REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 99 OF 2014

(From original conviction and sentence in Criminal Case No.1859 of 2013 of the

Senior Principal Magistrate's Court at Narok – Z. ABDUL, R.M)

ROBERT KIPKORIR NGETICH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant Robert Kipkorir Ngetich was charged with the offence of defilement of a five year old girl contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. An alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006 was also preferred.

Particulars of the offence were that on the 28th day of October 2013 in Narok South District in Narok South District in Narok County, the Appellant intentionally caused his penis to penetrate the vagina of NC, a girl aged 5 years.

After a full hearing, the Appellant was found guilty and convicted on the main charge and sentenced to life imprisonment. Being aggrieved by both the conviction and sentence, he filed this appeal which is based on the following grounds as contained in his amended petition filed on the 4th December, 2014:

1. that the trial magistrate erred in law and fact in holding that the prosecution had proved its case beyond any reasonable doubt despite contradictory testimony by the prosecution witnesses.

2. that the trial magistrate erred in law and fact in convicting the appellant on the main charge without considering that the evidence of PW4, Clinical Officer and P3 form were doubtful.

3. that the trial magistrate erred in law when she failed to adhere to the provisions of the Criminal Procedure Code rendering the trial a nullity.

4. That the trial magistrate erred in law and fact by failing to accord the appellant a fair trial when she denied him an explanation under Section 211 of the Criminal Procedure Code.

5. That the trial magistrate further erred in law and fact when she denied the Appellant a chance to mitigate.

6. The appellant prays that the conviction and sentence be set aside, and he be set at liberty.

The appeal is opposed by the Learned State Counsel, Ms. Nyakira who submitted that the complainant and all four witnesses gave a detailed and consistent account of the incident. She further submitted that the Clinical Officer's medical report corroborated the evidence that the complainant, a girl of then 5 years, was defiled, and the sentence handed down to the accused was appropriate as provided in the Sexual Offences Act No. 3 of 2006. She further submitted that the Appellant was well known to the complainant and at the time of the commission of the offence, he was holding a Masai sword against her and threatened to cut her if she screamed. She called him by his name and identified him in court as Robert, and further stated that he was their neighbour.

Brief facts of the case are that on the 28th October, 2013, the complainant a girl then aged 5 years and in class 1 *(one)* that on the material day, she had gone for a crusade nearby with one lady known as Stella – PW2, but they lost contact. It was about 8.00 p.m., when she left the crusade and went to the house *(Stella's house)* where her father had left her as he went to work, and lit up the lantern. While waiting for Stella, she heard a knock on the door and went to open. It was the Appellant but not Stella.

The Appellant who was well known to her pulled her and took her near the toilet in the same compound, removed his trouser to knee level and removed her pantys completely and made her to lie on the ground and defiled her while holding a Masai sword and threatened to cut her if she screamed. After the act she requested him to allow her go for a short call whereupon she ran away, back to the house and locked herself inside and hid under the bed. Later, Stella came and she opened for her, then ran and hid again under the bed. Upon Stella asking her what she was fearing, she narrated the incident to her. Stella then called the father of the complainant the mother said to have been in prison and together they took the child to the Police Station the following day, reported and later to the hospital where she was treated, and were issued with a P3 form. The Appellant disappeared from the village and only resurfaced after almost two months. He was arrested by the public and taken to the Police Station where he was charged with the offence of defilement as the main charge, and indecent act with a child as an alternative charge.

PW2 Stella Rono corroborated the complainant's evidence that she had gone to the crusade with her but they got separated and she went to the house alone, where she found her terrified and upon inquiry PW1 narrated the incident to her. She confirmed that she called the father of the child and on the following day, together took the child to the Police Station, reported, and went to the hospital where the child was treated, and a P3 form given to them for filling.

PW4, a Clinical Officer at the Ololulunga District Hospital confirmed having examined the child but after 57 days of the alleged defilement. He confirmed that indeed there was penetration into the child's vagina and thereafter filled the P3 form.

The age of the child was confirmed by an age assessment report dated the 18th February 2014 that was produced by the Prosecutor. It indicated that the child was then 6 years, meaning she was 5 years at the time of the offence.

On his part, the Appellant who was unrepresented by an advocate during the trial denied committing the offence expressly. He however did not refer to the offence at all in cross-examination of the prosecution witnesses. The Appellant gave unsworn evidence. He denied defiling the complainant and stated that he knew nothing of the allegation, and was arrested by people he found in his house who took him to the Police Station on the 23rd December, 2013, about two months after commission of the alleged offence. He did not mention or explain his absence from the village immediately after the alleged offence for 2 months. He however stated that the mother of the minor complainant asked him to pay to her shs. 100,000/= for her to withdraw the case but he refused insisting that he did not know anything about it.

The trial court upon analysing the evidence and directing his mind on the law applicable, he was convinced beyond reasonable doubt that the appellant committed the offence against the minor and proceeded to convict him and sentenced him to serve a life imprisonment as provided in the Sexual Offences Act No. 3 of 2006.

As the first appellate court, I have a duty to evaluate the evidence adduced in the lower court and re-evaluate the same and arrive at my own findings and conclusions – as held in the case **Selle and another -vs- Associated Motor Boat Co. Ltd. and others (1968) E.A. 123.**

I have examined the record carefully. The evidence of PW1 the Complainant, a child of 6 years was very clear, consistent and was not controverted by the Appellant in any way or at all. PW2 corroborated her evidence. The trial magistrate conducted a Voire Dire examination before she testified, and he was satisfied of her intelligence and understanding.

As stated earlier, the Appellant did not tender any plausible defence save to state that he did not know anything about the offence, a very generalised statement of defence.

I fully agree with the trial magistrate that the three ingredients that ought to be satisfied in an offence of defilement that is, age of the victim, identification of the offender and penetration were all proved. See case of **Hilary Nyongesa -vs- Republic, Criminal Appeal No. 123 of 2009, Eldoret.**

On identification, the minor child stated clearly that she knew the Appellant and called him by name, and that he was a neighbour. She pointed at him in court, and called him Robert. He was therefore positively identified at the time of committing the offence. The child had lit a lantern lamp in the house and there could therefore be no mistaken identity. The Appellant did not deny knowing the child or the events as narrated by her in court. Age assessment was done and a report duly produced in court, so was the medical report that showed clearly that there was penetration into the child's vagina, hence the offence of defilement was proved beyond any reasonable doubt.

I have considered the Appellant's grounds of appeal No. 1 & 2. I find no contradictory evidence by the prosecution witnesses. All the evidence by the 5 witnesses collaborated each other. The record is clear on this.

On ground 3 and 4, the Appellant did not elaborate in what manner the trial court failed to adhere to the provisions of the Criminal Procedure Code. No grounds were advanced to persuade this court to declare the trial a nullity.

The Appellant has stated that he was not explained by the trial court the provisions of Section 211 of the Criminal Procedure Code.

I have looked at the record of proceedings in the trial court.

Section 211 of the Criminal Procedure Code requires that after the close of the evidence in support of the charge and after summing up and submissions by the prosecution, if the court finds that there is sufficient evidence to put the accused on his defence, then the court shall inform him, and explain the substance of the charge and explain to him the right to give sworn or unsworn defence and consequences of each as he may choose.

The record shows that after close of the prosecution case, the trial court made a ruling that the accused had a case to answer, and that the accused opted to give unsworn evidence, and a hearing date for the defence given.

Though not expressly recorded, I am convinced that the procedure as provided under Section 211 of the Criminal Procedure Code was followed, and the accused explained his rights, and opted to give unsworn statement of his defence.

On mitigation, the record shows that the Appellant was given a chance to mitigate and he offered no mitigation. The court indeed noted that the accused did not mitigate and was not remorseful. I therefore find no fault with the trial magistrate in the manner he conducted the trial, and specifically the application of Section 211 of the Criminal Procedure Code.

Having considered all the grounds of appeal, I find that none has merit. The conviction is proper and this court will not interfere with it.

The Appellant was charged and convicted under Section 8(1) as read with Section 8(2) of the Sexual Offences Act, No. 3 of 2006. The complainant was only 5 years old. The minimum sentence prescribed under Section 8(2) of the said Act is life imprisonment. I find no reason to interfere with either the conviction or the sentence, and confirm the same.

The appeal is hereby dismissed.

Dated, signed and delivered at Nakuru this 6th day of March, 2015

JANET MULWA

JUDGE

Judgment read and signed in open court in the presence of:

N/A for the State

Appellant present in person

Court clerk: Omondi