REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 52 OF 2010

PAUL NYAGA NGATA …….....APPELLANT

VERSUS

REPUBLIC .....PROSECUTOR

From original conviction and sentence in Criminal Case No. 24 of 2007 at the Principal Magistrate's Court at Siakago by Hon. S.M. MOKUA - PM on 12/9/2008

J U D G M E N T

PAUL NYAGA NGATA the Appellant was charged with the offence of Defilement contrary to section 8(1) (2) of the Sexual Offences Act No.3 of 2006.

The particulars as stated in the charge sheet were as follows;

> **PAUL NYAGA NGATA: On the 18th day of December 2006 at 21.00 hours in Mbeere District of the Eastern Province, defiled AWN a child aged 10 years.**

The Appellant denied the charge and the matter proceeded to full hearing and he was convicted and sentenced to serve 15 years imprisonment. He was aggrieved by the Judgment and filed this appeal citing the following grounds;

1. ***That the trial Magistrate erred in both law and fact by failing to record the full Coram of the Court on various dates between 6/2/2007 to 6/8/2007 thereby creating doubts as to whether section 85(1) Criminal Procedure Code was fully complied with.***
2. ***That the learned trial Magistrate erred in both law and facts by failing to consider that the Prosecution's evidence was highly inconsistent and contradictory hence unsafe to rely on to secure a conviction.***
3. ***That the learned trial Magistrate erred in law and fact by failing to consider that the Prosecution's evidence was at variance with the charge sheet and therefore the charge was defective as provided under section 214 Criminal Procedure Code.***
4. ***That the trial Magistrate erred in law and fact by failing to consider that the Prosecution failed to prove their case beyond any reasonable doubt as required by law.***

The brief facts of the case are that on 18/12/2006 at 9pm, PW1 was in their house with her siblings when the Appellant called from outside. She went to see who was calling. She was asked to move near and get something from her mother. Their mother was not home then. She found it was the Appellant who was like her grandfather. The Appellant pulled her to the back of the house then to some thicket. They were followed by PW2. The Appellant took some sand/soil and put in her mouth so she was not able to scream. He threatened to stab PW2 who went back to the house. He removed PW1's pant and defiled

her. He left her there when he was through. She was in a lot of pain. She finally went home and slept. Her mother came the next day and she informed her. A report was made to Kiritiri Police Post then Siakago Police Station. She was also treated and a P3 form (EXB1) filled. The Appellant was later arrested and charged.

The Appellant in his unsworn defence stated that he was framed and that those who arrested him wanted money from him.

When the appeal came for hearing the Appellant presented the Court with written submissions in which he expounded on his grounds. He submits that there were inconsistencies and contradictions in the evidence of the Prosecution witnesses. And that the charge sheet was at variance with the evidence adduced.

Mr. Wanyonyi for the State opposed the appeal on conviction but appeared to suggest that the sentence could be reduced. He stated that age was established and so was the defilement.

This being a 1st appeal this Court is called upon to re-evaluate the evidence on record and come to its own conclusion. It has however to remember that it neither heard nor saw the witnesses and give an allowance for that. The Court of Appeal in the case of ***KIILU & ANOTHER [2005]1 KLR 174*** stated thus;

i. ***An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.***
ii. ***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 findings and 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.***
iii. ***The witness upon whose evidence it is proposed to rely should not make an impression in the mind of the Court that he is not a straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore unreliable witness which makes it unsafe to accept his evidence.***

I have considered the submissions made by both the Appellant and the State together with the grounds of appeal. I have also considered the evidence on record.

Ground 1

A perusal of the record confirms anomalies. This case was handled by two Magistrates. Mr. Omenta handled the case upto 21/5/2008. The obvious errors are the following;

i. From 21/1/2007 to 6/8/2007 and from 23/11/2007 to 21/1/2008 the Coram does not show the name of the presiding Judicial Officer and the representative for the State/Prosecution. It reads "***As before".*** And on 6/7/2007 when two crucial witnesses (PW1 & PW2) testified it's not shown who the Magistrate and Prosecutor were. In every criminal case there must be a Judicial Officer and a Prosecutor. And the Ranks of these two officers must be indicated. In this case it wasn't shown.
ii. PW1 and PW2 gave evidence on oath but were affirmed and not sworn. There is nothing on the record to show why the two witnesses were affirmed and not sworn. There was no *vore dire* examination conducted.
iii. The language used by these two witnesses is also not indicated. There is also no indication that there was any interpretation. Infact besides the ***"coram being shown as before"*** the only other person present was the accused person. There is no indication that any clerk was present on this date i.e. 6/7/2007.

In the case of ***KIBATHA –V- REPUBLIC [2007] 2 E.A. 245*** Court of Appeal held as follows;

> ***"A Court can only demonstratively show that the rights of an accused person under section 77 have been protected if its record shows that that has been the case. The record of the Magistrate in this appeal does not show that the trial Court protected the Appellant's right to have the proceedings interpreted to him in the Kikuyu language".***

I do find that it has not been demonstrated that there was any interpretation of any kind when PW1 and PW2 testified. In the case of ***EKIMAT –V- REPUBLIC [2005]1 KLR 182*** this is what the Court said of such proceedings;

> ***"The proceedings covered the entire prosecution case and even if thereafter the record showed that there was a Prosecutor, that part could not be separated from the rest and therefore it followed that the entire proceedings before the trial Court was a nullity".***

In this particular case the coram was never fully indicated, there was no indication of interpretation and no reason was given for affirming minors (no *voire dire* examination was conducted). Even if thereafter witnesses were properly sworn and the coram properly shown by the Magistrate who took over, the part by Mr. Omenta P.N. cannot be separated from entire record. I would dispose of this appeal on Ground 1 but I choose to deal with the other grounds to point out other errors.

Ground 2, 3 and 4

These 3 grounds touch on the evidence adduced. PW3 a clinical officer testified. This is what he stated at page 13 lines 1-7

> ***"No abnormality was detected in so far as part c was concerned. There was vaginal discharge. The hymen was broken but freshly broken. There were no spermatozoa and HIV test was negative. I filled the P3 form on 21/12/2006. I filled the P3 form 3 days after the commission of the offence herein. I cannot confirm whether there was penetration. The hymen may have healed during the 4 days prior to being seen"***

This witness examined PW1 on 20/12/2006 and found that the injury was 4 days old. He filled the P3 form on 21/12/2006. If the injury was 4 days old on 20/12/2006 then the defilement did not obliviously occur on 18/12/2006 night. He also said the hymen was freshly perforated but he saw no blood stains and the injury was 4 days old. This is contradictory.

On the issue of identification PW1 stated that she identified the Appellant's voice as he was like a grandfather. Her opening evidence was that she heard somebody call from outside. At page 6 lines 1-4

> ***"There came someone who called from outside hence I went out to find out who was calling. The man's voice told me to move near and take something that had been sent to us by my mother. It is accused's voice. I got it was accused. I have always known accused who is like my grandfather".***

Did she really know the voice of the attacker? In the case of ***LIBAMBULA –V- REPUBLIC [2003] KLR 683*** this is what the Court of Appeal said about voice identification 1 & 2;

i. ***Evidence of voice identification is receivable and admissible in evidence and it can be depending on the circumstances carry as much weight as visual identification.***
ii. ***In receiving such evidence, care would be necessary to ensure that it was the accused person's voice the witness was familiar with it, recognized it and that the conditions obtaining at the time were such that there was no mistake in testifying to that which was said and who said it".***

They went to a thicket. Was there any light there? PW2 does not mention any light. PW2's evidence is very doubtful. In his evidence in chief he did mention how he identified the Appellant. In cross-examination he stated that he knew his voice and when he flashed the torch he saw him. PW1 did not mention any torch. PW2 even states in his evidence that he heard PW1 scream and he also saw the

Appellant put soil in PW1's mouth when she raised an alarm. How was he able to see this? PW1 also stated that when PW2 followed him the Appellant told him he could stab him with a knife. But PW2 states at page 7 lines 18-20;

> ***"I came out and followed them but accused hit me and ordered me to go back to the house and sleep".***

Was he threatened or hit? It's not clear. PW5 who allegedly arrested Appellant has given various dates as the dates when he arrested the Appellant and arraigned him in Court. All these dates can't be correct.

The defence of the Appellant was very brief and it was that he had been framed. It was therefore the duty of the Court to weigh the evidence and determine whether the Prosecution proved its case to the required standard. From my evaluation of the record and evidence it is clear this case was not properly handled by the 1st learned trial Magistrate. Secondly the evidence on record did not confirm that the minor was defiled. It did not also confirm the complainant's age. And finally it did not prove that even if PW1 was sexually assaulted it was the Appellant who did it.

I find the appeal to have merit. I allow it and quash the conviction. The sentence is set aside. The Appellant to be released unless otherwise lawfully held under separate warrant.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 7TH DAY OF NOVEMBER 2013.

H.I. ONG'UDI

J U D G E

In the presence of;

M/s Ing'ahizu for State

Appellant

Njue – C/c