REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO.161 OF 2014

JOHANA KARIUKI WAWERU……...…….…….APPELLANT

VERSUS

REPUBLIC ……..…….…..RESPONDENT

(Being an appeal from the original conviction and sentence of the Principle Magistrate's Court at Githunguri criminal case No.353 of 2013 delivered on 14/8/2013 by B.M. Nzakyo Ag. PM)

JUDGMENT

The appellant was charged with defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars were that on the 9th day of June, 2011 in Githunguri District within Kiambu County intentionally and unlawfully caused his penis to penetrate the vagina of V N a child aged 14 years. In the alternative, he was charged with committing an indecent act contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.The particulars were that on the 9th day of June, 2011 in Githunguri District within Kiambu County intentionally touched the vagina of V N a child aged 14 years with his penis. He was convicted for the main charge and sentenced to serve 20 years imprisonment. He appealed both against the conviction and sentence. In his submissions he preferred to condense the grounds of appeal into three as follows:

1. That the learned trial magistrate erred in law and in fact in convicting him on the basis of evidence that was contradictory and unreliable.

2. The learned trial magistrate erred in law and in fact by relying on insufficient medical evidence.

3. That the learned trial magistrate erred in law and in fact by convicting him based on evidence that was not sufficiently corroborated.

He submitted thatthe evidence produced by PW1 who was the complainant contradicted that of PW2, the complainant's mother. He pointed out thatPW1 stated that after the alleged defilement she proceeded and told her mother what the appellant had done to her; yet PW2 testified that she only got to hear of the defilement from one Nduta. He referred to the evidence of Nduta who testified that the complainant told her that she had not told her mother of the incident. He submitted that the evidence given by PW4 was contradictory to that of PW1 in that, PW1 stated that there was no one at the river whereas PW4 stated that he was told by PW1 that there were people passing by. He emphasized that the evidence of PW1 was unreliable. He submitted that the alleged offence was reported five days after its occurrence and that there was a delay in conducting the medical examination which created doubts. He further submitted that no medical examination was conducted on him to prove that he was the actual perpetrator of the offence.He

submitted that since the complainant was mentally retarded, her evidence ought to have been corroborated by very cogent evidence.

In response to the appellant's submissions, counsel for the respondent, Frida A.A.Ombogo submitted as follows:

On the age of the complainant, PW2 produced an immunization card which indicated that PW1 was born on 11th August, 1996. On the proof of penetration, PW1 testified that she found the appellant at the water point. The appellant then asked her to accompany him to a grass farm. She refused and then the appellant removed her underpants and laid on her. The appellant then carried her to his house despite PW1's refusal and proceeded to defile her. Counsel for the prosecution submitted that PW1's evidence was corroborated by the medical evidence of PW5 who after examining PW1 established that her hymen was partially broken and concluded that she was defiled.

On the issue of identification, counsel submitted that it is not in dispute that the appellant was known to PW1 prior to the incident as he was their neighbour and that she knew him by his name. She further submitted that throughout the proceedings PW1 referred to the appellant by his name. Counsel also submitted that PW1's testimony was supported by that of PW2 who stated that PW1 gave the name of the appellant to PW3 as the person who defiled her.

On the issue of contradictory evidence, counsel submitted that the evidence adduced was consistent and watertight. She submitted that it is immaterial who received the evidence first between PW2 and PW3, that the fact is that the medical evidence coupled with positive identification connected the appellant to the crime.

On the issue of the period taken to report the offence, counsel for the prosecution submitted that the offence was said to have taken place on 9.6.2011 at 8:00am. The report to the police was made on 14.6.2011, 51/2 days after the occurrence of the alleged offence. She referred to the case of **D.M.N vs Republic HCCRA No. 327 of 2013** where the learned judge said, **"…it is not in dispute that the offence herein was reported to the police nearly one month after it was committed. The reason as to why it took so long to report the offence to the authorities, as can be deciphered from the evidence on record, is that the complainant was not willing to inform the prosecution witnesses what had happened to her. The offence on record reveals that the offence was immediately reported to the authorities for further investigations, immediately the complainant named the appellant as the person responsible for the offence."** She submitted that in the present case the delay was not deliberate and that the complainant had been threatened not to tell anyone what had happened. She submitted that the same could not vitiate the prosecution's case. She referred to Section 2 of the Sexual Offences Act No. 3 of 2006 as quoted in **D.W.N Vs Republic,** which defines penetration. Counsel also referred to Section 125 (2) of the Evidence Act which states that, **"a mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them."**

She submitted that when the complainant was testifying before the court, she appeared consistent, composed and intelligent. She did not contradict herself but gave appropriate answers to the appellant during the cross examination. Counsel for the prosecution submitted that the sentence of 20 years imprisonment imposed on the appellant is proper and prayed that the appeal be dismissed.

This being the first appellate court, its duty is to re-evaluate the evidence and come up with independent conclusions. See the case of **OKENO VS REPUBLIC (1972) EA,32.**

I have gone through the record of proceedings from the lower court. The prosecution called five witnesses.

According to **PW1**, V N who was the complainant, she was clear in her mind that it is the appellant who defiled her. She narrated how on the 9 June, 2011 at 8am when she went to the river to fetch water she found the appellant at the water point who asked her to accompany her to a nappier grass farm. It is there

that he first removed her underpants and laid on her. Thereafter he carried her to his house where he also removed her underpants and laid on her again. He thereafter gave her mandazi which she declined to eat. From the evidence on record, PW1 first narrated her ordeal to **PW3** Gladys Nduta who corroborated her evidence. Her mother who testified as **PW2**also reiterated her story and also produced her immunization card which indicated that she was born on the 11th August, 1996 thereby placing her age as at the time of defilement at 14 years.

The twist of the case was brought about by the testimony of PW5 Regina Kimaru, a Clinical Officer at Githunguri Health Centre. She examined the complainant and produced her medical treatment report from Githunguri Health Centre as well as her P3form. It is in the treatment card dated 14thJune, 2011that showed that the complainant was mentally incapacitated. That explains why the learned state counsel Miss Frida A.A Ombogo in her written submissions filed on 23 June, 2015 made reference to Section 125(2)of the Evidence Act which provides that a mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them.

The view of this court is that as soon as that medical treatment card was adduced in court the prosecution ought to have made an application to amend the charge sheet so as to reflect that the complainant was mentally challenged. The amendment not having been done ultimately implies that the complainant may have been prejudiced throughout the trial by not only her evidence but also that of other witnesses. For instance her mother referred to her mental incapacity as epilepsy whereas by common sense epilepsy may not necessarily mentally impair a person. Furthermore, that would contradict an expert's evidence as reflected in the medical treatment card that the complainant was mentally incapacitated. The same reflected that she was not able to differentiate between days and hours and count the alphabets A-Z and numericals 1-10. That may further explain why she had not gone to school even at her advanced age of 14 years.

On evaluation of the above observations I think that the failure by the prosecution to amend the charge sheet to reflect that the complainant was mentally challenged amounted to a defect in the original trial. For justice to be seen to be done it is the view of this court that a retrial ought to be ordered. I am more so persuaded because on evaluation of the evidence on record there is a likelihood that the retrial will resort in a conviction and would not be enabling the prosecution to fill up gaps in its evidence at the first trial. Furthermore, the appellant has only served two years in jail which is not such a lengthy period as would prejudice him. I also take into account the gravity of the offence which cannot be wished away. Thus the interests of justice require that a retrial be ordered. See **Opicho Vs Republic (2009) KLR 369**in which the Court of Appeal held:-

> **"In general a retrial would be ordered only when the original trial was illegal or defective. It would not be ordered where the conviction was set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. Even where a conviction was vitiated by a mistake of the trial court for which the prosecution was not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interests of justice required it."**

In sum, this appeal is dismissed with an order that a retrial be conducted. The appellant shall be escorted to Githunguri Police station for processing of fresh charges within 10 days and should appear before the Chief Magistrate's Law Courts at Githunguri as required by the Law after the processing of a fresh charge sheet. I further order that the trial be conducted on a priority basis given that the appellant has been in prison for some time. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 8thDay of October, 2015

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Johana Kariuki Waweru appellant in person.

2. Ms. Aluda for the respondent