REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO.73 OF 2014

BETWEEN

YUSUF KARANI alias JOSE................APPELLANT

AND

REPUBLIC..RESPONDENT

(An appeal arising out the of the conviction and sentence of CM's Court. cr. Case no.38 OF 2013 delivered on the 27/05/2014 by F. Makoyo R.M.)

J U D G M E N T

Introduction

1. The appellant herein Yusuf KARANI alias JOSE was charged with the offence of defilement contrary to Section 8(1) (2) of the Sexual Offences Act No.3 of 2006.

2. The particulars of the offence are that on diverse dates between 1st February 2013 and 15th March 2013 within Kakamega County the appellant intentionally caused his penis to penetrate the anus of EA a child aged 11 years.

3. In the alternative the appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offence Act No.3 of 2006. The particulars of the offence are that on diverse dates between 1st February 2013 and 15th March 2013 within Kakamega County the appellant intentionally touched the anus of EA a child aged 11 years with his penis.

4. The case was heard before the trial Magistrate and judgment delivered on the 27/05/2014. The appellant was convicted on the alternative charge and sentenced to serve ten (10) years imprisonment.

The Appeal

5. Being aggrieved by the said conviction and sentence the appellant has filed this appeal on the following grounds:-

> 1. THAT he did not plead guilty to the above appended charge.
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> 2. THAT the trial Court convicted him without considering that the evidence tendered in Court was malicious, fabricated, farfetched and was meant to settle scores with his brother.
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> 3. THAT the trial Court did not notice that PW1 was used to settle scores with his brother
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> 4. THAT the person who reported the alleged crime failed to testify knowing that his intentions were malicious.
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> 5. THAT PW1 was coached to implicate him with this crime and at the same time the Court relied on the evidence of a single eye witness to convict him which was unsafe.
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> 6. THAT the trial Court did not appreciate that the Administration Police officers did not testify.
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> 7. THAT the trial Court erred both in law and fact by not noticing that the evidence of the Investigating Officer was very far below the minimum standard required by law as he never went to the ground to ascertain the truth but relied on hearsay and innuendos.

8. THAT there was no P3 form or any treatment notes produced to confirm the same.

9. THAT the age of PW1 was not ascertained nor his evidence as to whether it was credible.

10. THAT the mental status of PW1 was necessary to be ascertained in this instant case.

11. THAT the trial Court rejected the appellant's alibi defence which was sufficient and cogent.

6. The appeal herein was canvassed orally. Appellant was not satisfied with both the conviction and sentence on grounds that the complainant never testified and the evidence was given by a child who was allegedly defiled. He submitted that the evidence of the child was coached testimony. He also submitted that he never saw the doctor in Court to confirm that he had indeed defiled the child and the only other witnesses who appeared apart from the complainant were the arresting officer and the Investigating officer.

7. Mr. Omwenga for the state submitted that it was true that the appellant was convicted on the basis of the testimony of a single witness the minor who was allegedly defiled. He added that the minor was examined by the Court before he gave his testimony and the trial Court was satisfied that the child was intelligent enough to understand the nature of the oath and that he appeared and sounded truthful. Mr. Omwenga further submitted that the childs testimony was very consistent on what happened to him and how he was molested and that his evidence was not shaken even after cross examination.

8.Regarding the complaint that Court relied on the evidence of a single witness to convict the appellant, Counsel submitted that according to Criminal Law Amendment Act 2002 which amended Section 124 of the Evidence Act to the effect that "………a criminal case involving a sexual offence the only evidence is that of a child of tender years being the only witness, Court shall receive the evidence of such a child and proceed to convict the witness if satisfied that accused is telling the truth."

9.He further submitted that in the instant case the trial Court examined the child and found that he understood the importance of telling the truth and also found that the child was truthful. He also submitted that the evidence of the child was credible. Counsel conceded that the Clinical officer Mr. C.O. Mambiri never testified in this case and that the question to be determined was whether the failure to call the said witness faltered the prosecution case? To this he submitted that it did not and added that the evidence of the child was sufficient to found a conviction against the appellant.

10. Being a first appeal this Court's duty is to re-evaluate the evidence on record afresh and come up with its own conclusion bearing in mind that it never saw the demeanor of those who testified during the trial. See **Pandya –vs- R [1957] E.A 336 and Kariuki Karanja –vs- Republic [1986] KLR 190 The Prosecution Case**

11. The Prosecution called three (3) witnesses. The child EA was PW1 After being taken through a *voir dire* examination he was allowed to give a sworn statement. He told the trial Court that when he used to live as a streetboy in Kakamega the appellant found him seated in the streets. He knew the appellant as Joseph. The appellant approached him and offered to buy him food and took him to his house to live with him. He claimed to have been raped twice by the appellant. It was on the second occasion that he told another child who they were living with about what the appellant was doing to him. After he told the child they were living with they decided to search for Joseph and found him sleeping at Muliro Gardens.

12.They then told the crowd at Muliro Gardens what happened and this made the appellant run to the Police station. They followed him to the Police Station and he reported the matter. He was taken to Kakamega General Hospital where he was treated and he was issued with the P3 form. MFI P1 and Post Rape Care Form MFI P2. He was cross examined and he explained that the appellant's house was in a compound with other houses and neighbours. He never told any adult about what happened and was taken by other children to the Police Station who told him what to say.

13. On being re-examined, he explained that he lived with the appellant who raped him twice. There was one bed and the appellant slept in the middle while he slept on one side and the other child on the other side. The trial Court also examined the child and the child confirmed that he lived with the appellant for about one (1) week. He also confirmed that the appellant lived in Sichirai in Lurambi. He explained that the appellant raped him while the other boy was asleep. He stated that they were sleeping on the same mattress the three of them.

14. PW2 No.54957 Sgt George Ongei stationed at Kakamega Police station told the trial Court that on the 8/06/2013 he was at the Police station when he heard the appellant shouting for help. He went outside the office and saw the appellant being chased by street boys. PW2 inquired why they were chasing the appellant and they said that the appellant had sodomised PW1. PW1 then arrived after a short while and was walking with difficulty. PW1 then told PW2 that he was living with the appellant who defiled him and he had to go back to the streets. He told his friends what had happened and on that day when they saw the appellant they chased him. PW2 told the Court that the appellant and the child were taken in as a child in need of protection.

15. He explained on cross examination that the appellant might have evaded being caught by members of the public and that he arrested him (appellant) at the Police station. He added that the complainant escaped from the appellant's house in May 2013.

16. PW3 No.67291 PC JOHN MUTANI attached to Kakamega Police station crime branch testified that on 08/06/2013 he found the appellant in their cells. He recorded the witness statements after being assigned the case. The complainant told him that in February 2013 the appellant offered to buy him food and took him to his house and defiled him. This was noticed on the 03/03/13 by another boy who lived with them as he (the complainant) had difficulties in walking. The boy advised him to leave that place. The appellant was thereafter spotted at Muliro Gardens and chased to the Police Station. PW3 then issued a P3 form which was duly filled and returned. He charged the appellant with the offence before Court. On cross examination PW3 stated that he did not visit the scene nor did he take the complainant to hospital. The Prosecution closed its case. The Trial Court found that a prima facie case had been established against the appellant who was put on his defence.

The Defence Case

17. The trial Court complied with the provisions of Section 211 of the CPC. The accused/appellant opted to give a sworn statement and did not call any witness. He testified that on the 5/06/2013 on a Saturday he received a call while he was at his workshop at Lurambi asking him to go to the Police station to attend to their alarm. He proceeded to the Police Station, but just as he was about to fix the alarm he was approached by a Police officer who claimed that he was threatening his brother and he was to be arrested. He saw his brother who claimed that he had damaged his property. He claimed that he was placed in police custody for two (2) days. He also claimed that he was told that he was arrested on suspicion of handling stolen property which was his phone but was charged with a different offence when he was arraigned in Court. He also claimed that his brother came to the Police with the complainant and another child.

18. On cross examination the appellant stated that he did not record his statement. He stated that he knew the complainant because he used to live at his home and that he stayed with him for a long time. He claimed that the Police were compromised and that the complainant was told to frame him. He closed his case and judgment was delivered on 27/03/2014.

Issues for Determination

19. The trial Court, after carefully considering the evidence by both the defence and the Prosecution found the appellant guilty of the alternative count and sentenced him accordingly. This Court will therefore dwell on the alternative charge and not on the main charge which is the subject matter of this appeal.

20. From the rival submissions on record and from the grounds set out by the appellant the following are the issues which this Court has to determine:-

a. Whether the trial Court relied on the evidence of one eye witness and whether it was wrong to do so.

b.Whether failure to call certain witnesses was fatal to the Prosecution's case.

c. Whether the age of the child (PW1) was verified and ascertained.

21. On the first issue this Court reminds itself that the case before the trial Court was a sexual offence case involving a child. The trial Court before taking the evidence of the child took him through a *voire dire* examination and found that the child knew the consequences of not telling the truth. The trial Court allowed the child to give a sworn statement and it also believed the child's testimony. In its judgment the trial Court observed that "**Having observed the demeanor of PW1 the Court is convinced that the witness is truthful."**

22**.** In this regard, I do find that the appellant's complaint that the child was coached should not therefore arise. As rightly stated by Prosecuting Counsel, the Criminal Law (Amendment) Act 2003 in legal Notice No.5 of 2003 amended Section 124 of the Evidence Act. The second part of the said Section states that **"……provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence; the Court shall receive the evidence of the child and proceed to convict the accused for reasons to be recorded in the proceedings, the Court is satisfied that the child is telling the truth."**

23.It means therefore that in a sexual offence case like the one now before Court, even if the child of tender years is the only one who gives the evidence, and the trial Court believes that he is telling the truth the trial Court can proceed to convict but it has to record its reasons in the proceedings. The effect of the proviso to Section 124 is to create, in cases of sexual offences, an exception to the general rule that an accused person cannot be convicted on the uncorroborated evidence of a child of tender years. In **Jacob Odhiambo Omumbo –vs- Republic Cr. Appeal No.80 of 2008** (Kisumu) the Court of Appeal made the said point as follows:-

"Though P5's evidence was that of a child of tender years the Court can convict on it by virtue of the proviso to Section 124 of the Evidence Act Cap 80 Laws of Kenya as amended by Act No.5 of 2003."

24. In **Mohamed –vs- Republic [2006] 2KLR 138** the Court of Appeal asserted this position further by stating thus **"it is now settled that the Courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied with the evidence of that one witness."**

25. On the second issue the appellant claims that the real complainant did not testify. I find that this ground cannot stand, the reason being that the complainant herein was the minor PW1 and no one else. It is true that the doctor was not called to produce the P3 form. The doctor's evidence would have been used to prove the offence of defilement if at all he testified. It is on record that the child was taken to be a truthful witness. As set out in the trial Courts judgment, the trial Magistrate was very cautious before convicting the appellant on the evidence of PW1. He believed in PW1's evidence as trustworthy because it was consistent and was not challenged or shaken by the appellant during cross examination. In effect reliance by the trial Court on the only evidence of PW1 was not fatal to the Prosecution's case. This is the alternative charge of committing an indecent act with a child contrary to Section 11(a) of the Sexual offences.

26. Particulars have been stated hereinabove. My view of the matter is that there was no need to call a doctor to confirm an indecent act in this case touching the anus of PW1 by the appellant. I should add that the failure to visit the scene or adduce medical evidence is not fatal to the Prosecution case. I should also add that the Prosecution has discretion to decide who to call as a witness and who not to call. See the dictum in the case of **Bukenya & others –vs- Uganda [1972] EA 549 at page 550**.

27. On the issue of proof of age of the complainant the trial Court in its judgment considered the same at length. It found that "in this particular case though it is obvious from the appearance and physical stature of PW1, there is no formal proof or otherwise of his exact age thus the Prosecution has failed to meet the threshold for triggering a charge under Section 8(2) of the Sexual Offences Act. The age

assessment is important in defilement cases because penalty in this cases is dependent on the age of the victim.

28. In the instant case the appellant was convicted and sentenced for an indecent act with a child of tender years. The penalty on this charge is not dependent on the age of the child. So long as the person was below 18 years as in the present case he was a child.

29. The Sexual Offences Act defines a “child” as any human being under the age of eighteen years. The trial Court saw that PW1 was a child and therefore took him through a *voire dire* examination before taking his evidence. Thus the trial Court was satisfied that the child in question was below 18 years. This Court has no good reason to depart from that finding.

30. I therefore conclude that it was not necessary to ascertain the exact age of the complainant in this case since the conviction was in respect of the alternative charge of committing an indecent act contrary to Section 11(1) of the Sexual Offences Act. For the above reasons, I find that the appeal lacks merit and dismiss it in its entirety. I confirm both conviction and sentence by the trial Court.

31. accordingly. Right of Appeal within 14 days from today.

Judgment delivered, dated and signed in open Court today at

Kakamega this 2nd day of December 2015.

RUTH N. SITATI

J U D G E

In the presence of:

Present in Court for Appellant

Mr. Omwenga (present) for Respondent

Mr. Okoit - Court Assistant