REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

HIGH COURT CRIMINAL APPEAL NO. 75 OF 2014

JOHN MBIKU NGUTU ……APPELLANT

V E R S U S

REPUBLIC ……..……. STATE

(From the original Criminal Suit No. 534 of 2013 from Senior Resident Magistrate Court at Mwingi).

J U D G M E N T

The appellant was charged in the subordinate court with defilement contrary to section 8(1) (2) of the Sexual Offences Act. No. 3 of 2006. The particulars of the offence were that on 29th September 2013 in Thaana Nzau location within Migwani District in Kitui County, intentionally did an act which cause the penetration of his genital organ namely penis into the female genital organ namely vagina of M M a child aged 15 years.

In the alternative, he was charged with committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. The particulars of the offence were that on the same day and place intentionally did an act which caused contact of his genital organ namely penis to the female genital organ namely vagina of M M a child aged 15 years.

He denied both charges. After a full trial, he was convicted on the main count. He was sentenced to serve 20 years in prison. Dissatisfied with the decision of the trial court, he has now appealed to this court.

He filed his initial grounds of appeal on 2nd August 2014. Before the appeal was heard he filed amended grounds of appeal, which he relied upon, together with the initial grounds. The grounds are as follows:-

1. That the complainant's age was not established during trial.
2. That the trial magistrate failed to distinguish which offence or charge he pleaded not guilty to hence he was charged with two charges making the whole trial unfair.
3. That some crucial witnesses like the chief who alleged to have arrested him were not summoned to adduce their evidence as to why he arrested him, even after he requested him to be summoned.
4. That the trial magistrate denied him proper the administration of justice by refusing to order for DNA test even after the prosecution and defence requested for the same in order to establish the truth of the alleged charges.
5. That the trial magistrate erred in law by not explaining to him the meaning of Section 211 of the

Criminal Procedure Code.

6. That the P3 form which was produced in court had no name of the medical officer who confirmed the complaint.
7. The magistrate who executed (pronounced) judgment was not the same who tried the case hence failed in the conclusions.
8. The prosecution case was not proved beyond reasonable doubt.

The appellant also filed written submissions. At the hearing of the appeal, he relied on his written submissions. He made no oral submissions. I have perused written submissions.

The learned prosecuting counsel Mr. Orwa opposed the appeal. Counsel submitted that the age of the complainant was established by production of the birth notification of the complainant by PW6 showing that she was born in 1998.

Counsel also argued that the appellant understood the charges he faced and participated fully in the proceedings. Counsel stated that the conviction was obviously on the main count.

With regard to failure to call witnesses, counsel submitted that the offence was committed in a thicket and as such there was no eye witness. Counsel submitted further that failure to conduct DNA test was not fatal to the conviction.

With regard to section 211 Criminal Procedure Code, counsel submitted that though it was not specifically captured in the record, in his view the appellant must have been informed of its contents orally and that was the reason why he chose to give a sworn statement in defence and call no witness.

In counsel's view PW3 as the author of the P3 form examined the complainant. No law required that the name of the medical practitioner should appear on the P3 form. Though a new magistrate took over the proceedings, the appellant elected to proceed from where the case had reached and he should not now be heard to complain on appeal.

Counsel argued that the prosecution proved its case against the appellant beyond reasonable doubt. In counsel's view there was a mistake in the section of the law cited in the charge, but that the error was curable.

At the trial the prosecution called four (4) witnesses. PWI was the complainant. It was her evidence that she was born on 5th October 1997 and was 15 years old and in class 6.

That on 29th September 2013 about 7.00 Pm, she went to buy kerosene at Thaananzau market. As she walked back home, she met the appellant on the roadside who held her hand and told her to go to a thicket and make love. They went there and he undressed her and had sexual intercourse with her twice. When she arrived home an uncle enquired where she had been and she disclosed what had happened. It was her evidence that the appellant had sex with her previously. A report was made to the police and she was taken to hospital.

PW2 was C V M the mother of the complainant. She came home on 29th September 2013 about 6.00 Pm and did not see the complainant. As a result they searched for her and some young men said that the appellant was seen with complainant. They then reported the incident to the Assistant Chief and later an uncle of the complainant D K said that the complainant had returned home. The complainant then disclosed that the appellant had sexual intercourse with her.

PW3 was Dr. Gerald Mutisya the MOH Mwingi. While at Migwani he examined the complainant who was 15 years of age Pregnancy test was positive. At this point the prosecutor asked that DNA test be conducted as the complainant had given birth. No such DNA test was however conducted.

PW4 was PC Gregory Maingi. It was his evidence that on 30th September 2013 at 5.30 Pm he received a

defilement report at Mwingi police station. The police took action and charged the appellant in court.

At this point the case was taken over by a succeeding magistrate.

In his defence, the appellant before the succeeding magistrate elected to proceed from where the case had reached. He elected to give sworn testimony. He stated that he was a boda boda operator. That on 29th September 2013 he did his business as usual and while at a hotel taking tea, a man came and told him that Mama M had sent him to arrest him. He stated that he had an existing grudge over a land dispute with the mother of M. He stated that M had delivered but no DNA was conducted. He denied knowing the complainant or committing the offence.

This is a first appeal. As a first appellate court, I am duty bound to re-evaluate all the evidence on record and come to my own inferences and conclusions. See the case of ***Okeno –vs- Republic (1972) EA 32***. Just like the learned magistrate who delivered judgment, I did not see witnesses testify. The magistrate saw only the appellant testify.

The appellant has raised several complaints on appeal.

Though the judgment does not specifically state the offence for which the appellant was convicted, in my view, the conviction was on the main count of defilement. I also find no prejudice suffered by the appellant as a result of the default of the magistrate in not specifically stating the offence for which the appellant was convicted.

The burden is always on the prosecution to prove a criminal case against an accused person beyond reasonable doubt. In the present case there was no eye witness to the incident. It was the word of the complainant against that of the appellant.

Though the appellant has complained that the Assistant Chief and the people who arrested him were not called to testify, in my view their evidence was not crucial. The appellant himself said in his defence that he was arrested on the orders of the complainant's mother, whom she knew before. I do not see the need for additional witnesses.

The age of the complainant was not disputed in the evidence.

The medical card produced showed that she was born on 16th May 1998. Therefore in my view the age was established.

What gives me apprehension is the fact that though the prosecution had at one point adjourned the case for a DNA test to be carried out, as the child – of the alleged long relationship of the appellant and complainant had been born, such DNA test was not conducted and no mention of the same was made in court thereafter. In my view, that default by the prosecution created a major gap in the prosecution case. The benefit of that deliberate gap has to be given to the appellant and I do so. The prosecution should either have conducted the DNA test or given reasons in court why same was not done. The evidence that remains on record in the absence of the DNA test is evidence of suspicion. Such evidence is not adequate to sustain a conviction in a criminal case.

In the result, I allow the appeal quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa this 14th July 2015.

GEORGE DULU

JUDGE