198/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 110 OF 2012

ISAAC NJUGUNA alias MANGA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from the original conviction and sentence in Kajiado Senior Resident Magistrate Criminal Case No. 1406 of 2011 by Hon M.A. Achieng (MRS) ,SRM on 26/7/2012)

JUDGMENT

1. The appellant was charged with the offence of Defilement of a girl contrary to section 8(1) as read with Section 8(2) of the Sexual Offences Act, 2006. Particulars thereof being that on the 24th day of October, 2011 at ***[particulars withheld]*** Village in Kajiado Central District, within Rift Valley Province, he did cause his penis to penetrate the vagina of **K T** a girl aged 9 years in violation of the Sexual Offences Act NO. 3 of 2006. In the alternative, the appellant was charged with committing indecent act with a child contrary to section 11(1) of the sexual offences Act No. 3 of 2006. Particulars of the offence being that the on the 24th day of October, 2011 at ***[particulars withheld]*** Village in Kajiado Central District, within Rift Valley Province, committed an indecent act with a child namely **K** T a girl aged 9 years by touching her genital organs namely vagina.
2. In count II the appellant was charged with the offence of defilement of a girl contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, 2006. The particulars thereof being that 24th day of October, 2011 at ***[particulars withheld]*** Village in Kajiado Central District, within Rift Valley Province did cause his penis penetrate to the vagina of **E P,** a girl aged 11 years in violation of the Sexual Offences Act of 2006. In the alternative, the appellant was charged with the offence of committing Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars thereof being that on 24th day of October, 2011 at ***[particulars withheld]*** Village in Kajiado Central District, within Rift Valley Province committed an indecent Act with a child namely **E P** by touching her genital organ namely vagina.
3. He was tried, convicted on both principle counts and sentenced to life imprisonment on **count 1** while the sentence in **count 2** was left in abeyance. Being dissatisfied with the conviction and sentence the appellant appeals on the following ground:-

- That medical evidence adduced was not satisfactory as it was adduced by a clinical officer who is not qualified.
- That he was not accorded services of an interpreter; some witnesses testified in Maasai, a language he was not well conversant with.
- His defence was not properly considered.

- The prosecution's case was not proved to the required standard

4. The prosecution's case was that on the **24th October, 2011,** PW1, **K T** (1st complainant) and PW9, **E P** (*2nd complainant*), minors aged 11 years and 9 years respectively having come from school went to a nearby homestead to ask for drinking water. They met the appellant who took them to his house. He told them to undress. They complied. He also removed clothes. He inserted his penis into the vagina of the 1st complainant as the 2nd complainant watched. She screamed because of the excruciating pain. On finishing she sat down. He then made the 2nd complainant remove her underpants. He inserted his penis into her vagina and had carnal knowledge of her. She did not cry. PW1 however screamed louder.
5. PW3, **K O** a neighbour to the appellant (*and village elder*) heard screams emanating from the house of the appellant. She went to the house, pushed the door and opened it only to find the appellant lying on the bed having sex with the child. She retracted her steps and locked the door from outside, then went to call the chief and other people.
6. PW4, **T L,** the Assistant Chief in company of the village elder and PW3 opened the door to the appellant's house. They found the appellant sitting on a wooden chair while the two (2) children were on the bed. He had not tied his belt and he was sweating profusely. PW5, **No. 070014462 Corporal Joseph Ndararonya** who was in company of PW4 arrested the appellant.

7. PW6, **Anne Kinyua** a Clinical Officer at **Namanga Health Centre** examined the complainants. The 1st complainant's genital organs had signs of inflammation, penetration and bruises. The 2nd complainant's hymen was not intact; there were bruises all around the vulva. There was reddening of the vagina which indicated penetration.
8. In his defence the appellant denied having committed the offences. He stated that PW2 went to his house asking for his caretaker. He was not able to tell where the gentleman was. PW2 then demanded to be paid her money. They quarrelled. Later on two (2) children knocked at his door. They asked for water. As he fetched water PW2 went to the door pushed the children inside and locked the door from outside. The event led to his arrest.
9. The appellant filed written submissions. He relied on the same. In response thereto, **Mrs Abuga,** learned Counsel for the State submitted that the case was proved beyond doubt. She urged the court to dismiss the appeal and uphold the conviction and sentence.
10. This is the first appeal. As the first appellate court, I am mandated to look at the evidence adduced before the trial magistrate a fresh, re-valuate and re-assess it and reach my own independent conclusion whether or not to uphold the conviction of the appellant. In making the finding I must bear in mind the fact that I did not have the opportunity of seeing or hearing the witnesses who testified (see ***Okeno versus Republic [1972] E.A. 32).***
11. The complainants herein were examined by a clinical officer. It is submitted that such an officer is not a medical officer hence not capable of giving evidence within the legal meaning of the term. **Section 2** of the **Clinical Officers Act** (**Training, Registration and licencing Act, Cap 260(K)** defines a Clinical Officer as;-

"***A person who, having successfully undergone a prescribed course of training in an approved training institution is a holder of a certificate issued by that institution and is registered under the Act....***

Section 7(A) of the Act states:-

"A person who is registered by the council shall be entitled to render medical or dental services in any medical institution in Kenya approved for the purposes of this section by the Minister by Notice in the Kenya Gazette".

In the case of ***Raphael Kavoi Kiilu versus Republic Criminal Appeal No. 198 of 2008.*** It was held that this is an area of competency of a Clinical Officer and there is no requirement in the Sexual Offence's Act that a P3 form must be produced by a medical officer.

12. In the circumstances it cannot be said as argued by the appellant that the evidence adduced by the clinical officer was unsatisfactory. The officer who filled the P3 form was qualified and his evidence was correctly admitted.
13. It is submitted that the trial was unfair as some witnesses testified in Maasai language and the appellant was not accorded service of an interpreter. Reinforcing the argument the appellant said that he was prejudiced being a Kikuyu. The record shows the appellant was accorded services of an interpreter. The interpreter communicated in English, Kiswahili and Maasai language. PW2 and PW3 adduced evidence in Maasai languages. They were cross-examined by the appellant. Infact the cross-examination was length, thorough and detailed. The appellant followed proceedings by participating, and when placed on his defence he duly defended himself.

In the case of said ***Hassan Nuno versus Republic (2010)*** **eKLR** the Court of Appeal stated thus:-

"We take judicial notice that one of the core duties of a court clerk is to offer interpretation services to accused or even to the court where it does not understand the language of the accused; or witnesses to the case...."

14. In this case when PW1 testified, proceedings were conducted in Kiswahili. But it was indicated the interpreter who was in court was able to communicate in English, Kiswahili and Maasai. PW2 and PW3 testified in Maasai language. The interpreter was the same one and they were duly cross-examined. The accused had no complaint whatsoever. In his defence he alleged there had been a misunderstanding between him and PW3, the village elder. This was evidence that he followed proceedings. That ground of appeal must therefore fail.
15. There is the last issue whether the case was proved beyond reasonable doubt and if the appellant's defence was considered. An evaluation of the evidence and judgment of the trial court shows that the complainant's age was proved and is not in dispute. Medical evidence adduced reveals that there was penetration of genital organs of both complainants. The issue that must be addressed is whether the act of penetration was done by the appellant. In his defence he denied vehemently having committed the offence. He alleged that the children had gone to ask for drinking water only to be pushed inside the house by PW3.
16. It was the evidence of PW1 that the appellant inserted his penis into her vagina while PW9 was watching. She screamed and continued wailing as the appellant had carnal knowledge of PW9. PW3 attention was attracted by her screams. Her evidence was corroborated by that of PW9. The court had this to say about PW9;-

"***I must comment on the demeanour of PW9. She was confident and consistent in their evidence.. Her demeanour struck to be someone who was telling the truth"***

17. The complainants were taken for medical examination and treated within hours of the ordeal. They were found to have been defiled. The appellant did not allege there had been ill will between him and the complainants that would have made them allege he was their assailant.
18. It was the learned trial magistrate's finding that he believed the complainant's and following evidence adduced he was justified in doing so. I therefore find that he considered the evidence adduced by the appellant in his defence and came to a conclusion that the appellant had defiled the complainants. This conclusion was a correct one hence the appeal cannot stand.
19. With regard to sentence. It has been held in the case of ***Sayeka versus Republic [1989] KLR 306*** as follows:-

"... The appellate court will not ordinarily interfere with the discretion exercised by the lower court unless it is evident that the lower court acted upon some wrong principles, or overlooked some material factors or the sentence is manifestly excessive in the circumstances of the case..."

20. **Section 8(2)** of the **Sexual Offences Act, 2006** provides thus:-

"A person who commits an act which causes penetration with a child aged elven years or less shall upon conviction be sentenced to imprisonment for life. The complainants were aged 9 and

11 years respectively. The court therefore acted on proper principles of the law".

21. In the premises, I have absolutely no reasons to interfere with the sentence meted out.
22. In the result I dismiss the appeal and confirm the conviction and sentence imposed.

DATED, SIGNED and **DELIVERED** this **12TH** day of **FEBRUARY, 2014.**

L.N. MUTENDE

JUDGE