REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 5 OF 2012

SAMUEL MAINA KARANJA……..APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(BEING AN APPEAL FROM A CONVICTION AND SENTENCE OF THE SENIOR RESIDENT MAGISTRATES COURT AT KANGEMA (HON. D. ORIMBA) DATED 13TH JULY, 2010)

JUDGMENT

This is a judgment on an appeal filed against the judgment delivered on 13th July, 2010 by the **Senior Resident Magistrates' Court** in Thika in **Criminal Case No. 344 of 2009.** In that case, the accused was initially charged with the offence of defilement of a girl under the age of 11 contrary to **section 8(1) (2)** of the **Sexual Offences Act, No. 3 of 2006 (or the Act)**. According to the particulars of the offence, on the 14th October, 2009, the appellant defiled one S W N a girl under the age of 11 years in Murang'a West District within central province.

In the alternative, the appellant was charged with the offence of indecent acts with a child contrary to **section 11(1) of the Sexual Offences Act No. 3 of 2006**. It is alleged that on the 14th day of October, 2009 in Murang'a District within Central province, the appellant intentionally and unlawfully did indecent act to S W N by touching her private parts namely vagina and breasts.

In the course of the proceedings the prosecution amended its charges and introduced a second count against the appellant; under this count, the appellant was charged with the offence of sexual assault contrary to section **5(1) (ii) of the Sexual Offences Act, No. 3 of 2006**.It was the prosecution's case that on the 14th October, 2009 in Murang'a District within Central Province, the appellant intentionally and unlawfully sexually assaulted S W N "*by placing her in a banana plantation after undressing her an act which caused the said S to be pierced by a hard object resulting to anal injury.*"

In his judgment, the learned magistrate came to the conclusion that the offence of defilement was not proved; however, he found that on the first count the state had proved the offence of attempted defilement and convicted the appellant accordingly. On the second count, the learned magistrate held that the offence of sexual assault against the appellant had been proved and so the appellant was convicted on this count also. Having been convicted under section 215 of the Criminal Procedure Code, the appellant was sentenced to serve ten years in prison on each of the counts for which he was convicted with both sentences running concurrently.

The appellant was not satisfied with the learned magistrate's conviction and sentence and has therefore appealed against the judgment on the following grounds:-

1. The learned magistrate erred in law and in fact by convicting the appellant without the medical evidence linking the appellant with the alleged crime;

2. The learned magistrate erred in law and in fact by convicting the appellant based on the evidence of the investigating officer (PW4) who had no capacity to take a confession from the appellant;

3. The learned magistrate erred in law and in fact by convicting the appellant without the evidence of material witnesses; and

4. The learned magistrate erred in law and in fact when he relied on the evidence of the first and second prosecution witnesses who were not eye witnesses and also failed to note that the evidence of the complainant was not on record.

The learned magistrate's record shows that the appellant's conviction was based substantially on circumstantial evidence; the appellant was neither caught in the act nor did the complainant testify. The only evidence that connected the appellant with the charges for which he was charged was the evidence of MWN (PW2), who at the material time, was engaged as a casual labourer at the complainant's mother's home. I will refer to this witness as "M" hereinafter. According to this witness, on the 14th November, 2009, she was working at the home of PN (PW1), whom I will refer to as "P", the mother of the complainant. She left for lunch at 1.00pm and came back at 3.00 pm. It is at this time that the witness saw the appellant whom she testified, asked her whether there was anybody at P' (PW1's) home. In answer to this question, M (PW2) told the appellant that there was nobody in the home.

According to M's (PW2's) evidence, while she was leaving Ps' (PW1's) home, apparently for the day, that she saw the complainant emerging, apparently with the appellant, from the same direction as the place where the appellant had been working. The complainant was holding her inner wear. She also noticed that the appellant's trouser was unzipped. Upon inquiry from the appellant of what was happening, the appellant is said to have become wild and threatened to harm M (PW2). It is then that M (PW2) picked the complainant and took her to her mother (PW1). She said that even before she took the complainant to her mother, the complainant told her that the appellant had defiled her.

The complainant's mother, P (PW1) confirmed that the complainant is one of her children. She produced a notification of birth certificate showing that the complainant was born on 11th August, 2005; this implies that as at the time the offence was committed she was aged four.

P' (PW1's) evidence, in its pertinent parts, is that on the material date, the 14th October, 2009, she left the complainant under the care of one JW to go and work at her uncle's home; JW was PW1's mother or the complainant's grandmother. She identified her uncle whom she had gone to work for as one AK. It was while working at her uncle's home that MWN (PW2) came and informed her that the appellant who had been assigned some tasks by Ps' (PW1's) mother had defiled the complainant. P said that M (PW2) told her that she had seen the appellant holding and leading the complainant away.

Upon receiving the rather unfortunate report, P (PW1) proceeded home immediately where, according to her testimony, she found her daughter. She checked her and noticed blood on her private parts. She also noticed that her pant and "biker" were also wet with blood. The biker and the pant were marked for identification but for some unexplained reason, it is only the pant that was later produced and admitted in evidence. Upon interrogating her daughter, the complainant is said to have told her mother that the appellant took her to the bush removed her pants and defiled her. She reported the matter to her chief who referred her to the police at Kimara. She was issued with the P3 form and thereafter she took the complainant to the hospital.

A curious aspect of the evidence of P (PW1) and M (PW2) is that while M says she took the complainant to her mother P (PW1), P told the court that M only came to report to her that her daughter had been defiled and that it is only after she received this report that she went home where she found her daughter. Again, JW, the person in whose custody the complainant had allegedly been entrusted and whose evidence, in my view was crucial in tracing the complainant's movements or disposition or the probable

explanation of the cause of the injuries occasioned to her did not feature anywhere in the unfolding events at the material time. It is also curious that she was not among the prosecution witnesses. Being the person entrusted with the care of the child no person would have been better placed to explain the whereabouts of the child or the injuries she sustained than JW. The prosecution did not offer any explanation as where she was when the complainant was allegedly assaulted. The only inference that can be drawn from these obvious omissions is that either the case was not properly investigated or had she testified, JW's evidence would have been prejudicial to the prosecution case.

The person who examined the complainant is one Patrick Mwangi who testified as PW3. He stated that when S was brought to him, she had a history of having been sexually assaulted; upon her examination, he established that there was a tear on the perianal region extended to anus. Her hymen was intact and there was no sign of spermatozoa; she was HIV negative and neither was she infected with any other disease. This witness concluded that though there were injuries, whose cause he could not tell, there was no sign of penetration. He produced the P3 form which he filled upon examination of the complainant and signed as the medical officer of health.

The investigations officer, Police Constable Augusta Mecca, booked in the appellant at Kangema Police Station. According to him, the appellant was arrested on 17th October, 2009 when he was apparently rescued by the police on patrol from a mob that had descended on him because he had allegedly defiled a child. As a result of the injuries that he sustained, he was treated at [particulars withheld] Hospital and later at Murang'a District Hospital. According to the investigations officer, the complainant told him that she had been defiled in a banana plantation. Although a "biker" and a pant were marked for identification, the investigations officer produced the pant only. He said that it was only the under wear that he was given. He said that he examined the underwear and noted that it was covered with mud and blood stains. Upon completion of his investigations, the investigations officer preferred charges against the appellant. It was not clear from the investigating officer's evidence why the appellant was arrested three days after the alleged offence had been committed. In her evidence P (PW1) confirmed that the appellant was her neighbour and it should have not been difficult to apprehend him immediately the offence was committed or soon after the report was made to the police. The appellant himself said that he was picked out by a mob while he was with his friends because P (PW1) was screaming and pointing at him; this mob set on him and from the evidence of the investigating officer the appellant was injured as result. The police who came to his rescue, according to this officer, were not out to arrest him but were on a regular patrol. Indeed in his judgment the learned magistrate noted that it is the investigating officer who rearrested the appellant when he was brought at the police station.

It has been necessary to bring out the evidence as captured by the magistrates' court in order to understand whether the learned magistrate came to the right decision in convicting and sentencing the appellant as he did.

This court is bound to reconsider the evidence, evaluate it and come to its own conclusions being minded that the in arriving at its decision based on the evidence presented before it, the magistrates' court had the advantage of hearing and seeing the witnesses and was therefore able to, amongst other things, assess their demeanour. As the appellate court, this court does not always enjoy such a benefit. These issues were considered in the case of **Okeno versus Republic (1972) EA 32** where the Court of Appeal addressed them and said;

"An appellant 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. 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; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can 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 page 36).

It is from this perspective that the appellant's appeal is considered.

The medical evidence was pivotal in conviction of the appellant; though the appellant does not appear to challenge it outright, he has urged this court to find that there is no link between him and the doctor's findings. In other words, this court is asked to find that the medical evidence as proffered in court could not have supported the criminal charges against the Appellant.

Patrick Mwangi (PW3) examined the complainant; this witness established that there was a tear on the complainant's perianal region extended to anus. According to his evidence the complainant's hymen was found to be intact, there was no penetration and that there was no sign of spermatozoa. No infections of any sexual disease including HIV Aids were detected on the complainant. Although the witness established that the complainant had sustained injuries on her perianal region leading to the anus he could not tell the cause of such injuries. This information is contained in the P3 form which was admitted in evidence in support of his evidence. It appears that it was filled on 22nd October, 2013 though the medical outpatient card which was also admitted in evidence shows that the complainant was treated on 15th October, 2013. Apart from the observations recorded on the P3 form on the injuries sustained and the possibility of the complainant contracting sexually transmitted diseases, the witness also made an observation on the complainant's state of clothing; it is clear from the P3 form that such an observation is an obligation that enjoins the medical officer filling the form to indicate the presence of, say, tears, stains whether wet or dry blood on the patient's clothing. Such an observation would no doubt be crucial in a case such as the one against the appellant where it was alleged that complainant's inner wears were found wet with blood.

The medical officer's observation on the state of the complaint's clothing was tersely stated as "changed during re-examination". It is apparent from the P3 form that the re-examination that the medical officer was referring to was done on 21st October, 2009 seven days after the alleged offence was committed. While it is clear that a re-examination of the complainant was done, it is not so clear what it is that "changed during re-examination" as stated by the doctor. The medical officer's observation of the state of the clothing of the complainant was, at best, ambiguous and it is more probable than not that the officer never examined the complainant's inner wears on any of the two occasions that he attended the complainant to verify the authenticity of the prosecution's case that the complainant's inner clothing was either wet or stained with her blood. It must be remembered the investigations officer stated in his evidence that he was presented with the complainant's pant which, according to him, was stained with blood. In my view, this is the kind of clothing which a medical officer should have examined and recorded his observations in the appropriate part of the P3 form if not for anything else, to corroborate the evidence that this clothing was at one point wet apparently with the complainant's blood. No explanation was ever given as to why this clothing was not given to the medical officer for analysis of the blood stains.

While convicting the appellant the learned magistrate held that according to the medical officer, the injuries sustained by the complainant were caused by a hard object. This appears to me to have been a misdirection because firstly, the witness himself stated in his examination in chief and during cross-examination that he could not tell what caused the injury, secondly and more importantly, he did not give any indication as to the type of object or weapon that could possibly have caused the injury in the in the P3 form; the relevant part in that form where this information should have been given was left blank.

Coming back to the injury itself, the medical officer was categorical in his conclusions that the injury was to the perianal region and there was neither vaginal injury nor vaginal penetration. This evidence does not support the offence of sexual assault contrary to **section 5(1) (a) (i) (ii)** (although the charge sheet reads **section 5(i) (ii)** which does not exist) of the **Sexual Offences Act** with which, as noted, the appellant was charged. That provision of the law provides:

5. (1) Any person who unlawfully-

(a) penetrates the genital organs of another person; with-

(i) any part of the body of another or that person; or

(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes

(b)…

is guilty of an offence called sexual assault.

It is clear that for the prosecution to sustain a charge of sexual assault under this section it must be proved that the accused person penetrated the genital organs of another person, in this case the complainant, either by any part of his own body or that of another person. "Penetration" is defined in section 2 of the Sexual Offences Act as the partial or complete insertion of the genital organs of a person into the genital organs of another person while "genital organs" are defined in the same section as the whole or part of male or female genital organs which, for purposes of the Act include the anus.

The medical officer's evidence was that there was no penetration of any of the complainant's genital organs as contemplated in **section 5(1) (a) (i) (ii)** of the Act as read with the **section 2 of the Act** which, as noted, defines the terms "genital organs" and "penetration". In the premises, there was neither factual nor legal basis for the learned magistrate to convict the accused person for the offence of sexual assault under the second count of the charges against him when such an offence had not been established or proved.

It is apparent that the farthest the medical evidence goes is to demonstrate that the complainant was injured but it cannot be said with any certainty that such an injury was as a result of a sexual assault or attempted defilement as the learned magistrate held in his judgment.

M (PW2) whose evidence influenced the decision that the learned magistrate came to, appears to me not to have been a credible witness. This witness said in examination in chief that she saw the child holding her inner wears emerge from the direction of where the Appellant was; she took away the child to the mother when, according to her, the appellant became wild when she asked him what had happened. She also said that she talked with the child who informed her that she had been defiled by the appellant. In cross-examination she said that she "called the appellant and he stopped". It is not clear from her evidence what it is that the appellant stopped from doing when she called him, if she called him. She was, however, firm that she took the child to the mother to check whether she had been defiled.

The evidence of P (PW1) is inconsistent with that of M (PW2). P (PW1) said that M (PW2) only reported to her that the appellant had defiled her child and it is only then that she left and went home where she found her child who had blood on her private parts. The child was not brought to her by M (PW2) as claimed by M (PW2). P (PW1) also said that M (PW2) told her that she saw the appellant leading the complainant away which evidence was contrary to what M (PW2) herself said that she only saw the complainant coming from where the Appellant was.

These inconsistencies in evidence of P (PW1) and M (PW2) are too glaring to ignore. Certainly any conviction based on such contradictory evidence would be unsafe. Considering that evidence against the appellant was mainly circumstantial there was no room for these inconsistencies and contradictions in finding a verdict of guilty.

Ordinarily, corroboration may be required in sexual offences and even in cases where a court may be justified in convicting on the evidence of the victim alone, the victim must have testified. In the appellant's case the victim, perhaps because of her age, did not testify and in the absence of her testimony or an eye witness' account, the more reason the learned magistrate should have found it compelling to convict only on corroborated evidence. In the case of **Margaret versus Republic (1976) KLR 267 at page 268**, it was held that it is not a rule of law that a person charged with a sexual offence cannot be convicted on the uncorroborated evidence of a complainant, but it has long been the custom to look for and require corroboration before a conviction for such an offence is recorded.

In the absence of any eyewitness, the appellant's conviction was largely based, as noted, on

circumstantial evidence. It has been demonstrated that the credibility of the evidence of the crucial witnesses in this respect cast in doubt to the extent that it cannot be concluded with any certainty the facts point. In the Court of Appeal decision of **Simon Musoke versus Republic (1958) EA page 715** at page the court said;

"… ***in a case depending exclusively upon circumstantial evidence he(the trial judge) must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt."***

This decision has been followed in the case of **Okeno versus Republic (1972) EA 32 at page 35** where the Court of Appeal said;

"In our view the magistrate clearly appreciated that a conviction based on circumstantial evidence can only be had where the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt."

The inculpatory facts in the case against the appellant cannot be said without reasonable doubt to be incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The contradictory evidence of PW1 and PW2 and the prosecution silence over the whereabouts of the complainant's caretaker, JW cast a dark shadow of doubt on the prosecution's case. I am bound to conclude that t it was not proved beyond reasonable doubt that the appellant attempted to defile the complainant contrary to **section 9(1)** of the **Sexual Offences Act;** neither was it proved that he sexually assaulted the complaint contrary to **section 5(1) (a) (i) and (ii)** of that Act.

In the premises I allow the appellant's appeal based on grounds 1, 3 and 4 of the appeal. I have not found any merit in ground 2 as there is nothing in the judgment to suggest that the conviction was based on the purported confession by the appellant; nothing turns on that ground. For the reasons I have given I allow the appeal. The convictions are quashed and both sentences are set aside. I order that the appellant be released forthwith unless he is lawfully held.

Dated signed and **delivered** in open court this 1st day of November 2013

Ngaah Jairus

JUDGE