REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL NO. 8 OF 2013

(FORMERLY MALINDI HIGH COURT CRIMINAL APPEAL NO. 54 OF 2011)

BENEDICT KITHEKA KITUI……APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

(Being an appeal from the conviction and sentence of the Resident Magistrate at Hola (M.O. Obiero) in Criminal Case No. 54 of 2011)

JUDGEMENT

The Appellant (Benedict Kitheka Kitui) was charged, tried and convicted at the Resident Magistrate's Court at Hola on two counts of defilement contrary to S.8(1)(2) of the Sexual Offences Act No. 3 of 2006. Thereafter he was sentenced to life imprisonment. The Appellant being aggrieved by both conviction and sentence has appealed to this Court.

The Appellant relied on his amended petition filed on 11th September, 2013. In the first ground of appeal the Appellant has contended that the charge was defective for failure to disclose the time when the offence was committed. On the second ground of appeal he argues that he was charged twice for the same offence as a result of which he was prejudiced.

In response to the Appellant's arguments, the state counsel submitted that it is not true that the Appellant was charged twice for the same offence. He contended that the Appellant was indeed charged with two counts since investigations had revealed that the Appellant had defiled the complainant on two different occasions. He argued that there was nothing wrong with what the prosecution had done and the magistrate cannot be faulted for convicting the Appellant on both counts since sufficient evidence was adduced to support the charges.

In the 3rd, 4th and 6th grounds of appeal, the Appellant argues that the learned magistrate erred by convicting him on contradictory, inconsistent and uncorroborated evidence. The Appellant also contends

that the trial magistrate breached the provision of Section 124 of the Evidence Act by convicting him on uncorroborated evidence. In reply, Mr. Mulama for the state submitted that the evidence adduced proved the charges and the trial magistrate was therefore correct in finding the Appellant guilty.

Through the 5th ground of appeal the Appellant asserts that the trial magistrate erred by not specifying the count for which he had been convicted and the count for which he had been discharged. Mr. Mulama conceded that there was a problem with the way the sentence had been passed.

In the 7th ground of appeal the Appellant contended that the trial magistrate did not consider his defence before arriving at his decision. He also appears to be saying that he was not given adequate time to prepare for his defence.

As expected of a first appellate court, I have carefully reconsidered, evaluated and analysed afresh the evidence adduced before the trial court. In doing so, I have given due allowance to the fact that I neither saw or heard the witnesses testify - see **OKENO v. R [1972] E.A.32**

I will deal with all the grounds of appeal together. The evidence of the complainant who testified as PW2 was brief. This is what she told the Court:-

"My name is C K M. I am 6 years old. I live in [particulars withheld]. I live with my mother. My mother's name is N. My father's name is M. I do go to [particulars withheld] Academy. I am in pre-unit. I can remember somebody did to me bad manners. The person is the accused herein. It was at day time. My mother was at her place of work. She operates a hotel.

The incident took place inside the accused person's house. The accused called me. I was outside our house. I was wearing a dress. I knew the accused person prior to the incident. He is called Kitheka. The accused is our neighbor. That is all."

When the complainant concluded her testimony the Appellant was invited to cross-examine her and he indicated that he had no questions for her. Before the complainant gave her evidence, the trial magistrate conducted a *voir dire* examination and concluded that although she did not understand the meaning of an oath she was a competent witness.

The Appellant's contention that the evidence of the complainant needed corroboration in accordance with Section 24 of the Evidence Act is unfounded since the said Section has a proviso to the effect that:-

"….where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

The Court of Appeal captured the import of the proviso to Section 124 of the Evidence Act in **MOHAMED v. REPUBLIC (2008) 1 KLR (G&F) 1175** when it stated that:-

"The message, in our view is clear; the Courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."

Once the magistrate believed that the complainant was telling the truth, he was entitled to rely on her evidence and arrive at a conviction on the same without the need for corroboration. All he needed to do was to record in the proceedings the reasons as to why he believed that the complainant was telling the truth. The trial magistrate in his judgement dealt at length on the evidence of the complainant and concluded that:-

"During the testimony, I observed her demeanour and the only thing I noticed was that she was traumatized. I did not note anything which would suggest that she is not telling the truth or that

she was acting under influence."

In those two lines the trial magistrate had given the reasons for believing the complainant. On my part, I do not find anything in the Court proceedings and in the evidence of the complainant to make me arrive at a different conclusion.

The complainant clearly identified the Appellant in Court as a neighbor. She talked of bad manners being done to her. I find that this was her way of describing sexual activity.

The fact that the complainant was defiled was corroborated by the evidence of her mother (PW1 R N M). She told the Court that on 26th February, 2011 she was washing her daughter when she complained of pain in her private parts. She checked her vagina and saw injuries on the vaginal wall. She also saw blood. She then enquired from her what had happened and she informed her that their neighbour by the name Kitheka had caused the injuries to her. The child further informed her that the assault had taken place on two different days namely 24th February, 2011 and 25th February, 2011.

The evidence of PW1 was confirmed by the medical officer PW3 Dr. Sultan Sherman who testified that there was evidence of fresh penetration.

The evidence adduced before the trial Court confirmed defilement. The defilement was linked to the Appellant by the evidence of the complainant.

In his evidence the Appellant denied committing the offence. The trial magistrate considered this defence vis-à-vis the prosecution evidence and rejected it.

The Appellant claimed during cross-examination that the mother of the complainant was his girlfriend. The Appellant never cross-examined PW1 about the alleged relationship. He did not explain why the mother of the complainant would want to lay false charges against him. In fact the Appellant did not offer any defence at all apart from narrating the circumstances surrounding his arrest.

I have perused the Court proceedings and find that the trial magistrate clearly appreciated the Appellant's poor health and accommodated him during the trial. The Appellant cannot now turn around and claim that he was not given ample time to prepare his defence.

There is indeed an error in the statement of the offence. The Section the Appellant is alleged to have contravened is indicated as 8(1)(2) of the Sexual Offences Act, 2006. There is no such section in the said Act. The charge ought to have read "Section 8(1) as read with Section 8(2) of the Sexual Offences Act, 2006". However, an overview of the entire proceedings clearly shows that the Appellant fully participated in the trial and all along knew the charge that was facing him. No prejudice was caused to him by the said minor defect which in my view is curable by Section 382 of the Criminal Procedure Code (Cap 75). It was not compulsory to state in the charge the time when the offence was committed. I am satisfied that the charge sheet as drafted met the requirements of sections 134 and 137 of the Criminal Procedure Code.

The Appellant was indeed correct when he faulted the sentencing by the trial court. Once the magistrate found him guilty of the two counts, a sentence ought to have been imposed for each count as required by Section 14 of the Criminal Procedure Code (Cap. 75).

Was there proof that the complainant was defiled on two different occasions by the Appellant? The complainant only talked of bad manners being done to her. The impression one gets is that she was defiled once. She did not give the date but there is evidence that she was defiled. It would therefore have been safe to find the Appellant guilty on one count only. The child was not clear on the date of the defilement. She could have been defiled on any of the dates in the two counts. I will therefore allow the appeal to the extent that the Appellant's conviction is upheld in regard to one count only. The count can either be the 1st or 2nd count. I therefore confirm conviction in regard to the 1st count. The conviction in respect of the 2nd count is overturned and set aside.

The offence for which the Appellant was convicted attracts a life sentence. The Appellant will therefore serve life imprisonment on count 1. Save for the foregoing, the appeal fails and is dismissed.

Orders will issue accordingly.

Dated and signed this day of 2013

W. KORIR,

JUDGE OF THE HIGH COURT

Dated and delivered this 2nd day of December, 2013

S.N.MUTUKU

JUDGE OF THE HIGH COURT