. The trial magistrate took the evidence of the witness re-called and misdescribed the witness as PW4 and failed to administer the oath indicating that the witness was still on oath. I will come back to this anomaly later in this judgment. Honourable Teresia Ngugi , Senior Principal Magistrate then took over the proceedings and it is apparent from the record that she did so on wrong footing perhaps owing to the last order of the departing magistrate who indicated that the matter was to come up for submissions. Honourable Teresia Ngugi therefore proceeded to fix the matter wrongly for mention for submissions. Later in the proceedings she further irregularly put the appellant on his defence the second time and fixed the same case for defence hearing. There was some delay thereafter and Honourable Teresia Ngugi was transferred and Honourable J. A. Kasam Ag. Senior Resident Magistrate took over and proceeded with the defence and thereafter delivered the judgment which is now the subject of this appeal. It is instructive to note that prior to proceeding to take the defence case, the trial magistrate declined a further application by the appellant to have the case started afresh. This is important because the appellant has not specified which ruling or refusal (to have the case started denovo) is subject to his first ground of appeal. I say so because two magistrates Honourable Ochenja and J. A. Kasam at different stages of proceedings overruled the appellant in his attempt to have the case restarted afresh. Either way I will consider whether any or both applications were merited.

The provisions of **Section 200 (3)** of the **Criminal Procedure Code** were in my view enacted to take care of situations where a trial magistrate for one reason or the other ceases to exercise jurisdiction therein and is succeeded by another magistrate. The provision provides as follows:

"Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused of that right". (emphasis mine)

It is my considered view that the section does not give an accused person a blanket right to ask a trial court for a case to restart denovo. My reading of the provision shows that an accused person MAY ask the court that a particular witness be re-called/resummoned to testify. The right to recall is also not absolute and will depend on the reasons given and circumstances obtaining in a case. This is a position that is apparent in a number of decisions in this court and the court of appeal. In the case of **NDEGWA -VS- REPUBLIC (1985) e KLR 534,** the court of appeal made the following observations,

"The provisions of Section 200 of the Criminal Procedure Code (cap 75) ought to be used very sparingly; and only in cases where the exigencies of the circumstances are likely to defeat the ends of justice if the succeeding magistrate is not allowed to adopt or continue a criminal trial started by a predecessor ".

The court went further to state that the provisions should not be invoked where the witnesses are still locally available and the passage of time was short so as not to cause or produce any accountable loss of memory on that part whether actual or presumed to prejudice the prosecution.

In the case of **EPHRAIM WANJOHI IRUNGU AND 7 OTHERS –VS- REPUBLIC (2013) e KLR,** the court in refusing to have a case started denovo stated as follows:

"To ***start the trial afresh would involve much inconvenience and delay of the case even if Mr Esmail's clients who are out of bond do not seem to mind. This case has entered its third year and any further delay is undesirable as justice delayed is justice denied.***

I am satisfied that Honourable Ochenja exercised his discretion judiciously in declining to order a retrial and such denial does notnullify the subsequent proceedings".

The appellant herein in my view did not place sufficient material on both occasions to warrant the trial magistrates in the two occasions cited above to exercise their discretion in favour of the appellants application for denovo. The prosecution had closed their case and appellant had put on his defence. The magistrates on the two occasions exercised their discretion judiciously and I find no basis to fault them in that regard. As a matter of fact Honourable D. M. Ochenja infact allowed an application for a recall of a

witness (clinical officer) for further cross examination. I should mention here that even if I had found any of the trial magistrate herein having erred in the application of **Section 200(3) Criminal Procedure Code** and thereby prejudiced the appellant the remedy available would be a retrial as provided for under **Section 200 (4)** of the **Criminal Procedure Code** .

The appellant took issue with the age of the complainant stating that the same was not established. Though I agree with the appellant that the age of the complainant in such cases are crucial factors because the sentence to be meted out is dependent on age, I do not agree that an age of a victim can only be established by birth certificates or medical assessment. The age of a victim can be established in other ways and I am inclined to agree with Mr Sitati on this score as demonstrated by the authorities quoted by the state **(WAHOME CHEGE –VS- REPUBLIC (2014) e KLR AND FAPPYTON MUTUGU –VS- REPUBLIC (2014) e KLR** where it was held inter alia that formal documents to prove the age of a victim of sexual offence may be necessary in borderline cases but in situation where the child is aged 5 years as was the case in FM'S case , the court was prepared to accept any evidence showing that the child was aged 11 years or less. In WC'S case, the court held that the evidence adduced by the minor and supported by the P3 produced was sufficient to establish the age of the victim. In the case of **JOEL SIO MWASI-VS- REPUBLIC (2014) e KLR** the court held that where there is consistency on the age of the minor it was not necessary to call for birth certificate or an age assessment report. It is sufficient in my view for a trial court to satisfy itself that the age of the victim in obvious cases has been sufficiently proved. The appellant did not raise any issue at the trial concerning the age of the complainant during trial especially when the minor state that she was 6 years at the time. To my mind, there was no dispute on the age at that stage of the proceedings otherwise the trial court could have noted it. In the absence of that I do find that the grounds on age, is an afterthought by the appellant and in that respect I find no basis on the same.

I have considered the proceedings at the trial court and the manner in which the same was recorded and I would agree with the appellant that the same left a lot to be desired. I will begin with the first cited anomaly which I have cited above in this judgment which is the misdescription of witnesses who were called to testify. The clinical officer, ESTHER GACHOKI called as PW2 during the trial before Honourable H. N. Ndungu gave evidence concerning the examination carried out on the minor (complainant) and identified the P3 form as the document she filled and signed. The P3 was marked for identification and the proceedings is unclear when the same was actually produced as an exhibit because the evidence of the investigating officer is unclear if she produced the P3 but that is not all when the appellant later after Honourable H. N. Ndungu had been transferred, made application to have the clinical officer recalled for cross –examination, the then trial magistrate Honourable D. M. Ochenja inexplicably described her as PW4 and indicated that the witness was still on oath as though the witness had been stood down earlier which was not the case. Furthermore, the name of the witness being recalled for cross examination is not indicated. This further complicated the proceedings especially given that the magistrate who took the evidence is not the one that eventually wrote the judgment. It is therefore unclear in the absence of a name being attached to the witness recalled and wrongly being referred to PW4 is actually the PW 2, ESTHER GACHOKI the clinical officer who had earlier testified. This anomaly is compounded in the judgment on the trial court where in the trial magistrate writing the judgment misdescribes PW2 (Esther Gachoki- the clinical officer) as the one who was at the scene of the crime and who found the accused person's zip wide opened. The state admitted the error but termed it human error which did not go into the substance of the case to influence the outcome of the case. I do not agree and I am inclined to agree with the appellant's assertions that the proceedings appear to have been taken a bit casually to the extent that the appellant was as a result, exposed to unfair trial. This is evident by the fact that the proceedings show that the appellant apparently was put on his defence twice within the same trial. The proceedings in the trial court shows that on 9th January 2011, Honourable H. N. Ndungu (SPM) put the appellant on his defence in accordance to **Section 211 Criminal Procedure Code**. The succeeding magistrate Honourable Teresia Ngugi (SPM) once again on 13th June 2013 put the appellant on his defence. This could be explained by the change of magistrates trying the accused but it is prudent upon any succeeding magistrate to diligently go through the proceedings alternatively order for the proceedings to be typed if the handwriting of the departing magistrate could be difficult to follow to ensure that the rights of an accused person as well as the victim are protected. Failure to observe the same can lead to miscarriage of justice and the same should be avoided.

On the issue of reliance of uncorroborated evidence of the minor by the trial court, I do agree with the Mr Sitati's submissions that **Section 124** of the **Evidence Act** does not require corroboration in criminal cases involving sexual offences and that the evidence of a victim in such cases is sufficient . However there is an important rider to the rule and that is a requirement that a judicial officer or a trial court must satisfy himself/herself and with reasons to be recorded that the alleged victim is telling the truth. I note in this appeal that the trial court did not record whether she was satisfied that the complainant was speaking the truth or the reasons the court had taken into account in believing that the complainant was speaking the truth for avoidance of doubts. I note that the appellants have raised a number of issues in this appeal which has had the effect of casting doubts about the prosecution case at the trial court.

The appellant has raised the unexplained delay in reporting the incident after it occurred in relation to the conduct of PW3 DANIEL MUHORO GITHI and PW4 JW the mother of the complainant as shown in their evidence. The incident took place on 14th June 2008. PW3 told the court that he found the appellant inside the store with the complainant with his zip open and this was after being attracted by cries for help by the complainant. I do find it odd that the witness chose to keep quite after witnessing such a horrendous crime. If indeed he found the minor crying after being defiled one would expect that if he could not scream or raise an alarm there and then, he at least ought to have run looking for the mother or anyone for help. It is also unclear from the proceedings when the said witness told the mother because he kept jumping from the fact that he informed her the same day to the fact that he informed her on 16th June. Either way I do not think that the witness was credible enough. But perhaps what is more intriguing in the case is the conduct of the mother (PW4) upon learning about the defilement of his daughter. She was also unsure when she learned about the incident because on one hand she says she came home on 14th June 2008 and observed " nothing unusual" and it was not until 16th June when PW3 informed her of the ordeal that faced the minor. However on the other hand under cross examination, she stated that she learned about the defilement on 14th June 2008. Assuming she learned about the incident on either dates surely what prevented her from taking immediate action of rushing the child to hospital or reporting the incident to the police or any other authority? PW4 told the court that she was a secondary school teacher, so one would expect that she is schooled enough to know what immediate action is required in such instances. I do not find the excuse for the delay sound in any respect. Is it normal or ordinary for a mother who is a teacher at a secondary school, to find her 6 year old daughter defiled and sits doing nothing for 3 days waiting for the husband to come home to decide for her what to do? These are questions that the trial court should have addressed because they could not be ignored. I do find it appalling and not plausible and in the very least, it ought to have created some doubts in the mind of the trial court properly directing itself especially in view of the defence put forward.

I am further perplexed at the turn of events when the father turned up 3 days later the mother who had observed "nothing unusual" from the minor then took the said minor to the police and to the hospital where she was admitted for one day. Perhaps the mother was a bit reckless and had some other challenges or afflictions that prevented her from taking her child to hospital earlier after being defiled but the father who could have shed some light over the same was never called to testify. I know the state has discretion on who to summon as a witness, but on this occasion, I am not persuaded that sufficient material was placed before the trial court to explain two important aspects in the case which were

1. Delay in reporting the incident.
2. Character of the mother (PW4) that would justify inaction in the face of such a serious crime being committed against her daughter.

The two aspects for me were important in evaluating the defence and submissions put forward by the appellant. I do find the appellants submissions that his defence was causally dismissed not to be farfetched. In the light of the foregoing I do find that the trial magistrate misdirected herself by failing to take note of the aforesaid anomalies and she taken the anomalies into account ,perhaps the finding on guilt could have been different.

As I have indicated above the changes that occurred in the trial during the course of trial did not do any favours to the interest of justice. This is a case that normally rests on credibility of the witnesses especially the complainant and where you find that the court that convicted the appellant is not the

same court that took the evidence of the complainant, then one requires to be careful and sure of facts of the case. That is why the law as already pointed out requires a trial court as matter of essence to record the demeanor of a minor and indicate clearly whether in the opinion of the court the witness(minor) appears truthful and straightforward to safeguard the interests of justice. In the absence of the same, it would be unsafe for a court to find a conviction against an accused person based on such evidence.

The appellant also faulted the trial court for not stating in her judgment whether she was convicting the appellant on the principle charge or whether she found him guilty on the alternative charge. I agree that the learned magistrate may have inadvertently failed to state what she was convicting the appellant for but I do not think that the same would have materially affected the outcome of this appeal. If that was the only issue in this appeal I would invoked my power under **Section 362 Criminal Procedure Code** and just revise the conviction accordingly in relation to the charge facing him. However this appeal has raised other pertinent issues which I have highlighted.

I have considered all the issues in this appeal and even contemplated sending back the case for a retrial but in view of the passage of time and futility of restarting a case of this nature 7 years after the event considering the mobility of witnesses, I found that it would not serve the ends of justice. Consequently, owing to the circumstances of the case at the trial court and my findings over the same as pointed out above I can only arrive to one conclusion which is to find merit in this appeal which I hereby do. I set aside both conviction and sentence against the appellant. He shall be set free forthwith unless lawfully held. It is so ordered.

R.K. LIMO

JUDGE

DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 11TH DAY OF MARCH 2015 in the presence of

Mr Kimani for the appellant

Mr Sitati for State

Mbogo Court Clerk