REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 9 OF 2014

(LESIIT, J)

(Being An Appeal From The Judgment And

Sentenceby Cm's Court At Isiolo By Hon. Joan Irura Ag Pm In Criminal

Case No. 823 Of 2012)

DOMINIC SIBI PETER……………………….APPELANT

VERSUS

REPUBLIC..RESPONDENT

JUDGEMENT

1. The Appellant was arraigned before the Chief Magistrates Court at Isiolo with two counts of offences.
2. In count 1 the Appellant faced the charge of Defilement contrary to section 8(1) (3) of the Sexual Offences Act hereinafter SOA. The particulars of the offence were:

> "**That on diverse dates between 25th and 28th December 2012 at [particulars withheld]in Isiolo County of the Eastern Province, intentionally and unlawfully caused his penis to penetrate the vagina of S A a child of 15 years old.**"

3. The Appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the SOA. The particulars of the offence were:

> "**On divers dated between 25th and 28th of December 2012 at [particulars withheld] in Isiolo County of the Eastern Province intentionally touched the vagina of S A a child of 15 years old with his penis.**"

4. The Appellant was tried and convicted of the alternative count of committing an indecent act with a child and was sentenced to 10 years imprisonment.
5. The Appellant was aggrieved by the conviction and sentence in this case and therefore filed this appeal. He cited 8 grounds of appeal namely:

1. **The learned Senior Principal Magistrate erred in law in convicting and sentencing the**

Appellant on scanty and insufficient evidence.

2. **The learned Ag. Senior Principal Magistrate erred in law and fact in convicting and sentencing the appellant when medical evidence did not support the charge.**

3. **The learned Ag. Senior Principal Magistrate erred in law in convicting the appellant on uncorroborated evidence.**
4. **The learned Ag. Senior Principal Magistrate relied merely on suspicious as there was no evidence tendered to support count 2 of the charge.**

5. **The learned Ag. Senior Principal Magistrate failed to consider the evidence of the appellant and hence arrived at a wrong conclusion.**

6. **The learned Ag. Senior Principal Magistrate erred in law in shifting the burden of proof to the appellant.**

7. **The sentence meted on the appellant is manifestly excessive.**

8. **The learned Ag. Senior Principal Magistrate failed to appreciate that the collapse of count 1 would seriously affect the proof in count No. 2.**

6. The facts of the prosecution case were that the complainant, a girl of 15 years in standard 7 went to visit her friend, one S K on the material day. That was on 25th December 2012. She was taken to accused home where K, the complainant, the Appellant and one A spent the night. The complainant remained there until 28th December 2012. During that time, the prosecution case was that the Appellant had sex with her at least three times.
7. The Appellant denied the offence. He however, admitted hosting the complainant, her friend and one A in his house, but said he kept travelling to and from Wamba between 26th December 2012 and 28th December 2012. He concluded by saying that A influenced him to do so but did not say to do what.
8. I have carefully considered the evidence adduced before the trial court and have subjected the evidence to a fresh analysis and evaluation, while bearing in mind that I neither saw nor heard the witnesses. I have drawn my own conclusions having given due allowances as necessary.
9. I am guided by court of appeal case of **Okeno Vrs. Republic** **1972 EA 32** is where the court gave the duties of a first appellate court as follows.

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vrs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters Vrs Sunday Post [1958] E.A 424."**

10. Mr. A Anampiu urged that the prosecution did not adduce any evidence in support of count 2 for which the Appellant was convicted. Counsel urged that PW1 who was the complainant in the case did not adduce any evidence in support of count 2 and further that there was no independent evidence to corroborate the complainant's evidence. Mr. Anampiu raised issue with the fact that the complainant had to refresh her evidence to recall events of the case.
11. Mr. Moses Mungai learned counsel for the Respondent did not oppose the appeal. In regard to complainant's evidence Mr. Mungai submitted that since the complainant's evidence was not corroborated, and since corroboration was required for the offence charged of indecent act, the

state was not opposing the Appeal.

12. Mr. Anampiu for the Appellant urged that the Complainant's Age was not specifically proved and that contrary to learned trial magistrate's finding, no birth certificate for the complainant was adduced in evidence.
13. Regarding the house where the complainant was found in Isiolo Town, Mr. Anampiu urged that there was no evidence to prove that it was Appellant's house. Counsel urged court to consider the severity of the charge and find same was not proved. Mr. Anampiu submitted that the learned trial magistrate assumed without any evidence, that the Appellant had touched the complainant's private parts.
14. I will deal with all the issues raised by the Appellant.
15. The learned trial magistrate in assessing the credibility of the complainant and who had the advantage of seeing and hearing her testify found:

> **"In light of the above evidence there is no doubt in my mind that the accused and complainant were together from the 25.12.2012 upto the 28.12.2012 when the complainant was arrested from the accused person's house. Both the complainant and the accused person confirmed this line of evidence. The complainant in her evidence stated that she had sexual intercourse about 3 times when she was at the accused person's house. According to the medical evidence nothing shows that the complainant was defiled. There are no remarks showing that she had been sexually active around that time. For a charge of defilement to standard (sic) medical evidence is very crucial. The P3 form adduced in court as exhibit does not support the allegations of defilement as such the charge under count 1 cannot stand. In the circumstances the accused person is acquitted in respect of count 1"**

16. The learned trial magistrate found that the complainant was telling the truth and found that there was no doubt in her mind that the Appellant and Complainant were together between 25th December 2012 and 28th December 2012. The learned trial magistrate also found that the defence admitted those facts. Having had the opportunity to see and hear the witnesses the learned trial magistrate was in a better position to assess the demeanour and credibility of the witness. I respectively agree with the learned trial magistrate finding of fact on that point.
17. The learned trial magistrate next findings were a mixture of fact and law. Her conclusions were that since medical evidence and the P3 report adduced in the case did not show that the complainant was defiled; and due to lack of evidence from the medical witness that the complainant was sexually active around the time the incident occurred then the charge of defilement had not been proved. The learned trial magistrate found that for a charge of defilement to be proved to the required standard, medical evidence was crucial and the same was missing.
18. I noted that the learned counsel for the Appellant and the learned Prosecution Counsel both held the view that there was need for corroboration of the complainant's evidence and further that the medical evidence and medical documents adduced must corroborate the evidence of defilement.
19. The position held by the learned trial magistrate and both counsels in this appeal was the legal position on evidence of children of tender Age before the amendments to the Evidence Act, Section 124 thereof by the Criminal Law (amendment) Act 2003 in Legal Notice No. 5 of 2003. Prior to the amendment) S.124 of the Evidence Act required corroboration of evidence of Children of tender Age.
20. The amendment to section 124 stipulates as follows.

> **"124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings Against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.**
>
> **Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the**

alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

21. Even though the complainant was not a child of tender Age, there was no need for corroboration of the complainant's evidence in law once the learned trial magistrate found that she was a truthful witness. I am satisfied the learned trial magistrates finding that the complainant was a truthful witness and that the court had no doubt in its mind that the complainant and the Appellant were together between 25th and 28th December 2012 was made on sound basis.
22. The requirement that her evidence that she had sexual intercourse with the Appellant needed medical corroboration was reached as a result of a misapprehension of the law.
23. PW4, the Clinical Officer who examined the complainant, completed the P3 form and produced it in court as Exhibit 1 testified that the complainant informed her that she had been sexually assaulted. PW4 then said that upon examination he found that the complainant's hymen was broken. That evidence that the complainant informed PW4 that she was sexually assaulted and the finding that the complainant's hymen was broken both gives support to the complainant's evidence that she had sex with the Appellant. It goes to show consistency in the complainant's evidence that she had had sexual intercourse with the complainant.
24. Considering the tenor of the learned trial magistrate's basis for the conclusion that there was no corroboration to complainant evidence it is clear that the learned trial magistrate was looking for certain kind of evidence to corroborate defilement. Learned trial magistrate found lack of corroboration on basis the P3 form did not show that the complainant was defiled; further there were no remarks showing the complainant was sexually active around the material time.
25. The question whether the complainant was defiled or not is a matter of fact first and foremost. The complainant had given her evidence adducing facts from which the court could make a finding. The learned trial magistrate looked beyond the complainant's evidence to medical report, and medical evidence in order to seek for corroborating learned trial magistrate forgot to observe the complainant was not a child of a tender Age and so the injuries one would expect a child of say 10 years to suffer as a result of penetration by an adult man would be absent in her case. With respect the learned trial magistrate misdirected herself by looking for medical proof of defilement and therefore came to the wrong conclusion.
26. Once the learned trial magistrate found the complainant was telling the truth that she had been with the Appellant, then on the same basis, in absence of facts to negate such conclusion, the complainant's evidence that she had had sex with the Appellant should also have been accepted.
27. On the issue of the prosecution request to have complainant stepped down to refresh her evidence Section 167 of the Evidence Act provides.

"167. (1) A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or made so soon afterwards that the court considers it likely that the transaction was at that time fresh in his memory.

2) A witness may, while under examination, refresh his memory by referring to any writing made by any other person and read by the witness within the time mentioned in sub-section (1), if when he read it he knew it to be correct.

(3) Whenever a witness may refresh his memory by reference to any writing, he may, with the permission of the court, refer to a copy of such writing, if the court is satisfied that there is sufficient reason for the non-production of the original.

(4) An expert may refresh his memory by reference to professional treatises."

28. The law permits for refreshing of memory of a witness by reference to their written statements and contemporaneous writing. From the record, the examination in chief of the complainant had not reached the relevant events, which were the subject matter of the case, when the application to refresh her memory was made. The learned trial magistrate exercised her duties and

responsibilities as a trial court correctly when she allowed the prosecution to refresh the complainant's memory.

29. I have come to the conclusion that the learned trial magistrate came to the correct finding that the complainant was telling the truth but misapprehended the facts and the law when she found that there was need for corroboration of the complainant's evidence.
30. Having analyzed and evaluated the entire evidence afresh I find that there was sufficient and cogent evidence to sustain conviction for the main count of defilement. This court could have substituted the conviction from the offence of committing an indecent act with a child contrary to section 11(1) of the SOA to that of Defilement contrary to section 8 of the SOA. That is however technically impossible because the learned trial magistrate acquitted the Appellant of the main count under section 8 of SOA and convicted in the alternative charge under section 11(1) of SOA.
31. What the learned trial magistrate should have done was to enter no finding on the main count of defilement and convict in the alternative count of indecent act. The reverse would also be correct. Where appropriate, if court came to conclusion it was the main count which was proved and not the alternative charge, then for offence not proved "no finding" should be the final order made in its respect.
32. The final question I will consider is that of the complainant's Age. The only evidence we have in this regard is from the complainant's mother PW2. She said that her daughter was 15 years old and was in Primary School in standard 7. PW4, the Clinical Offcier who examined the complainant testified that he estimated the complainants Age to be 15 years old. I agree with the appellant's counsel that the complainant's birth certificate was not an exhibit in the case.
33. Question is whether the conviction on alternative charge can stand in light of evidence before court and complainant's alleged Age?
34. For the charge under section 11 of the SOA all the prosecution needed to prove was that the complainant was below 18 years of Age. The learned trial magistrate was satisfied the complainant was a child. She even carried out voire dire examination due to that conviction. That ingredient of the charge was therefore proved. The learned trial magistrate also found that the Appellant did not plead defence that complainant deceived him that she was above 18 years nor that he reasonably believed she was above 18 years. The learned trial magistrate findings cannot be faulted.
35. The other ingredient is to prove that there was an indecent act committed by the Appellant. Under the interpretation section of SOA "indecent act" is defined as

a. "**Any contact between any part of the body of a person with the genital organs breasts or buttocks of another, but does not include an act that causes penetration."**

36. The complainant's evidence was that she shared a bed with the Appellant between 25th and 27th December, 2012. She described that they had sexual intercourse. Just before the sexual act, the appellant's genital organ must have touched the complainant's genital organ. The offence under section 11 of SOA was therefore supported by evidence and therefore proved.
37. The Appellant was sentenced to 10 years imprisonment. That is the remaining sentence for the offence and cannot be disturbed except by enhancing it which I do not propose to do.
38. I have come to the conclusion that the Appellant's appeal has not merit, for the reasons I have explained in this judgment I will not disturb the conviction of the sentence. Consequently the Appellants Appeal is dismissed.

DATED AT MERU THIS 15TH DAY OF MAY 2014

LESIIT J.

JUDGE.