REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 159 OF 2014

ROBERT MWADIME MAGHANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(**From original conviction and sentence in Criminal Case Number 62 of 2015 in the Senior Resident Magistrate's Court at Wundanyi delivered by Hon Orenge K.I. (Ag PM) on 20th August 2013)**

JUDGMENT

INTRODUCTION

1. The Appellant herein, Robert Mwadime Maghanga, was tried and convicted by Hon Orenge K.I. Ag Principal Magistrate for the offence of defilement of a girl contrary to Section 8 (3) as read with Section 8(3) of the Sexual Offences Act No 3 of 2006. He was sentenced to twenty (20) years imprisonment. He had also been charged with the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the said Act.

2. The particulars of the main charge were as follows :-

"On diverse dates between 8th January 2013 and 12th February 2013 at [particulars withheld] Location, within Taita Taveta County, intentionally and unlawfully caused his penis to penetrate the vagina of J W a child aged 13 years."

ALTERNATIVE CHARGE

"On diverse dates between 8th January 2013 and 12th February 2013 at [particulars withheld] Location, within Taita Taveta County, intentionally and unlawfully touched the vagina of J W a child aged 13 years with his penis."

3. Being dissatisfied with the said judgment, on 12th November 2015, the Appellant filed a Notice of Motion application seeking leave to be allowed to file an appeal out of time at the High Court of Kenya, Mombasa. The same was allowed and the Petition deemed as having been duly filed and served . The Memorandum Grounds of Appeal were as follows:-

1. THAT the learned magistrate did not consider the fact that the medical report stated that there

were no discharges found which stated clearly that the said offence did not take place.

2. THAT the trial learned magistrate did not consider that there was a strong enmity based on family matters between his family and that of the complainant.

3. THAT the witness issued by the complainant mother was contradicting (sic)**.**

4. THAT he was not given enough time to prepare himself before the beginning of the case (sic)**.**

4. The Appeal herein was subsequently transferred to the High Court of Kenya, Voi. On 19th July 2016, this court directed the Appellant to file his Written Submissions. Instead of doing so, he filed the said Written Submissions along with further Grounds of Appeal. The said Grounds of Appeal were as follows:-

1. THAT the Learned trial magistrate erred in law and facts by failing to consider that both his conviction and sentence were founded on the evidence of a single witness.

2. THAT the pundit trial magistrate erred both in law and facts by failing to consider that the prosecution witnesses had failed to discharge the burden of proof beyond reasonable doubt as required by the law.

3. THAT the Learned trial magistrate grossly erred in law and facts by failing to consider that the alleged offence originated from a grudge.

4. THAT the Learned trial magistrate erred in law and facts by failing to adequately consider his defence which was firm to cast doubt on the prosecution case.

5. In his response to the State's Written Submissions dated 27th September 2016 and filed on 28th September 2016, the Appellant filed additional Written Submissions and Grounds of Appeal on 8th November 2016. The said Grounds of Appeal were as follows:-

1. THAT the Learned trial magistrate erred in law and facts by failing to consider that both conviction and sentence was (sic) **founded on the evidence of a single witness which would or was insufficient to sustain a conviction.**

2. THAT the learned trial magistrate erred in law and facts in relying in uncorroborated evidence to convict him.

3. THAT the pundit trial magistrate erred in law and facts in failing to consider that his conviction was against the merits of the evidence.

6. Bearing in mind that the Appellant was acting in person, this court overlooked the manner in which the said Grounds of Appeal had been placed before it for determination as Article 159(2)(d) of the Constitution of Kenya, 2010 mandates courts to administer justice without undue regard to technicalities. Notably, the State raised no objection the same.

7. When the matter came up on 8th November 2016, both the Appellant and the State requested the court to render its decision based on the said Written Submissions, which were not highlighted. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

8. Being the first appellate court, this court is under a duty to re-examine the evidence that was adduced in the lower court as was held by the Court of Appeal in the case of **Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR** where it was stated that:-

"**On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

9. It did appear from the respective parties' Written Submissions that the following issues were really what had been placed before the court for its determination:-

a. Whether or not the Prosecution had proved its case beyond reasonable doubt;

b. Whether or not the Appellant's defence had displaced the prosecution evidence.

10. The Appellant's grounds of appeal were repetitive. However, for the purposes of the Appeal herein, this court adopted the Grounds of Appeal that were filed on 6th September 2016 as they encompassed all the grounds he had relied upon. Although his Written Submissions cut across all the Grounds of Appeal making it difficult for this court to separate the same under the different Grounds of Appeal, the court nonetheless dealt with them under the separate heads shown hereinbelow.

I. PROOF OF THE PROSECUTION CASE

11. Grounds of Appeal Nos (1) and (2) were related and were dealt with under this head.

12. The Appellant submitted that there was heavy burden of proof on the Prosecution because of the gravity of offence he had been charged with. He relied on the case of **CRA No 330 of 1987 Charles Kibara Muraya vs Republic**.

13. His main argument was that his conviction and sentence was based on the sole evidence of the Complainant, J W (hereinafter referred to as "PW 1") which was not corroborated and urged this court to exercise caution in believing the same. He faulted the Learned Trial Magistrate for not having noted her demeanour in compliance with Section 124 of the Evidence Act Cap 80 (Laws of Kenya).

14. He referred this court to the cases of **CRA No 1 of 2014 Ogeto vs Republic** and **Chemangong vs Republic (1984) KLR 611** which was basically that an appellate court will not interfere with the finding of a trial court unless it is based on no evidence or misapprehension of the evidence, or the trial judge is shown demonstrably to have acted on wrong principles in reaching the decision.

15. He further submitted that no DNA test was conducted to establish whether or not the same contained his spermatozoa. He also cast doubt on PW 1's evidence regarding the condoms that were said to have been found on him because from her evidence, he said it appeared that she had had sexual encounters previously because she did not complain of pain.

16. On its part, the State pointed out that the offence occurred during the day and consequently PW 1 was able to identify the Appellant as he was a person known to her. It submitted that the evidence of a single witness could sustain a charge as provided in the proviso to Section 124 of the Evidence Act.

17. The said Proviso provides as follows:-

“Provided 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”

18. It added that W M (hereinafter referred to as “PW 3”) corroborated PW 1’s evidence as he found her and the Appellant hiding in a bush and that he also saw used condoms at the scene. It was its argument that PW 1’s evidence was further corroborated by the Clinical Officer at Wesu Hospital, Williamson Mwadime (hereinafter referred to as “PW 2”) who confirmed that PW 1’s hymen had been broken but did not find any evidence of spermatozoa.

19. On analysing the evidence and the Appellant’s submissions, this court was persuaded to find that this was not a case of a person having been convicted on the basis of the evidence of a single witness. PW 1 and the Appellant were found hiding in a bush by PW 3 as he was going to cut napier grass. He saw used condoms were found at the scene.

20. The Appellant’s assertions that only a person of unsound mind could keep used condoms was neither here nor there because the evidence was that the condoms were found at the scene. Notably, nowhere in the proceedings was it indicated that PW 1 did not complain of pain when she allegedly had sex with him. The Appellant’s argument that it was probably not the first time PW 1 was having sex because she did not complain of pain on the first day was only a fact that was known to him only. It is only him who could explain how he came to be possessed of this knowledge.

21. Number 88391 PC David Masinde would have done a thorough investigative job by having the used condoms subjected to a DNA test to confirm if the seminal fluids belonging to the Appellant could be found therein. However, failure to do so did not weaken PW 1’s evidence that she had sex with the Appellant herein.

22. Indeed, it was sufficient if PW 1’s evidence was corroborated by some other evidence which in this case was, PW 3 finding her and the Appellant hiding in a bush and confirmation by PW 2 that her hymen was broken. Her mother, H M (hereinafter referred to as “PW 5”) also said that PW 1 did tell her that the Appellant defiled her.

23. Notably, PW 1 was consistent in her Examination-in-chief, Cross-examination and Re-examination that the Appellant gave her fifty (50) shillings to have sex with him. She even attempted to lie about what she was doing when she was caught standing in the bush by PW 3 because she told him that she was looking for grass. Her evidence, which was corroborated by PW 2 and PW 3, convinced this court that she was a truthful witness.

24. If she was framing the Appellant due to the monies the Appellant had claimed PW 5 allegedly owed him, she would most probably have implicated him immediately PW 3 appeared but in this case, she appeared to cover up for him.

25. It was therefore the finding and holding of this court that the Learned Trial Magistrate arrived at a correct conclusion regarding the Appellant’s guilt because he was found hiding in a bush together with PW 1 by PW 3, used condoms were found at the scene and PW 1’s hymen was absent. Both PW 1 and PW 3 placed him at the scene of the incident.

26. In the premises foregoing, Grounds of Appeal No (1) and (2) were not merited and are hereby dismissed.

II. DEFENCE OF ALIBI

27. Grounds of Appeal Nos (3) and (4) were dealt with under this head.

28. The Appellant adduced unsworn evidence. The same had no probative value because it denied the Prosecution an opportunity to test the veracity of the same during Cross-examination. It was his evidence that PW 5 owed him money and that she had brought the charges against him so that he could not claim his money from her.

29. His witness, Jackson Mwafula (hereinafter referred to as “DW 2”) was his brother. He adduced sworn evidence. During Cross-examination, he admitted that he was not with the Appellant when the alleged offence was said to have been committed and that PW 1 did not have a grudge against the Appellant herein. The State submitted that this was proof that there was no malicious intention on the part of PW 1 to have testified against the Appellant.

30. It was the view of this court was that the Appellant did not offer any defence of alibi to remove himself from the scene of the alleged offence or to demonstrate that there was any grudge between him and PW 5. It was therefore not correct as he had stated that his defence was firm or corroborated by an independent witness. On his part, the Learned Trial Magistrate was correct in finding that the Prosecution had proved its cases beyond reasonable doubt.

31. In the premises foregoing, Grounds of Appeal Nos (3) and (4) were not merited and the same are hereby dismissed.

III. SENTENCE

32. PW 1 was aged thirteen (13) years. She submitted in evidence a Birth Certificate that showed that she was born on 1st June 1999. The Appellant did not dispute this fact. In fact, in his Written Submissions, he had asked this court to treat her evidence with caution as she was a child of tender years. This court was therefore satisfied that the Prosecution had proved that PW 1 was aged thirteen (13) years.

33. Section 8 (3) of the Sexual Offences Act provides as follows:-

“1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

3. A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

34. As the Learned Trial Magistrate sentenced the Appellant to twenty (20) years which was in accordance with the law, this court found no reason to interfere with his finding.

CONCLUSION

35. Although the Appellant had listed denial of adequate time to prepare his case at the beginning of the case as a ground of appeal, this court found no such evidence as on the first day, he indicated that he

was ready to proceed with the hearing. In any event, he did not address this issue in his Written Submissions heading this court to believe that he had abandoned the said Ground of Appeal.

36. Accordingly, having considered the Appellant's Grounds of Appeal, the Written Submissions and case law that were relied upon by the Appellant and the State, this court found that the Prosecution had proven its case beyond reasonable doubt.

DISPOSITION

37. As the Appellant's guilt was unequivocal and he failed to advance any sufficient reason to persuade this court to interfere with the decision of the Trial Court, this court hereby declines to quash the conviction and/or set aside the sentence that was meted upon the Appellant by the Trial Court but instead affirms the same as the same was lawful and fitting.

38. The upshot of this court's judgment, therefore, was that the Appellant's Appeal that was lodged on 12th November 2013 was not merited and the same is hereby dismissed.

39. It is so ordered.

DATED and **DELIVERED** at **VOI** this **20TH** day of **DECEMBER** 2016

J. KAMAU

JUDGE

In the presence of:-

Robert Mwadime Maghanga……..Appellant

Miss Anyumba……..for State

Josephat Mavu– Court Clerk