REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 78 OF 2013

DOMINIC LESUYAI SEKUNA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Honourable B.S. Khapoya [Ag S.R.M] on the 25th day of April 2013 in the Principal Magistrate's Court at Maralal in Criminal Case No. 130 of 2013)

JUDGMENT

The Appellant was charged with one count of **defilement** contrary to S**ection 8(1)(3)** of the **Sexual Offences Act**, 2006 and two counts of **attempted defilement** contrary to Section 9(2) of the Sexual Offences Act, 2006. In all the three counts the Appellant was also charged with alternative counts of committing an Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act.

It was alleged that on 29/12/2012, the Appellant inserted his penis into **V.L**. a child aged 12 years and at the same time and place he attempted to defile or commit indecent acts on **E.N** and M.L. who were 14 and 13 years old respectively.

The prosecution led evidence that on 29th December 2012, **PW1, PW2, PW3** and one James were in the bushes collecting firewood. The Appellant approached them from behind and asked for their names but they did not answer. Acting on a false accusation that the children had insulted him, he attacked them with axes and a green walking stick. He tied them to different trees using the ropes that were in their possession and proceeded to sexually assault them in turns. **PW1** testified that he undressed her before tying her legs apart. He used her sweater to cover her eyes and mouth. The Appellant then lay on her and touched her private part using his penis for about 5 minutes, which caused her a lot of pain.

After he was done, he moved on to **PW2** whose legs the Appellant had tied to different trees. He removed her trouser and biker and then raped her for about 5 minutes. **PW2** felt a lot of pain and bled a lot from her vagina. Thereafter, the Appellant moved onto Masoni **PW3**. The Appellant beat **PW3**, removed her skirt and underpants and then touched her private parts with his penis. She explained during cross-examination that the Appellant pushed his penis into her vagina which caused her pain and resulted in bleeding.

When he finished, the Appellant untied the children and left. **PW1** also testified that he threatened to kill them if they told anyone of what he had done. After dressing up, the children ran home and told their

mothers: **PW4**, who **PW5** and **PW6. PW4** who works as a nurse at Maralal District hospital testified that when she examined the children she observed signs that they had been defiled. **PW5** noted that **PW1** was bleeding. The three took their children to hospital and later reported the matter at Maralal Police Station.

The Complainants were examined by **PW7.** He observed that **PW1**'s hymen was broken and there were blood stains on her vagina orifice and her pants. He estimated that the injuries had been inflicted about five hours earlier. He categorised the degree of harm as grievous probably caused by a traumatizing blunt object. **PW7** did not find any signs that **PW2** and **PW3** had been sexually assaulted. Their hymen was intact. Nonetheless he prescribed antibiotics for them. He filled their P3 Form which he produced as exhibits **Pexh.1,2** and **3. PW5** stated that the children were able to describe the Appellant to her and pointed out to him the following day. He was seated on a stone with a green walking stick wearing a red shirt and black trousers. However he escaped on seeing some moran headed his way but he was finally arrested on 15th February 2013 while playing football at Kenyatta Stadium.

The matter was investigated by **PW8** who was at the time stationed at Maralal Police Station. She offered a summary of the witness' evidence as per the statements made to her. She produced **PW1**'s birth certificate and **PW2**'s and **PW3's** treatment cards to prove their respective dates of birth.

After the close of the prosecution case, the trial court found that the evidence had established a ***prima facie*** case against the Appellant and put him on his defence.

He told the court that on 29th December 2012, when it is alleged that he sexually assaulted **PW1, PW2** and **PW3,** he was working in his butchery situated at Chang'aa Estate. He closed shop at 8.00pm and went home without any incident. He denied having committed the offence with which he had been charged.

Before sentencing the court asked for an witness impact assessment report which she considered together with the Appellant's mitigation and sentenced him to 20 years imprisonment on the first court and to 10 years on the second and third alternative counts. The sentences were to run consecutively.

The Appellant has appealed to this court against the conviction and sentence of the trial court and listed four grounds in his Amended Petition of Appeal; that the charge sheet was defective; that he was convicted on evidence that was unsatisfactory, contradictory and unreliable witnesses; that he was not subjected to a medical examination; and that the trial court erred in directing that the sentences against him run consecutively.

The Prosecution Counsel contended that the prosecution's case was watertight. She submitted that the sentence was legal and lenient in the circumstances. That the trial court acted in accordance with the law in directing that the three counts run consecutively as the victims and offences were separate and distinct although the offences were committed at the same place and time.

ISSUES FOR DETERMINATION:

i) Defective charge sheet on Count 1.

ii) Whether prosecution witnesses' evidence was contradictory and unsatisfactory.

iii) Sentences – whether they should run consecutively

ANALYSIS:

This court being the first appellate court it is incumbent upon the court to re-assess and re-evaluate the evidence on record afresh and to arrive at its own independent conclusion and must be alive to the fact that the court did not have the opportunity to observe and or hear the witnesses. Refer to the case of **Okeno** V. **Republic** (1972) EA 32.

On the first ground of appeal, the Appellant argued that the first charge was defective for the reason that it was a non-existent provision of the law thereby rendering the charge sheet fatally defective. Upon perusal of the Charge Sheet it is noted that the first count the Appellant was charged with is for the offence of defilement contrary to **Section 8(1) (3)** of the **Sexual Offences Act.**

Section 8(1) of the **Sexual Offences Act** provides for the offence of defilement, while **Section 8(3)** thereof is the punitive section that prescribes the sentence upon conviction for defilement of a child aged between 13-15 years. On the charge sheet it is cited as one provision, whereas it should contain the wordings **"as read with Section 8(3)"**.

The charge sheet was in drawn in accordance with **Section 134** of the **Criminal Procedure Code** which provides for the ingredients of a charge sheet as follows:

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

In compliance with the above provision, the particulars of the offence, clearly disclosed to the Appellant that he was being accused of intentionally and unlawfully inserting his male genital organ (penis) into the female genital organ (vagina) of V.L. a child of 12 years.

In addition the court record shows that the Appellant understood the nature of the charges against him, he was able to cross-examine the witnesses and lead his defence. In the circumstances there was no prejudice or injustice occasioned upon him by the error. Therefore his allegation that he was charged for a crime not known in law has no basis.

I find that this error is curable under the provisions of Section 382 of the Criminal Procedure Code as the error is found not to have caused any prejudice to the Appellant or caused him any injustice and this ground of appeal is disallowed.

The second issue for determination is whether the evidence tendered by the prosecution witnesses was contradictory and unsatisfactory.

From the court record, the trial magistrate conducted a ***voire dire*** test on the three minors and formed an opinion that the minors understood the meaning of an oath and proceeded to allow them to give testimony under oath.

On identification, all the three minors were able to positively identify the Appellant by way of recognition as he was a person known to them and the incident occurred during the day therefore the conditions for identification were favourable. **PW1**and **PW2** both gave a description of the clothes he had worn that is a red sweater and black jeans; they also described his physique in that he was short and light skinned; he was later spotted by **PW4** with the same clothes and same green cane that he had on the day of the incident. The three complainants were able to give an indepth narrative of what the Appellant did to them.

The evidence of **P.W.7** who examined the children corroborated the evidence of **P.W.2 EMMA** that she had been defiled as her hymen was torn, whereas the other two minors' hymens were found to be intact.

This court is satisfied that the *voire dire* test was properly conducted on the minors and that the evidence adduced by the prosecution witnesses on identification of the Appellant by the complainants was not contradictory and that it was corroborated. The evidence on penetration and defilement of **PW2** was also corroborated by **PW 7**. The age of the complainant was also proved by the prosecution.

The prosecution is found to have proved its case beyond reasonable doubt on Count 1 and the trial magistrate is found to have rightfully convicted the Appellant on Count 1. On the two alternative charges

of Indecent Act with a child the evidence of the Complainants is uncorroborated therefore it would have been prudent upon the trial magistrate to have invoked the proviso to **Section 124** of the **Evidence Act Cap.80 Laws of Kenya** and also to have cautioned himself that he found the prosecution witnesses to be truthful before proceeding to convict the appellant on the alternate counts.

The ground of appeal that the evidence that the Appellant was convicted on evidence that was unsatisfactory, contradictory and unreliable witnesses is hereby found to be partially successful and is partially allowed on the alternate counts.

On the ground of appeal on sentence, this court makes reference to the renowned case of **Wanjema** V. **Republic,** [1972] EA 493 which sets down the principles upon which an appellate court can interfere with the sentence of the trial court. It was held that:

- **"..... an appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial fact, acted on a wrong principle or the sentence is manifestly excessive in the circumstance of the issue....."**
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The appellant submitted that the sentences passed were harsh and excessive as the ought to have run concurrently and not consecutively as ordered by the trial court.

As stated earlier this court is of the view that the trial court overlooked a material factor before convicting the Appellant on count therefore the appeal being partially successful on the alternate counts the conviction thereof is quashed and the sentence set aside.

CONCLUSION AND DETERMINATION:

The appeal is partially successful only on the conviction and sentence on the alternate counts. The conviction on the alternate counts are hereby quashed and the sentences set aside. The conviction and sentence on Count 1 is hereby upheld. The net effect is that the Appellant shall serve twenty (20) years and not the forty years imprisonment. The sentence to run from the date the trial court passed sentence.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 10th day of October, 2014.

A. MSHILA

JUDGE