REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 170 of 2011

DOMINIC KILONZO WAMBUA ……..……APPELLANT

V

REPUBLIC …….RESPONDENT

(Being an appeal from the original conviction and sentence in Makueni Senior Resident Magistrate's Court Criminal Case No. 484/2010 by Hon. J. Karanja on 19/9/2011)

JUDGMENT

Dominic Kilonzo Wambua hereinafter "*the appellant*" was charged with the offence of defilement of a girl under the age of eleven (11) years contrary to section 8(2) of the Sexual Offences Act.

Particulars of the offence were that on the 1st day of October, 2010 at (Name withheld) Village (Name withheld) Location, Kathonzweni District within Eastern Province intentionally and unlawfully caused penetration of his genital organs into that of **C.M.M.** a girl aged eleven (11) years.

In the alternative he is charged with indecent assault of a female contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. Particulars thereof being that on the material day the appellant unlawfully and indecently assaulted her by touching her private parts. The appellant denied the charges. He was tried, convicted and sentenced to life imprisonment.

Being aggrieved by the conviction and sentence thereof he has appealed to this court.

In his grounds of appeal the appellant stated that the trial magistrate erred by convicting him when-

§ There was no sufficient evidence to establish ingredients of the charge;

§ convicting him when the age of the minor was not proved;

§ Relying on evidence of identification without an identification parade being conducted and convicting him under section 215 of the Criminal Procedure Code.

This is a first appeal. It is my duty to consider afresh the evidence that was adduced before the trial court, evaluate it and reach my own conclusion. **See Okeno vs Republic [1972] E.A. 32.** I must however bear in mind the fact that contrary to the trial court I did not have an opportunity of seeing and hearing witnesses who testified. It behoves on me to give such an allowance.

To prove the case the prosecution called six (6) witnesses.

PW1, **C.M.M** the complainant was 12 years old at the time of testifying. She had gone to the river in company of their neighbour **M.M.** On their way back they encountered the appellant who chased them demanding from them his phone. **M.M** ran off but he caught up with her. He removed her under clothes and had carnal knowledge of her. He then ran into the forest. She composed herself and stood up. As she walked home she encountered her mother and siblings. Her underpants that had been thrown by the appellant were picked by her sister. She was taken to hospital. They reported the matter to the police.

PW2, **M.M 2** an eleven (11) year old boy knew the appellant as a herdsman who was employed by their village-mate **N.** He said that when they met the appellant he accused them of having taken his phone. The appellant caught PW1 as he ran to notify her parents. As they went to the scene of the incident he saw the appellant whom he knew as **M** running away through the bushes.

PW3, **B.W**, the complainant's mother was at home having sent her and **M.M** to take cows to the river. A few minutes later **M.M** returned home running and notified her that the complainant had been caught by a strong man. They ran to the scene of the incident to find the complainant crying. They took her to hospital for examination. She learnt of the accused's arrest. In court she identified the accused as a person who used to work for their neighbour, **N.**

PW4, **C.M.N** an Assistant Chief received the report and information of the whereabouts of the appellant. He mobilised people who arrested him.

PW5, **No. 51100 PC J.M** received the report from the complainant and her mother. He issued her with a P3 form. Thereafter he re-arrested the appellant and recorded statements from witnesses.

PW6, **Catherine Nzomo** a clinical officer at Machakos Provincial General Hospital examined the complainant. She found her genetalia normal but she had bruises on the labia minora. The hymen was not intact. She had a foul smelling discharge.

In his defence, the appellant stated that he went to work as usual on the material date. He returned from work at 6.00pm. While at home at 9.00pm, people woke him up. He was arrested and taken to the Police Post. Thereafter he was charged with a case he knew nothing about.

It was the submission of **Mr. Swaka** counsel for the appellant that the charge the accused faced was defective as he was charged contrary to section 8(1) of the Sexual Offences Act instead of Section 8(1) as read with Section 8(2) of the Act. He argued that the appellant was convicted under section 215 of the Criminal Procedure Code instead of the correct section. Ingredients of the charge according to him were not proved. The age of the child was not ascertained which was prejudicial to the appellant. Failure to subject the appellant to an identification parade was also prejudicial to the appellant.

Mr. Mukofu for the State conceded to the appeal on the grounds that the charge was singularly under section 8(2) instead of section 8(1) of the Act.

Regarding the alternative charge it was his sentiment that the evidence adduced sought to prove that there was penetration which was not caused under the offence of indecent act. Though he conceded to the appeal, he applied for a retrial. He argued that the evidence against the appellant was overwhelming and he had been sentenced to serve life imprisonment.

Further, he stated that witnesses in the case were readily available and justice would only be served if a retrial was ordered.

Counsel for the appellant in response thereto argued that a retrial would be unjust as the original trial was defective and illegal.

I have perused the charge sheet presented in the lower court. The appellant was charged with defilement contrary to section 8(2) of the Sexual Offences Act.

Section 8(2) of the Sexual Offences Act stipulates as follows;-

"***A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to impressment for life".***

This is section that prescribes the penalty to be imposed. It was a requirement for the appellant to be charged contrary to section 8(1) of the Sexual Offences Act which provided as follows :-

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

That section describes the offence committed. The charge should have been contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. I do agree with the appellant and the State Counsel that the charge in the circumstances was defective.

Having evaluated the evidence adduced it is apparent that no evidence was adduced to support particulars of the offences stated in the alternative charge.

The issue this court will now address is whether a retrial should be ordered as sought by the learned State Counsel,

Factors to be considered when a court has to order a retrial were stated in the case of **Fatehali Manyi vs Republic [1966] E.A. 343** where it was held as follows:-

1. A retrial will be ordered if the original trial was illegal or defective.

2. Each case must depend on it's own peculiar facts and circumstances.

3. An order of retrial should only be made where the interest of justice require it.

4. It will not be ordered if by so doing an injustice or prejudice will be occasioned to the accused.

5. An order for retrial will not be made for purposes of enabling the prosecution to fill up gaps in its evidence at the first trial

The Court of Appeal also considered the issue in the case of **Bernard Holima Ekimat vs Republic C.A. Criminal Appeal No. 151 of 2004** where it was held that a retrial, *interalia* should not be ordered to enable the prosecution fill gaps in the evidence or aid the prosecution to rectify mistakes in the charge. Further, a retrial would not be ordered if the potentially admissible evidence to be adduced during

the retrial would not sustain a conviction.

Finally a retrial can only be ordered if the interest of justice requires it.

This is a case where the child was examined by a clinical officer, PW6 who found her labia minora (main vagina) lips bruised and her hymen was broken. There was evidence of some penetration into her genitalia.

The issue to be determined is whether the identification of the accused was watertight. The complainant herein said he did not know the appellant before but people told her he was called **D.K.**

PW2 on the other hand who was then aged 10 years said he knew the person who chased them as **M.**

PW3 said when PW2 ran home to report the incident he told her that PW1 had been caught by someone. To quote her, she said in her testimony:-

"***He told me that M.M has been caught by someone. I asked what kind of person and he said it was a big man…"***

At page 13 of the proceedings he continued her testimony by stating as follows;-

"***We followed up to another home and asked if the man had passed there. They said he had passed. We were told the man was called M but we found he was called D.W …"***

The witness did not divulge her source of information of the identity of the appellant. This evidence was hearsay which was inadmissible and should not have been accepted.

If indeed PW2 knew the appellant as he stated he could have told PW3 right at the outset that it was **M** they had encountered. The question of the accused's identify is questionable in the circumstances. The identification was questionable.

Guided by principles enunciated in the two (2) cases cited, it is obvious that the charge the appellant faced was defective. Ordering a retrial herein would be giving the prosecution a chance of coming up with substitution of the charge which will be tantamount to filling up the gaps they had left. This will be

prejudicial to the accused. The upshot of the above is that the conviction herein cannot be safely supported.

The said conviction of the appellant is therefore quashed, sentence set aside, and the appellant is ordered to be set at liberty forthwith unless held for any other lawful cause.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **9TH** day of **MAY, 2013.**

L.N. MUTENDE

JUDGE