REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Case 685 of 2010

JAIRUS ONDIEKI MARIGA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From original conviction and sentence in criminal case Number 4609 of 2006 in the Chief Magistrate's Court at Makadara – Mrs. T.W. Murigi (SRM) on 22nd October 2010)

JUDGMENT

1. The appellant **Jairus Ondieki Mariga** was charged with one count of defilement of a child contrary to **Section 8(1)** and **(2)** of the **Sexual Offences Act No. 3 of 2006** and with one count of indecent act with a child contrary to **Section 11(1)** of the **Sexual Offence Act**. The brief particulars were that on the 15th day of August 2006 at [particulars withheld] in Nairobi within Nairobi Province, intentionally and unlawfully committed an act which caused penetration with his male genital organ into the female genital organ of J.N. (name withheld to protect the minor's identify) a child aged 7 years, in count I, and that on the same date and place he unlawfully and intentionally committed indecent act with J. W. (name withheld to protect the minor's identity) by touching her private parts, namely vagina, in count II.

2. In the alternative to count I, he was charged with indecent act with a child Contrary to **Section 11(1) of the Sexual Offences Act No. 3** of **2006.** It was alleged that he unlawfully and intentionally touched the private parts of J. N namely vagina.

3. At the end of the trial, the learned trial magistrate convicted the appellant on count I under **Section 8 (1) and 8 (2)** of the **Sexual Offences Act No. 3** of **2006** for the offence of defilement of a child aged below 11 years, and sentenced him to serve life imprisonment. The learned trial magistrate also convicted him on count II for indecent act with a child contrary to **Section 11(1)** of the **sexual offences Act** and sentenced him to serve 10 years, imprisonment. The sentences were ordered to run concurrently.

4. The appellant appealed to the superior court against conviction and sentence on both counts and relied on four grounds that can be summed up as follows:-

a) That the evidence was insufficient and contradictory.

b)That the Learned trial Magistrate erred in Law by her failure to sum up the prosecution case and give directions contrary to section 211 of the CPC Cap 75 of the Laws of Kenya.

c) That the Learned trial Magistrate failed to protect the Appellant's constitutional rights.

d)That the sentence was manifestly harsh.

5. Being the first appellate court I have analyzed and re-evaluated all the evidence on record, to come to my own conclusion in line with **AJODE VS. REPUBLIC 1972 EA 32,** in which the Court of Appeal held that:

"In law it is the duty of the first appellate court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witnesses and make allowance for that."

6. On the first ground, the appellant urged that the learned trial Magistrate grossly misdirected herself in Law by convicting the appellant on insufficient and contradictory evidence.His reasons were that, the medical reports of Nairobi Women's Hospital exhibit1 and exhibit 2 stated that **PW1** and **PW2** were examined on 16th August 2006 while **PW6** the investigating Officer stated that she took the children and had them examined on 18th August 2006. I have examined the court record and find that **PW6** did testify that she interrogated the appellant on 18th August 2006 and later on interviewed **PW1** and **PW2** whom he reffered to Hospital. In the same breath she testifies that she saw **PW1** and **PW2** on 16th August 2006.

7. The medical reports were produced as exhibits 1 and 2 and were dated 16th August 2006. The report by **PW6** was made on 17th August 2006. I find that these are indeed contradicting statements by **PW6** that the trial court should have noted, but do not go to the core of the case since the P3s are stamped and duly dated.

8. From the record **PW1,** a minor was defiled by the appellant on 15th August 2006 while at home with her sister **PW2**. The appellant entered their house while her mother **PW3** was away and entered their bed where he requested **PW2** to move and go take a shower in the bathroom where he would join her. He touched **PW2** on her vagina. When **PW2** moved out of the bed the appellant was left alone in bed with **PW1**. Her evidence was that he inserted his private part inside her vagina and that she felt pain.

9. **PW1** and **PW2** identified the appellant in court. He was not a stranger to them as he lived near them and used to frequent their house when **PW1** was in class 1. He also used to come and repair their fridge and electricity. **PW1** testified that the appellant had defiled her before and she reported to her mother **PW3** who did nothing. I find that this evidence is corroborated by that of **PW3** who testified that **PW1** had earlier informed her of the appellants conduct towards her.

10. **PW3** did testify that **PW1** informed her that the appellant had defiled her while **PW2** informed her that the accused had inserted his finger inside her vagina. **PW1**'s evidence was corroborated by **PW4** who testified that although **PW1'**s hymen was intact, her cervix was irregular. This was further corroborated by **PW5** who produced the medical report on behalf of Dr. Muhombe who examined her on the 16th August 2006 and found that her hymen margins were viserated and irregular at 3 O'clock position. Dr. Muhombes diagnosis was that sexual assault involving penetration had occurred.

11. I wish to add here that the fact of the hymen being intact does not negate the **PW1**'s assertion that the appellant inserted his penis into her vagina.

Section 2 of the **Sexual Offences Act No. 3 of 2006** interprets the act of penetration as follows:

"Penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person".

12. The appellant submits that **PW3** testified that **PW1** and **PW2** were treated at a clinic on 15th August 2006 and examined at Nairobi Women's hospital after 2 days. The court record bears him out that

she took them to the clinic on 15th August 2006 before taking them to Nairobi women's hospital. However, the record does not indicate that she took them to Nairobi women's hospital after two days as indicated by the Appellant, but that she took **PW1** and **PW2** to hospital for two consecutive days.

13. As to whether **PW3** tampered with exhibit 1 and 2 to read 16th August 2006, I note that the trial court found that **PW3** did amend exhibit 2 to read 16th August 2006 although she was not aware it would be used in Court. The trial court found her statement to be truthful. This notwithstanding, the veracity of this exhibit was put to rest by **PW5** who confirmed that the medical documents were authentic documents from the Nairobi women's hospital.

14. **PW4** Dr. Zephaniah Kamau the police pathologist testified that he examined **PW1** on 21st August 2006 and saw that she had a small scar over the lower pubic area. The injury was caused by a sharp object and her genitalia was normal with no injury on the vulva or vagina. The hymen was intact though the cervix was irregular. He produced her P3 form as exhibit 3. **PW2** was also examined. She had no injuries to the vagina and her hymen was intact. Her genitalia was normal. He produced her P3 form as exhibit 4. The appellant was also examined by **PW5**. He found that his genitalia were normal. He produced his P3 form as exhibit 5.

15. **PW5** Dr. Aden Rilwan testified on behalf of Dr. Muhombe who had examined **PW1** and **PW2**, and produced a report on her behalf marked as exhibit 1 contrary to the appellant's submissions that **PW 5** confirmed that the medical report from Nairobi Women's Hospital was to the effect that the external genitalia of the minors were normal, the court record indicates that the Dr. testified that **PW1** had lacerated anterior commissure extending to the anterior part of the vagina. The hymen margins were viserated and irregular. A further report indicated that **PW2**'s external genitalia was normal and her hymen margins were viserated all round. **PW5** produced the report as exhibit 2.

16. The second ground is that the learned trial Magistrate erred in Law by her failure to sum up the prosecution case and give directions contrary to **Section 211** of the **Criminal Procedure Code Cap 75** of the Laws of Kenya. The said section provides as follows:-

211**.** ***(1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).***

(2)If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of the witnesses.

17. I have perused the record of the proceedings of the lower court and find that the trial court recorded the following at page 65:-

Accused in custody - present

Interpretation – English/Swahili

Nyachoti for the accused

"Accused will give unsworn defence

We shall call one witness

We are ready"

18. I find that even though the record does not indicate in writing that **Section 211** of the **Criminal Procedure Code** was complied with, I am satisfied that the provisions of that Section complied with since the Appellant was represented, and his counsel addressed the court and made an election of how the appellant intended to make his defence. I find that failure to write in the proceedings that the court had read over and explained provisions in Section 211 of the Criminal Procedure Code to the Appellant was irregular but that no prejudice or failure of justice was occasioned to the appellant.

19. The third ground is that the learned trial Magistrate grossly misdirected herself by her failure to protect the Appellant's constitutional rights under Section 77 of the repealed constitution. The appellant submitted that **PW6** the Investigating Officer had kept him in custody from 18th August 2006 to 25th August 2006, a period of six days beyond the statutory 24 hour limit, and denied him bond before being arraigned in court.

20. **PW6** however in re-examination submits that the delay was due to the difficulty in booking an appointment with **PW5** Dr. Zephaniah Kamau the police pathologist and was not intentional. In the case of **JULIUS KAMAU MBUGUA VS REPUBLIC CR. APPEAL No. 50 OF 2008**, the Court of Appeal reviewed a wide range of previous decisions on the issue of remedies available to accused persons who are taken to court later than provided for. The court rendered itself in the following manner:

"Moreover, it was not shown that the alleged unlawful detention had any link or effect on the trial process itself or that it caused trial related prejudice to the appellant which affected the validity of the trial. The alleged unlawful detention occurred long before the appellant was charged. The alleged unlawful detention does not exonerate the appellant from the serious crime he is alleged to have committed. The breach could logically give rise to a civil remedy – money compensation as stipulated in *Section 72 (6).* ***That is the appropriate remedy which the appellant should have sought in a different forum."***

21. The fourth and final ground is that the sentence imposed against the appellant was manifestly harsh. I note that the sentencing is in accordance with **Section 8 (2)** and **Section 11(1)** of the **Sexual Offences Act** under which the appellant was charged and convicted. The said **Section 8(2)** Sexual Offences Act which is coached in mandatory terms provides that:

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

While Section 11(1) provides that

"Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."

Therefore harsh as the sentences may be, it is what is provided for by law.

22. The learned state counsel Mr. Mulati in opposing the appeal on behalf of the state, urged that the appellant was not a stranger to the minors and that they knew him from when they were much younger by name. He further urged that the minors positively identified the appellant and were categorical even on cross-examination that the appellant was the one who defiled and sexually assaulted them.

23. The learned trial magistrate did evaluate the defence evidence and state as follows:

"I find that the prosecution has proved it's case beyond reasonable doubt against the accused on the main count and in count II. I discredit his defence as a mere denial lacking any credibility. His

defense that both complainants did not inform anyone in the plot has no basis at all."

24. After a careful reassessment of the evidence on record, the petition of appeal and the submissions advanced, I am in agreement with the conclusions drawn by the learned trial magistrate from the evidence. I therefore uphold the conviction and affirm the sentence imposed by the learned magistrate.

I dismiss the appeal.

SIGNED DATED and **DELIVERED** in open court this **1st** day of **November 2012**.

L. A. ACHODE
JUDGE