REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.256 OF 2011

BETWEEN

LABAN ODHIAMBO PETER ……..……..…….. APPELLANT

AND

REPUBLIC ……..……..…….. RESPONDENT

(Being an appeal from original conviction and sentence of the SRM's Court at Kilgoris in Criminal Case No.412 of 2009 – by Hon. Ochieng B. O., SRM, delivered on 28th October, 2011).

JUDGMENT

Introduction

1. The appellant herein, Laban Odhiambo Peter was arraigned before the SRM's Court at Kilgoris in Criminal Case Number 412 of 2009. He was charged on the main count with defilement of a girl contrary to **Section 8 (1)** as read with **Section 8 (3)** of the **Sexual Offences Act, No.3 of 2006**. The particulars of the offence were that on the 22nd day of June 2009 at 2.00 a.m. at [particulars withheld] Transmara District in Rift Valley Province intentionally and unlawfully caused his penis to penetrate the vagina of T K, who is a child of 13 years.
2. The appellant faced an alternative charge of committing an indecent act with a child contrary to **Section 11** of the **Sexual Offences Act, No.3 of 2006**, it being alleged that on the 22nd day of June 2009 at 2.00 a.m. at [particulars withheld] in Transmara District in the Rift Valley Province he unlawfully and indecently assaulted T K by touching her private parts, namely vagina.
3. The appellant pleaded not guilty and during the trial that ensued, the prosecution called the following witnesses:- N T K as PW1. She is the complainant. PW2 was T K, a brother to the complainant. N K testified as PW3. She is mother to both PW1 and PW2. PW4 was K S, another brother to the complainant. Number 85922 Police Constable (W) Susan Wahugu testified as PW5, while Dr. Robert Mutula of Kilgoris District Hospital testified as PW6.

Facts of the Case

4. The facts of this case are that the complainant herein together with her mother, PW3, PW2 and PW4 were asleep in the house on the material day. The appellant was also asleep in the same house but sharing a room with PW2 and PW4. While PW3 slept on a bed, the complainant slept on the floor just next to the mother's bed. At about 2.00 a.m., the appellant entered the room where the complainant and her mother were sleeping. The appellant defiled the complainant from behind; the complainant raised an alarm which woke up PW3, but as soon as PW3 woke up, the

appellant ran back to his room. The matter was later reported to the police. The appellant was subsequently arrested and charged.

The Prosecution Case

5. The complainant in her testimony testified that when she woke up from her sleep after the appellant had defiled her, she realized that her petticoat, biker and pant had been removed from her body, and the blanket she had covered herself with had also been pulled away from her. That as she woke up, she saw someone leaving the bedroom where she and her mother were sleeping. PW3 followed the person who was the appellant herein. When questioned about what he had done to the complainant, the appellant denied committing the act.
6. In the morning, the incident was reported to complainant's father who had slept in a different house on the night of the incident. The appellant still denied committing the offence when asked about it by the complainant's father. The complainant's father reported the incident to the appellant's father as the complainant went to school. Later in the day the complainant was taken to Kilgoris police station and thereafter to Kilgoris District Hospital for examination and treatment.
7. In her further evidence, the complainant stated that the bedroom where she slept and the one where the appellant and other boys slept was separated by only a door. That the appellant worked for the complainant's family as a servant and that prior to the incident, the appellant had shared a room with the complainant's brothers for three days/nights. The complainant also stated that she could not say how the appellant had accessed the room where she slept because according to her, the door separating the two rooms was always latched.
8. As to how she was able to recognize the appellant on a dark night, the complainant stated that when her mother woke up, she lit a lamp and that she clearly saw the appellant sleeping next to her before he ran away. The complainant also testified that when she saw the appellant, he had no clothes on, neither did she.
9. PW2 testified that on the material night, he and the appellant together with PW4 were asleep in a room that was adjacent to the bedroom occupied by the complainant and her mother. According to PW2, all the boys slept in one place and one bed. At about 2.00 a.m., PW2 heard PW3 saying that someone had been to her room. At that very point, PW2 said he heard someone creeping back into their bed. PW2 corroborated the complainant's testimony that on the material night, his father slept in another house.
10. PW3, the complainant's mother also testified that at about 2.00 a.m. on the material night she was woken up by the complainant's cries. As she woke up, the appellant who was in her room ran back to the boys' room. The appellant ran back to the boys' room through the door in between the rooms. The door was open. PW3 followed the appellant to the boys' room and found the appellant standing. On questioning him about what he had done, the appellant did not answer. That same night PW3 lit the kerosene lamp and examined the complainant who was bleeding from her private parts. The complainant did not have her pant and petticoat on, but only a top. During the day, PW3 reported the incident to her husband. The complainant was also taken to the police station and later to the hospital.
11. During cross-examination, PW3 testified that she could not have gone outside at night to the house where her husband slept to report the incident because there were elephants.
12. PW4 was 11 year old K S . He testified that on the material night at about 2.00 a.m. (though the typed record reads 2.00 p.m.), the appellant who was sharing a bed with him and PW2 got out of bed and went to disturb the complainant. He also said he heard the complainant scream and PW3 talking. PW4 also testified that soon after he heard the complainant scream, he saw the appellant jumping back into the bed and that later after PW3 lit the lantern, he saw blood on the mattress where the complainant had slept.
13. Number 85922 Police Constable (W) Susan Wahugu testified as PW5. She is the one who booked the report made by and on behalf of the complainant concerning the incident that took place at 2.00 a.m. on 22nd June 2009. The report was booked at Kilgoris police station at about 2.00 p.m. on 22nd June 2009. PW5 carried out investigations, took witness statements. She also issued a P3 form to the complainant and accompanied the complainant to hospital. The complainant's age was assessed to be 13 years. PW2 and PW4 were also taken for age assessment.

14. Dr. Robert Mutula, a Senior Medical Officer at Kilgoris District Hospital examined the complainant on the 22nd June 2009. According to Dr. Mutula, the complainant complained of pains in the pubic area. On examination, he found that the complainant's hymen was freshly broken and had tears and her genitalia was blood stained and that though the complainant was having her menses, there had been penetration. Dr. Mutula also testified that a broken hymen takes 5-7 days before it starts to heal. The complainant's age assessment was done by Dr. Philip Masaulo. She was found to be about 13 years of age. The P3 form was produced as **P. Exhibit 1**.
15. At the close of the prosecution's case, the appellant was put on

his defence. He gave an unsworn statement and denied that he committed the offence. The appellant also testified that he had no faith in the doctor who examined the complainant. He also said that it was PW3 who told the complainant to say that the appellant had defiled her.

16. DW2 was P O, father to the appellant. He told the court that on hearing the allegations against the appellant, he interrogated the appellant who told him that he (appellant) never committed the offence. That after being issued with a letter by the head teacher at the complainant's school he accompanied the complainant and her mother, PW3, to the police station and later to the hospital. It was DW2's testimony that the appellant did not commit the offence. He however admitted that he could not say what may have taken place on the material night because he never slept in the house where the alleged incident took place.

Trial Court's Judgment

17. After a careful analysis of all the evidence that was placed before it, the trial court was persuaded that the prosecution had proved its case against the appellant beyond any reasonable doubt as required by **Section 8 (1)** of the **Sexual Offences Act**. The trial court also found that the appellant's story was lacking in merit. The appellant was therefore found guilty as charged on the main count, convicted and sentenced to 20 years imprisonment.

The Appeal

18. Being dissatisfied with the findings of the learned trial court as well as the sentence, the appellant filed appeal. In his homemade Petition of Appeal filed before court on 9th November 2011, the appellant sets out the following 9 grounds of appeal:-

1. ***THAT*** *the learned trial magistrate erred in law and in facts on finding that the prosecution had shown a prima facie case against the appellant.*
2. ***THAT*** *the learned trial magistrate erred in both point of law and facts to convict with the recognition evidence notwithstanding that conditions and circumstances prevailing at the time of the act were not favourable to permit positive identification.*
3. ***THAT*** *there was total failure in appreciating the background of the matter and the likelihood of the fabrication of the evidence of the complainant and her witnesses.*
4. ***THAT*** *the crucial witness in this matter i.e. the clinical officer's evidence could not connect me in the commission of such a fat offence.*
5. ***THAT*** *the learned trial magistrate did not meticulously treat circumstantial evidence with greatest care to secure his decision.*
6. ***THAT*** *the sentence imposed by the learned trial magistrate was excessive in the circumstances.*
7. ***THAT*** *the learned trial magistrate erred in both point of law and fact by convicting and sentencing the appellant without examining and confirming the documents as to the edge of the complainant.*
8. ***THAT*** *I (the appellant) did not run away and offered first information to the authorities on realizing that he was the key suspect is an obvious indication that the honorable magistrate failed to put in consideration, the trial court further left the burden of proof on the part of the appellant by failing to consider that it is the prosecution that should prove its case beyond reasonable doubt and not the appellant to defend himself excessively.*
9. ***THAT*** *the learned trial magistrate erred in both point of law and facts when he failed to exercise*

his judicious authority over the matter before him to prove it at all the alleged incident did or did not take place.

19. The appellant prays that his appeal be allowed so that he may be set free.

Mandate of this Court

20. This appeal is a first appeal. On this appeal, this court is under a duty to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter. In doing so, this court must consider the following:-

"I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion;

II. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence;

III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

See Peters –vs- Sunday Post Limited [1958] EA 434. Also generally see Ngui –vs- Republic [1984] KLR 729; Koech & Another –vs- Republic[2004] KLR 322 and Okeno –vs- Republic [1972] EA 32.

The Submissions

21. At the hearing of this appeal, the appellant put in written submissions in which he urged the court to find that the evidence before the trial court was not cogent, that the evidence by the witnesses was contradictory and finally that the conditions obtaining on the night of the alleged attack were not conducive to positive and error- free recognition of the appellant.
22. The respondent on the other hand, through Mr. T. Imbali submitted that the appeal had no merit; that the evidence by the complainant, PW2, PW3 and PW4 all points to the fact that the appellant left his bed, sneaked into the complainant's room where complainant was sleeping with PW3 and defiled her. Counsel submitted that the evidence by the above stated witnesses showed a clear nexus between the appellant and the defilement that was visited upon the complainant.
23. Mr. Imbali further submitted that the medical evidence by PW6 clearly confirmed that the complainant had been defiled since her hymen was freshly broken. Counsel also submitted that since the appellant worked as a servant in the complainant's home where everyone knew him, and lived and slept in the same compound, the question of mistaken identity did not arise, more so when the appellant was caught in the act.
24. Finally Mr. Imbali submitted that since the sentence imposed by the trial court was the minim provided under the law, it cannot be said that the same was excessive. Counsel urged the court to dismiss the appeal in its entirety.

Findings and Conclusions

25. I have now carefully reconsidered and evaluated the evidence on record. I have also carefully considered and weighed the evidence of the learned trial magistrate. I have also considered the law and the fact that I do not have the benefit of seeing and hearing the witnesses who gave evidence during the trial. With all the above in mind, the issue that arises for determination on this appeal is whether the prosecution indeed proved its case against the appellant beyond any reasonable doubt. In other words this court must satisfy itself that the findings by the learned trial

magistrate are well founded.

26. There is no doubt in this case that from the evidence on record, the alleged offence took place in the dead of night at about 2.00 a.m. The question of identification/recognition therefore arises. In this case all parties were in agreement that the appellant was like family, since he shared the same abode with the complainant's family. This therefore means that the issue that this court has to determine is whether the appellant was positively identified as the person who defiled the complainant.
27. The court has also to determine whether the ingredients of the offence of defilement as set out under **Section 8 (1)** of the **Sexual Offences Act, No.3 of 2006** were proved by the prosecution. **Section 8 (1)** provides as follows:-

"8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

Section 8 (3) of the **Act** which is the punishment section provides as follows:-

"8(3) A person who commits an offence with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

28. The **Children's Act, No.8 of 2001** under **Section 2** thereof defines child as any human being under the age of eighteen years.

29. In this case therefore, and for the conviction of the appellant to stand, the prosecution must have proved:-

a. *that the appellant was positively recognized as the perpetrator of the alleged offence;*
b. *that the appellant's act with the complainant caused penetration; and*
c. *that the complainant was a child aged between twelve and fifteen years so as to support the sentence imposed by the learned trial court.*

30. The general principle on identification in criminal cases is now clear. In the case of **Simiyu & another –vs- Republic [2005] 1 KLR 192**, the Court of Appeal held, *inter alia*, that **"in every case in which a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence always ought to be given first of all by person or persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given"**, and that where the complainant does not mention the name of the attacker(s) to the police, then it means that the complainant is not sure of the person who attacked them.
31. In the case of **Sasi –vs- Republic [2009] KLR 353**, in which the appellant was charged, tried and convicted of the offence of robbery with violence contrary to **Section 296 (2)** of the **Penal Code**, the Court of Appeal, held on second appeal that since identification was by recognition by a complainant who had known the appellant for 20 years, the court could not disturb such a finding.
32. In the instant case, I am satisfied that the appellant was recognized by the complainant, PW3 and PW4. The complainant clearly stated that while she slept on the floor next to her mother's bed, the appellant entered the room, stealthily removed her petticoat, biker and under pant and defiled her. She only realized what was happening to her when she felt pain. She cried and her mother, PW3 woke up. They both saw someone leaving the room and on lighting the lamp, it was clear to them that it was the appellant who had done the deed to the complainant.
33. PW3 found the appellant out of bed just in the next room. PW4 stated that he heard the appellant leave the bed which they shared and soon after she heard the complainant and PW3 speak, he also saw the appellant jumping back into the bed. The appellant was questioned about what he had done, but he said nothing. I therefore do not find the testimonies by the appellant and his father to be such evidence as would displace the prosecution's case against the appellant.
34. On the issue of penetration, Dr. Mutula told the court that upon examination of the complainant, he found that her hymen was freshly torn, and had not started healing. Dr. Mutula said that though

the complainant was having her menses the fact of penetration was clear on examination and he concluded that the complainant had been defiled. The doctor also said that the complainant's genitalia was blood stained though he attributed this to the menses.

35. Dr. Philip Masaulo examined the complainant as to her age and by the report dated 25th June 2009, the complainant was said to be approximately 13 years of age. Under **Section 8(3)** of the **Sexual Offences Act**, the offence of defilement punishable by 20 years imprisonment is one committed against a child aged between twelve and fifteen years. I am satisfied as indeed was the trial court, that the complainant was aged 13 years old as at the time of the alleged offence.
36. Should this court interfere with the sentence of 20 years imprisonment imposed upon the appellant by the trial court? I do not think so. An appellate court may only interfere with the sentence passed by a trial court if such sentence is illegal and/or irregular or if the sentence is manifestly excessive in the circumstances.
37. In the instant case, **Section 8 (3)** provides for a minimum sentence for a conviction under **Section 8 (1)** of the **Sexual Offences Act**. In the circumstances, the said sentence was neither harsh nor excessive.
38. Accordingly, and for the reasons above given, I find this appeal to be lacking in merit on both conviction and sentence. The appeal is hereby dismissed in its entirety. R/A of 14 days explained.
39. Orders accordingly.

Dated and delivered at Kisii this 13th day of February, 2014

R.N. SITATI

JUDGE.

In the presence of:

Present in person for Appellant

Miss Cheruiyot for Respondent

Mr. Bibu - Court Clerk