REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 46 OF 2014

PETER MACHARIA NJENGA……..…….APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

(An appeal from the conviction and sentence of the Senior Principal Magistrate's Court (J. A. Kasam) at Kerugoya, Criminal Case

No. 715 of 2012 dated 26th August, 2014)

JUDGMENT

1. The appellant herein, **PETER MACHARIA NJENGA,** was charged before **Kerugoya Senior Principal Magistrate's Court Criminal Case No. 715 of 2012** with defilement contrary to ***Section 8 (1) (3)*** of the **Sexual Offences Act No. 3 of 2006**. The particulars as per the Charge Sheet presented before that court is that on 21st September, 2012 in Kirinyaga County the Appellant defiled one **DMM** a child aged between 12 and 15 years. After trial, he was convicted and sentenced to serve 20 years imprisonment. He was aggrieved by both conviction and the sentence meted out against him and filed appeal raising the following grounds:

2. ***(i) That the learned magistrate erred in law and fact by failing to***

   carry out proper voire dire inquiry before taking the evidence of the complainant.

   (ii) That the learned magistrate erred in law and fact by failing to appreciate that the evidence adduced did not support the charge.

   (iii) That the learned magistrate erred in law and fact by failing to appreciate that there were discrepancies regarding identification of the appellant.

   (iv) That the learned magistrate erred in law and fact in failing to appreciate that the co-existing circumstances destroyed the inference of the appellant's involvement in the alleged offence.

   (v) That the learned magistrate erred in law and fact in failing to appreciate that the conviction was against the weight of evidence adduced.

   (vi) That the sentence was manifestly harsh and excessive regard being made to all circumstances of the case.

3. In his oral submissions in support of the appeal Mr. Ngigi, learned counsel for the appellant, submitted that the complainant then aged 13 years old was a minor and that the trial court ought to have carried out *voire dire* investigation before administering oath and taking down her evidence. He contended that the learned magistrate erred by not complying with ***Section 19 (1***) of **Oaths and Statutory Declaration Act** by not establishing whether the minor understood the nature of an oath. He relied on the authority in the case of **BEN MAINA MWANGI -VS- R [2006] eKLR.**
4. The Appellant's learned counsel further contended that the complainant complained of being raped by the Appellant while the Charge Sheet indicated that she was defiled. In his view there was no nexus between the evidence adduced by the complainant and the particulars of the charge as contained in the Charge Sheet.
5. The Appellant further, submitted that he was not positively identified as the witness had told the trial court that the corridor where he met the Appellant and his friend was dark and given that the Appellant was not known to her prior to the incident it was not possible for him to be identified and that though the complainant told the trial court that she put lights on in the room, the source of the light or its intensity was not given. He contended that the learned trial magistrate erred by not interrogating the issue and cited an authority in an unreported case of **BERNARD GIKUNJU MURIUKI –VS- REPUBLIC (Kerugoya H.C.CR.A. No. 93 of 2012)** to buttress his point that there was no conducive environment for positive identification.
6. The Appellant also pointed out that there was discrepancy between the evidence of the Complainant (P.W.1) and her mother (P.W.3) on number of men the complainant met along the corridor leading to the house she was headed to. According to the Appellant, P.W.1 told the Court that she met two (2) men while her mother (P.W.3) testified that they were three. He faulted the learned trial magistrate when she found the contradiction minor in view of the time of the incident. Another contradiction pointed out by the Appellant was the knowledge of the Appellant by the complainant. According to him, while the complainant denied knowing the Appellant, the mother to the Complainant said that the Appellant was known to the Complainant as he used to tease her. In his view this contradiction was material in the case and should not have been disregarded as it was by the learned trial magistrate.
7. The Appellant also faulted the prosecution for not calling the lady who had sent the Complainant to her house where she was raped contending that the witness was important and that excluding her was fatal as the trial ought to have made an inference that the evidence of the excluded witness could have been prejudicial to the prosecution case.
8. On the medical evidence adduced, the Appellant faulted the prosecution for not producing the blood stained pant that was recovered from the victim. He further submitted that the doctor who was called to testify was not certain on what could have caused the bleeding and tearing of the genitalia of the Complainant and that criminal matters require certainties not speculations. According to the Appellant the doctor was not make conclusive on the question of penetration and that the P3 produced was lacking in that respect.
9. Mr. Omayo, learned counsel for Respondent opposed this appeal and supported conviction and sentence by the trial court.
10. On the issue of *voire dire* examination of the complainant, the respondent through learned counsel Mr. Omayo, responded that *voire dire* was properly done by the trial court arguing that there is no legal requirement that questions and answers be recorded contending that what is important is the fact that the witness understands the obligation to tell or speak the truth. He submitted that the trial court fully complied with ***Section 19(1)*** of **Oaths and Statutory Declaration Act**.
11. On the issue of testimony given by the Complainant to the trial court that she was raped when the particulars of the charge facing the Appellant indicated 'defilement', Mr. Omayo responded that what was important to be established was penetration which was a fact in the case and that the minor could not be expected to distinguish between the legal term rape as opposed to defilement.
12. On identification, the learned State Counsel countered the Appellant's submissions that identification of the Appellant was not positive by advancing the view that the Appellant was positively identified by the victim and pointed out that the witness was able to give the details of even what the Appellant wore on the material date and even pointed out that the Appellant had spots on his face – a fact he submitted was still evident pointing out the features on the Appellant's face during the hearing of this appeal. He contended that there is sufficient lights in the room where the defilement took place for the Appellant to be identified positively.

13. On the question of discrepancies on the prosecution evidence pointed out by the Appellant, Mr. Omayo responded that the discrepancy on the number of men found on the corridor by the Appellant was minor. He further contended that the offences of the nature faced by the Appellant required no corroboration and that the medical evidence adduced supported the prosecution's case. He reiterated that the evidence adduced was not speculative as suggested by the Appellant and contended that it was not fatal that the pant worn by the complainant at the material time was not produced as an exhibit during trial. He maintained that the prosecution case was proved beyond reasonable doubt.
14. This Court has considered this appeal and arguments from both sides. The work of a first appellate court in an appeal is to re-evaluate the evidence tendered in a trial court and check to see if the trial court was correct to draw inference it did or conclusion it did. To do that I will first outline the issues raised by this appeal. The petition of appeal raised the following issues for determination by this Court:

i. Whether the trial magistrate conducted voire dire inquiry properly in accordance with the law in regard to the complainant's testimony.

ii. Whether the evidence tendered supported the charge.

iii. Whether the appellant was positively identified by the complainant.

iv. Whether the discrepancies pointed out affected the weight of the prosecution case.

v. Whether the sentence was manifestly excessive**.**

Whether *voire dire* **inquiry was properly conducted**

15. On the first question of ***voire dire*** examination, the Appellant contended that the complainant was a minor and the court ought to have properly conducted *voire dire* inquiry and that the trial court erred by not complying with ***Section 19*** of the **Oaths and Statutory Declaration Act.** (Cap 15 Laws of Kenya) provides as follows:

"Where in any proceedings before any court or person having by law or consent of parties authority to receive evidence if any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth, and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken……...shall be deemed to be a deposition within the meaning of that section (emphasis added)

The above provision clearly refers to evidence of children of tender years and situations where evidence is taken without administering of oath on account of the fact that the child may not appreciate the importance or the nature of an oath. Under ***Section 2*** of the **Children's Act**, a definition of a 'child of tender years' refers to a child of less than 10 years of age. The complainant in the case facing the Appellant was aged 13 years. The trial court was not obligated to conduct a *voire dire* inquiry although the record of proceedings clearly shows that the learned trial magistrate did the same before properly administering the oath. The section above cited by the Appellant refers to situations where a child gives unsworn testimony but at the trial in this appeal, the witness gave sworn testimony and the Appellant had the opportunity to cross-examine and test the veracity of the evidence given. In that respect the learned trial magistrate cannot be faulted on account of not recording questions and answers of the minor. The inquiry was not necessary and the Appellant suffered no prejudice at all (see the cases of **BASIL OKARONI -VS- R [2013] eKLR** and **SOLOMON MUIRURI KUNGU -VS- REPUBLIC [2011]eKLR).**

16. This Court has looked at the authority cited by the Appellant **(BEN MAINA MWANGI -VS-**

REPUBLIC [2006] eKLR) but the same is not relevant in this appeal for the simple reason that the child in Ben Maina Mwangi's case was a child of tender years (4 years old) which legally obligated the trial court to conduct a *voire dire* inquiry prior to taking down her evidence.

17. **Whether the evidence taken supported the charge**.

The Appellant argued that while the Complainant talked of being "raped" in her evidence, the particulars in the Charge Sheet indicates "defilement". I have considered the response made by the Respondent on this ground and I agree with the learned Senior State Counsel that the two terms "rape" and "defilement" are really legal terms and to expect a 13 year old to differentiate is perhaps expecting unnecessarily too much from her. What is crucial and important in law to establish is that there was penetration whether partial or complete for the sexual offence to be deemed to have occurred. How 'penetration' is described or perceived may not be so material depending on the circumstances. I have looked and re-evaluated the evidence tendered before the trial court. I have considered the evidence tendered by the minor. She clearly described the ordeal she underwent and immediately after being defiled (though she wrongly described the same as being "raped" which is a legal term that is used to describe a forced sexual intercourse committed against a person over 18 years old as opposed to defilement which refers to a person who commits the same offence with a child) she walked to the Police on her own and reported the incident. P.W.4 P.C. **Joseph Emaseti**, who was on duty at the material time told the trial court how the victim reported the case appearing shaken.

18. I have in addition to the above considered the evidence tendered by the clinical officer **Hezron Macharia Maina** (P.W.2). He confirmed examining the victim who according to him was aged 13 years old and that examination was done a few hours (six hours) after the incident. He observed that the victim was walking with difficulty and apprehensive supporting what the Police officer (P.W.4) had also observed at the report office showing that the girl was still traumatized. On examination, the clinical officer noticed that the pant the girl was wearing was blood stained. It is true that the prosecution should have done better by producing the pant as an exhibit during trial. However, I find that nevertheless the following observation made by the doctor material in so far as the offence committed was concerned;

"the intritus was torn at the lower part at 6 o'clock and was bleeding."

This Court finds that the witness (P.W.2) was conclusive in his assessment. The minor had been defiled.

19. The Appellant's contention that the doctor was being speculative about the victim being defiled and not certain is without basis. The P3 form produced as exhibit 3 at the trial and the evidence of the clinical officer was anything but speculative. The learned trial magistrate was correct in her assessment of the evidence and the conclusion made that penetration had been proved beyond reasonable doubt. The investigating officer (P.W.4) produced a birth certificate to establish the age of the complainant which showed that the complainant at the material time was aged 13 years old. The age fell within the bracket given on the particulars of the charge and the evidence adduced on the whole clearly supported the charge. The evidence adduced was cogent and demonstrated the offence of defilement had been committed against the minor.

20. **Whether the discrepancy pointed by the Appellant affected the weight of evidence**

The Appellant pointed out discrepancies on the prosecution case and told this Court that while the complainant told the trial court that she met two men at the corridor leading to the house where she was defiled, the mother (P.W.3) told the trial court that her daughter (the complainant) had met 3 men at the corridor. The Appellant also pointed out that the mother told the trial court that the Appellant was known to the complainant as he used to make passes at her while the complainant denied prior knowledge of the Appellant. I have established the discrepancies but I agree with the Respondent and the trial court's observations in the judgment that the said discrepancies were minor and did not go to the root or the substance of the case which was the fact that the child had been defiled by one of the men found on the corridor and whether the said man had been known to the victim or that he had been making passes at her in my view is immaterial in so far as the commission of the offence is concerned. This Court considers that it is to establish that the identity of the offender had been positive which brings

me to the next important issue for determination.

21. **Whether the appellant was positively identified by the complainant**

I have considered the Appellant's submissions to the effect that the environment under which the offence was committed was not conducive for positive identification. I have further considered the contention that the learned trial magistrate erred by not interrogating the intensity or the sufficiency of the lights in the room where the child was defiled. In this regard, I have carefully evaluated the evidence and the submissions made by both the appellant and the respondent's learned counsels. The complainant gave evidence at the trial court giving a clear description of the assailant including the clothes worn on the material day. She tellingly gave a definite description about the face of the Appellant. When the said witness made a report at the Police she told the Police that even if she did not know the culprit by name she could pick him out if she saw him. She described the spots on the face of the Appellant clearly and the Respondent's learned counsel Mr. Omayo at the hearing of this appeal drew my attention to the Appellant's face and I indeed observed the spots clearly seen on the face as the Appellant is brown by complexion as described by the complainant at the trial court.

22. The observations made by the learned trial magistrate including the authority in the case of **MUSOGA GERALD -VS- UGANDA CRIMINAL APPEAL NO. 177 OF 2003** which she cited are relevant and spot on the question of identity. The conclusion of the learned trial magistrate on the issue of identification is cogent. The time the offence took place and the place it took place was indeed sufficient for the complainant to positively identify the Appellant. I am not persuaded that the evidence of the owner of the house where the offence took place could have altered in any material aspect the positive identification of the Appellant. Looking at the evidence adduced, this Court is convinced beyond reasonable doubt that identification of the Appellant was positive. He was the man who defiled the complainant on the 21st day of September, 2012 at around 6.40 p.m. or thereabout. The defence of alibi raised at the hearing of this appeal and without leave pursuant to ***Section 350(2)*** **Criminal Procedure Code**, nevertheless does not hold water in view of the aforesaid evidence which the learned trial magistrate correctly found watertight.

23. **Whether the sentence against the Appellant was excessive**

This Court is not surprised that the Appellant's counsel in his submission ignored this ground because the law is clear. ***Section 8(3)*** of the **Sexual Offences Act** provides as follows:

> ***"A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than 20 years."***

24. The Appellant was given a sentence of 20 years imprisonment as provided by law. The trial court's hands were tied by law as the minimum sentence prescribed is 20 years which she meted out. The same cannot be said to be excessive in any way.

From the foregoing, this Court finds that the appeal herein is without merit. The same is dismissed. The conviction and the sentence given by the trial court is upheld. It is so ordered.

Dated and delivered at Kerugoya this 12th day of October, 2015.

R. K. LIMO

JUDGE

12.10.2015

Before Hon. Justice R. Limo

Court Assistant Willy Mwangi

Appellant present

Sitati for State present

Ngigi for the Appellant

COURT: Judgment dated, signed and delivered in the open court in the presence of Mr. Ngigi counsel for appellant and Mr. Sitati counsel for the Respondent.

R. K. LIMO

JUDGE