IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO, & M'INOTI, JJ.A.)

CRIMINAL APPEAL NO. 90 OF 2016

BETWEEN

J M T..APPELLANT

AND

REPUBLIC...RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Malindi (Chitembwe, J.) dated 9th July, 2015

in

H.C.CR.App.No. 47 of 2014)

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JUDGMENT OF THE COURT

The appellant who gave his age as 70 years was accused of defiling a 9 year old girl and was accordingly charged, tried and convicted. As such has brought this appeal challenging the dismissal of his first appeal against conviction and life sentence in the High Court.

Mr Nyongesa representing him has urged us to upset the decision of the High Court on two related grounds. One, he submitted that the learned Judge of the superior court below failed to appreciate that the evidence of the victim ought to have been corroborated despite the provisions of the provison to **section 124** of the Evidence Act, in view of the unique nature of the case, where the victim gave self-contradictory and refractory evidence bordering on hostility; that there was infact evidence to corroborate that of the victim exonerating the appellant which the prosecution failed to avail at the trial; and that the learned Judge failed to note that the trial court did not state the reason for believing the evidence of the victim. Two, it was argued that had the learned Judge re-evaluated the evidence in totality and considered those contradictions and inconsistencies, which were material to the determination of the first appeal, he would have arrived at a different conclusion altogether; and that the precise occasion when the victim was defiled was never established.

Mr. Yamina, learned Principal Prosecution Counsel for his part thought that the two grounds had no substance and urged us to dismiss the appeal in its entirety, for, in his opinion the alleged inconsistencies and contradictions were immaterial. Regarding proof of the case, he submitted that the appellant himself largely confirmed the testimony of the victim that he would give her money, except that he maintained

that he did so for the purpose of the victim presenting it in church as offering and that it was never meant as an inducement for sex with her.

What has caused us considerable anxiety in this matter is the manner in which the victim presented her evidence. First, due to her age (9 years), she was taken through a *voir dire* examination after which the learned magistrate was satisfied that she was intelligent enough to testify albeit without taking an oath. The magistrate also made note, whose import and relevance we are unable to fathom, that the victim was ***"jovial and full of smiles"***. In her initial testimony the victim exonerated the appellant from blame saying;

> ***"The accused picked me up from school around break time. He is my uncle. He was seen by teachers. He did not take me. After break, madam Njao took me home. The accused did not do anything to me. They are only framing it*** *(sic).* ***The children are the ones who say I slept with him but they are lying. I don't remember what I recorded at the police station. No one has told me to say a different story".***

At that stage the prosecutor informed the learned magistrate that the victim had departed from her version of the statement she had recorded with the police, and that the prosecutor needed time, ***"to organize"*** their case because the victim was a child. An adjournment of nearly two months was granted and at the resumed hearing, the victim's story had undergone tremendous metamorphosis, making a complete about-turn. She now clearly and graphically recalled how, specifically on 23rd November, 2013 the appellant lured her to the bush promising to show her how people make love and vulgarly told her in Kiswahili language,***"twende tutombane"****;* how he walked ahead as she followed, how upon getting to the bush she herself spread a sack on the ground, and how the appellant inserted his penis into her private parts. After the incident she informed her elder brother, M as her grandmother with whom she lived was away in Nairobi.

According to the grandmother, she became suspicious upon eavesdropping on children conversation in which she overheard the victim tell her playmates how she had cheated that she had bilhazia when in actual fact she had been defiled by the appellant who she named. Because the appellant was known in the area he was approached with those allegations which he denied. The matter was reported to the chief but in the meantime one Sunday some women in church notice blood on the backside of the victim's dress. It was at that stage that she was taken for medical examination. Upon examination the clinical officer noticed that the victim was passing blood-stained urine, she had no hymen and had suffered lacerations on the vagina and concluded from these that the victim had been defiled.

It is the two versions of the events as related by the victim that informed the submission by learned counsel for the appellant that the victim's evidence ought to have been corroborated. It is further on record that the victim told her grandmother a lie that she was suffering from bilhazia when in fact she claimed to have been defiled after allegedly being induced with Kshs.15 by the appellant which he would leave in a strategic place. As we bear in mind the fact that the victim told a lie, the apparent contradictions and inconsistencies in her evidence, the appellant's denial of the offence, the standard of proof in a criminal case, the age and circumstances of the victim, we ask, what was the weight to be given to her evidence?

The circumstances of the victim, according to the evidence on record, were that she lived with the grandmother in [particulars withheld], Tana River County. Her parents were said to be living separately somewhere in Kisumu County. There was mention in the evidence that her step mother also lived in Bura. In other words at 9 years she was not living with her parents. It was strange that even after the victim had allegedly told her grandmother of the defilement, the latter did nothing until some woman in church allegedly noticed blood on the victim's dress that is when the matter was reported to the police and the victim taken to the hospital.

We reiterate that upon conducting a *voir dire* examination the learned trial magistrate found the victim to be intelligent. On her general demeanour and the contradictions in her evidence, the learned magistrate was satisfied that;

> ***"In my assessment she was quite intelligent and carried a knowing smile on her face. The accused is a person well known to her. She can never have been mistaken about the accused. She could not remember the dates the accused defiled her, but this does not erode her credibility……I am satisfied the alleged victim has told the truth. Her credibility was beyond doubt. With the medical evidence adduced and the testimonies of all the prosecution witnesses in support of her case, there can never be any doubt. The witnesses have been candid and gave consistent testimony".***

The trier of facts is the best judge of the witness' credibility and reliability gained through observing the impression and appearance of witnesses as well as their conduct before the court. Whenever a trial court observes any conduct or impression that has a bearing on the case, the proper practice is to record it and test it against the overall evidence given in the case by the witness concerned.

This requirement was first codified in 2003 and subsequently amended in 2006 introducing the proviso to **section 124** of the Evidence Act to allow trial courts in cases involving sexual offence, where the only evidence is that of the victim, to receive and rely on that evidence to convict, so long as the trial court is satisfied, for reasons to be recorded that the victim is telling the truth.

The learned trial magistrate was, no doubt impressed with the victim's testimony and believed she was a truthful witness. The High Court noted that the trial court having believed the victim from first hand observation and believed her as truthful, it could not interfere with that conclusion. Both courts were, however in agreement that the initial testimony in which the victim exonerated the appellant was procured by threats and promises through her teacher, the victim's aunt and another person called N. Those are concurrent factual findings based on evidence that we cannot lightly upset. For our part, we are satisfied that the victim's departure from her recorded statement was the result of interference. To the contrary we are not prepared to accept the theory that the victim was coached to give the incriminating evidence.

The appellant was well known to the victim. She gave a graphic account of events that linked the appellant with the offence with which he was charged. Hers was not the only evidence implicating the appellant. Her grandmother and a cousin (PW3) as well as the clinical officer confirmed that she had been defiled. She gave the particulars of the appellant not only to her grandmother but also to PW 3 and the clinical officer. She also gave to the police the appellant's name and led them to the spot where he had left for her some money.

Like the High Court, we find no substance in the appeal. It is dismissed in its entirety.

Dated and delivered at Mombasa this 10th day of March, 2017

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR