REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 44 OF 2012

KIMANZI MWANDIKWA .....1ST APPELLANT

MUSE MUTUI.....2ND APPELLANT

KIMANZI MUSYA .....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NUMBER 19 OF 2010

IN THE PRINCIPAL MAGISTRATE'S COURT AT KYUSO – B. M. MARARO (PM) ON 23RD FEBRUARY, 2012)

JUDGEMENT

Kimanzi Mwandikwa, Musee Mutui and Kimanzi Musya the 1st, 2nd and 3rd appellants were the 1st, 2nd and 3rd accused persons respectively in Kyuso Principal Magistrate's Court Criminal Case No. 19 of 2010 (formerly Mwingi Magistrate's Court Criminal Case No. 880 of 2010). Each one of them had been charged separately with defilement contrary to Section 8(1) as read with sub-section 3 of the Sexual Offences Act No. 3 of 2006.

Each of the appellants was also faced with an alternative count of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

On the main charge, each appellant is said to have on 23rd August, 2010 at [particulars withheld], in Kitui County committed an act which caused the penetration of his male genital organ (penis) into the female genital organ (vagina) of K K a girl aged 15 years.

As for the alternative charge each appellant is said to have on the date and the place stated in the main count unlawfully and intentionally caused his male genital organ (penis) to come into contact with the female genital organ (vagina) of K.K. a child aged 15 years.

At the conclusion of the trial the magistrate (B.M. Mararo, Principal Magistrate) found each appellant guilty and sentenced each one of them to ten years imprisonment. The appellants being dissatisfied with both conviction and sentence have filed this appeal.

With the permission of the Court the appellants filed an amended memorandum of appeal on 11th

October, 2013 in which they fault the decision of the trial magistrate for the following reasons:-

1. **THAT the learned trial magistrate erred in law and in fact in finding the appellants guilty against the weight of the evidence tendered.**
2. **THAT the learned trial magistrate erred in law and in fact in failing to consider weight of defence testimony in its totality.**
3. **THAT the trial magistrate erred in law and in fact in failing to consider the appellants' mitigation hence giving a severe sentence in the circumstance.**
4. **THAT the trial magistrate erred in considering irrelevant factors and failing to consider relevant factors in arriving at the decision.**
5. **THAT the learned trial magistrate erred in law and in fact in failing to determine the date, manner and the delay in bringing the appellants to court.**
6. **THAT the learned trial magistrate erred in law and in fact in relying on the evidence of the Clinical Officer who had also examined the complainant and filled the P3 form six days after the incidence hence occasioning miscarriage of justice.**
7. **THAT the learned trail magistrate erred in law and in fact in failing to consider the appellants had been condemned unheard in the orderly proceedings.**

a. **The learned trial magistrate erred in law and in fact in relying on the prosecution case where vital ingredient of the offence had not been proved namely the age of the complainant.**
b. **That the learned trial magistrate erred in law in fact in relying solely on uncorroborated evidence which was distorted, unreliable and incredible under the circumstances of the case.**
c. **That the learned trial magistrate erred in law and in fact in relying on hearsay evidence based on allegation of witnesses who were never called to testify.**

The appellants' counsel Mr. Nzili also relied on the submissions dated 12th April, 2013.

Mr. Mulama for the state opposed the appeal. He made oral submissions and also relied on the submissions dated 1st October, 2013 and filed on the same date.

This being the first appeal, I will reconsider the evidence tendered in the trial Court, evaluate it and come to my own independent conclusion. In doing so, I will remember that I neither saw nor heard the witnesses testify.

The complainant testified as PW1 and told the Court that 23rd August, 2010 at around 8.30 a.m. he arrived at the house of her uncle PW4 K K with a view to getting work so that she could use the proceeds to pay her tuition. At her uncle's home she found Kimanzi (1st Appellant) who works there. She also found her grandmother who lives in her uncle's homestead. They took breakfast and during that time a girl called M passed by and informed her that there was no work. She then told her grandmother that she was going back home. As she was leaving she saw the 1st Appellant near the kitchen. The 1st Appellant told her to go and get a basin from his house and take it to her grandmother. On entering the house he followed her and stuffed a shirt into her mouth and tied her mouth. He then put her on the bed and tied both her legs and hands with a rope. He raped her and later called Musee (2nd Appellant) and Kimanzi (3rd Appellant) who joined him in defiling her in turns. They did so until 3.00 p.m. when they released her. At one stage some boys she identified by their voices as P N and M M came and knocked the door but the appellants refused to open the door. After she was released she immediately reported the incident to her sister and told her to report the incident to her grandmother who was not present at the time. She then proceeded to school. On 2nd August, 2010 the appellants were arrested by members of the community police and escorted to Kyuso Police Station where they were rearrested by PW6 Police Constable Benson Kisiangani who carried out investigations and had the appellants charged.

Each appellant denied committing the offence with which they are charged.

The evidence adduced in the trial leaves a lot of question marks. The grandmother and the sister of the complainant were never called to testify. There is no reason given as to why the complainant was not

taken to hospital immediately after the alleged sexual assault. P N and M M are said to have knocked on the door of the house of the 1st Appellant during the incident. One of the two is said to have reported the incident to the complainant's sister by the name M. What did M do? There is no evidence on record about what she did to help her sister. M M was not called as a witness. P N could be the person who testified as PW2 and gave his names as P J N. He did mention one M presumably M M. He was declared a hostile witness. All these loopholes only serve to show the casual manner in which the case was investigated and treated.

Before I make my determination on the appeal, I wish to address two issues namely the handling of PW2 P J N and the sentencing of the appellants.

On 15th February, 2011 the prosecutor declared PW2 P J N a hostile witness after he had just started testifying. Other witnesses were thereafter called to testify. Thereafter the prosecutor applied for an adjournment. At that point the Court made orders as follows:-

"Further hearing 7.4.11

P N J K is lying to court. His statement is the opposite of his evidence. I find him in contempt and he will pay a fine of kshs.10,000/= in default three months imprisonment."

The issue of how PW2 was handled has not been raised by any of the parties but it is important for this Court to clarify the law. The treatment of PW2 by the trial Court was erroneous. Where the prosecutor applies for a witness to be declared hostile, he must state the reason(s) for making the application. It is the prosecutor who applies to have a witness declared hostile for it is only the prosecutor who knows if a witness' testimony in Court is different from the statement recorded with the police. Once the Court allows the application, it will declare the witness hostile. The moment the witness is declared hostile, the prosecutor will then proceed to cross-examine the witness using the statement recorded with the police. At the conclusion of the cross-examination the accused person should be accorded an opportunity to ask the witness questions. PW2 was not treated in this manner.

Sometimes a witness may refuse to take oath, answer questions or produce exhibits. A witness who plays 'dumb', 'blind' and 'deaf' is called a refractory witness and such an uncooperative witness is dealt with in accordance with Section 152 of the Criminal Procedure Code (Cap 75) as follows:-

"152. (1) Whenever a person, appearing either in obedience to a summons or by virtue of a warrant, or being present in court and being verbally required by the court to give evidence -

(a) refuses to be sworn; or

(b) having been sworn, refuses to answer any question put to him; or

(c) refuses or neglects to produce any document or thing which he is required to produce; or

(d) refuses to sign his deposition, without offering sufficient excuse for his refusal or neglect, the court may adjourn the case for any period not exceeding eight days, and may in the meantime commit that person to prison, unless he sooner consents to do what is required of him.

(2) If the person, upon being brought before the court at or before the adjourned hearing, again refuses to do what is required of him, the court may again adjourn the case and commit him for the same period, and so again from time to time until the person consents to do what is so required of him.

(3) Nothing contained in this section shall affect the liability of any such person to any other punishment or proceeding for refusing or neglecting to do what is so required of him. or shall prevent the court from disposing of the case in the meantime according to any other sufficient

evidence taken before it."

At other times, offences amounting to contempt of court are committed in the face of the court. Section 121(2) of the Penal Code provides for the handling of such contempt as follows:

> **"121.(2) When any offence under any of paragraphs (a), (b), (c), (d) and (i) of subsection (1) is committed in view of the court, the court may cause the offender to be detained in custody, and at any time before the rising of the court on the same day may take cognizance of the offence and sentence the offender to a fine not exceeding one thousand four hundred shillings or in default of payment to imprisonment for a term not exceeding one month.**
>
> **(3) The provisions of this section shall be deemed to be in addition to and not in derogation from the power of the High Court to punish for contempt of court."**

Even assuming that the trial magistrate proceeded under Section 121 of the Penal Code, it is clear that the punishment imposed is illegal. PW2 was fined Kshs. 10,000/= in default three months imprisonment. The magistrate, having presumably proceeded under Section 121(2) of the Penal Code, should have imposed a fine not exceeding Kshs. 1,400/=. The default sentence is a term of imprisonment not exceeding one month. PW2 having not appealed and the file having not come to me by way of revision, I will leave the matter at that.

The second issue that I find necessary to address is the way the appellants were sentenced. The appellants testified on 19th January, 2012 and each one of them told the Court that he was 19 years old. In mitigation on 23rd October, 2012 all the appellants stated that they were 18 years old. The offence with which they were charged was alleged to have been committed on 23rd of August, 2010. The trial magistrate ought to have called for age assessment reports on the appellants before sentencing them. Age assessment reports would have guided the magistrate as to whether he was dealing with adults or children.

Turning back to the evidence adduced in the trial Court, I find that the magistrate fully complied with the proviso to Section 124 of the Evidence Act and in doing so, he addressed the evidence of the complainant (PW1) in his judgment and stated that:-

> **"I examined the demeanor of the witness and she was firm, clear and concise and I found her though a minor to be a credible and reliable witness. Her evidence was clear and concise and described in detail as to what the different accused persons did to her. I also do not see as to why the complainant would maliciously/falsely accuse the accused persons with whom they had no relationship."**

This Court cannot fault this finding by the trial Court.

The only disturbing issue about this case is why crucial witnesses were not called. There is no explanation on record as to why they were not called. One of the key witnesses (PW2) turned hostile. Is it not possible to infer that had the prosecution called these witnesses they could have given evidence that would have been inconsistent with the prosecution case? In a case like this, the words of the Court of Appeal in **BUKENYA AND OTHERS v. UGANDA [1972] E.A. 549** become apt:

> "**It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. First, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the Court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case (Trial on Indictments Decree, s. 37). Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the Court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case. If they had**

disappeared, the prosecution could easily have called evidence to show that reasonably exhaustive enquiries had been made to trace them, but without success."

I am alive to the proviso to Section 124 of the Evidence Act (cap 80) which allows the conviction of an accused person based on the sole evidence of a victim of a sexual offence. However, I suspect the proviso to Section 124 of the Evidence Act was not introduced so as to take away the onus placed on the prosecution of proving a case beyond reasonable doubt. I think that the said proviso was passed in light of the fact that sexual offences are normally committed in privacy and it would be hard to prove the same if corroboration is demanded. The proviso does not, in my view, provide shortcuts to the investigating officer. Where there is evidence to corroborate the testimony of a victim of a sexual crime, that evidence should be availed to the Court or reasons given as to why the witnesses have not been called. Sexual crimes now carry heavy penalties and care should be taken to ensure that innocent people do not land in jail. Thorough and exhaustive investigations should therefore be conducted so that only those who are culpable are punished.

A bird's eye view of this case makes me agree with counsel for the appellants, that the appellants' conviction is not safe. The appellants should have been given the benefit of doubt. I thus allow the appeal and set aside the conviction and sentence in respect of each of the appellants. Each appellant is thus set free unless otherwise lawfully held.

There will be orders accordingly.

Prepared, Dated and signed this 27th November 2013

W. KORIR,

JUDGE OF THE HIGH COURT

Dated and delivered on 2nd day of December, 2013

S.N.MUTUKU

JUDGE OF THE HIGH COURT