REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 2 OF 2020

JOB.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence by Hon. Kasera,(PM) dated 31st

January, 2020 in Criminal case (SO) No. 38 of 2017 in the Chief Magistrate Court at Kajiado)

JUDGMENT

1. The appellant was charged with defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, No. 3 of 2006. Particulars were that on diverse dates between 6th and 19th December, 2017, in [particulars withheld] Township of Kajiado County, he intentionally caused his male organ to penetrate the anus of AK, a child aged 8 years.

2. He faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Act. Particulars being that on diverse dates between 6th and 19th December, 2017 at the same place, he intentionally caused his male organ to touch the anus of AK

3. The appellant denied both counts and after a trial in which the prosecution called 5 witnesses, and the appellant's sworn defence, he was convicted on the main count and sentenced to life imprisonment. He was aggrieved with both conviction and sentence and lodged this appeal raising the following grounds:

> ***1. That the learned trial Magistrate erred in law and fact in relying on conjecture in arriving at a conviction in the absence of DNA test to conclusively identify the perpetrator in light of the following pertinent facts:***
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> > ***(a) That the learned Magistrate ignored the unequivocal precedent set by the High Court in the case of Reuben Shituli v Republic [2019] eKLR that though DNA testing is not a mandatory requirement in defilement cases, it is necessary where there is more than one possible perpetrator for the purpose of identity.***
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> > ***(b) That the minor testified that all material times, he lived in the same house with among others, his 18 year old uncle, M. The said uncle would accompany him to the house in which the appellant resided to watch movies.***
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> > ***(c) That all material times, the uncle M resided in the same house with the minor and was a possible suspect.***
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> > ***(d) That the said uncle went back to Samburu on 22nd December, 2017, a day before the appellant was arrested.***
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> ***2. The learned trial Magistrate erred in law and fact in dismissing the appellant's defence and finding the minor's account to be believable despite clear inconsistent and patched up accounts as detailed below:***
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> > ***(a) The minor's hands were allegedly tied at the back and mouth shut with a tape on the first encounter, a horrible ordeal indeed. Surprisingly, within the same week, he voluntarily went back to the house twice and was sodomised in similar fashion on each occasion but did not inform anyone, not even his close uncle M.***
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> > ***(b) The minor opened up on the issue on 22nd December, 2017, the same day his uncle, M left Nairobi for Samburu.***
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> ***3. The learned Magistrate erred in fact in finding that the identification of the accused person was watertight by considering matters of conjecture and speculative inferences without weighing and making a finding on the relevant evidence adduced on record.***

4. The learned Magistrate erred in fact in making an erroneous finding that the appellant lived alone in a house opposite that in which the minor lived. It was at all times an uncontested fact that accused was a form three student at [particulars eithheld] Academy in Kisumu and travelled to Nairobi for the December Holidays to visit his cousin. The learned Magistrate in fact considered this fact in granting the accused person bail and allocating hearing dates during school holidays.

5. The learned Magistrate failed to consider the evidence of PW3, LKK, the minor's aunt who confirmed that the appellant was a visitor who had come to visit her neighbour in December.

6. The learned Magistrate erred in law in taking into consideration selectively and unfairly inculpatory evidence to the exclusion of exculpatory evidence and therefore failed to consider and weigh the evidence as a whole before convicting the appellant.

7. The learned Magistrate erred in law and fact in failing to appreciate the fear the minor exhibited at her aunt's house to the extent that the child was afraid of divulging the details of the sodomy to his own mother and it had to take the threat of throwing him off the balcony at 2 a.m in the morning for him to speak out. This could only have been possible if the offender resided in the same house.

8. The learned Magistrate erred in law and fact in relying on the medical report of DR. Wagura which indicated that the minor had bruises to the anus as proof of penetration. Nowhere in the medical report or in the doctor's testimony does the doctor associate the bruise to sodomy.

9. That the learned Magistrate erred in meting a harsh and most punitive sentence on the appellant despite the fact that the charge was not proven.

4. Parties filed written submission and agreed to dispose of this appeal through those submissions. The appellant filed submissions dated 15th September, 2020 on 16th September, 2020 through his advocates. It was submitted that the trial court was wrong in finding that the appellant had been properly identified as the perpetrator of the crime because he lived alone in the house opposite that of the complainant's aunt. It was also argued that the trial court did not state that it believed that the complainant was telling the truth and record reasons for that belief.

5. The appellant further argued that he was a student and had travelled to Nairobi from Kisumu for December holidays, a fact the trial court acknowledged, and even the complainant's aunt had stated that he was in the neighbour's home from 5th December, 2017. He relied on section 124 of the Evidence Act and argued that the trial court failed to state whether the witness was truthful. He cited the case of ***Chila v Republic*** [1967] EA 722 p. 273 on corroboration. He also cited the decision in ***Martin Okello Alogo v Republic*** [2018] eKLR, for the argument that before convicting on the evidence of identification by a single witness, the court should warn itself on the possibility of mistaken identity.

6. The appellant again argued that the complainant had testified that he lived with his 18-year-old uncle who would accompany him to the house he was staying to watch movies and, therefore, the uncle would be a possible suspect since he left for Samburu on 22nd December, 2017 a day before his arrest. He raised doubts why the complainant opened up on the issue only after his uncle had left. He also argued that the complainant was threatened by his mother (PW2) to disclose the incident which meant the uncle could have been the possible perpetrator. According to the appellant, such circumstances would have required a DNA test to establish the identity of the perpetrator.

7. The appellant again argued that it was necessary to call the uncle (Miller) as a witness. He relied on ***Donald Majiwa Achilwa & 2 Others v Republic*** [2009] eKLR to argue that the law obligates the prosecution to call all necessary witnesses to establish the truth in a case, even though some of the witnesses' evidence may be adverse to its case. He argued that M featured prominently throughout the proceedings and was, therefore, a crucial witness since defilement was allegedly committed in his presence.

8. On sentence, it was argued that the life sentence imposed was harsh. He relied on ***Francis Karioko Muruatetu & another v Republic*** [2017] eKLR, which declared mandatory sentences unlawful. He urged the court to allow his appeal, quash the conviction and set aside the sentence.

9. Miss Ireri, learned prosecution counsel also relied on her written submissions dated 30th October, 2020 and filed on 1st December, 2020. It was argued that the prosecution proved its case beyond reasonable doubt; that the evidence of PW5 established penetration; that the age of the complainant was assessed as 8 years, that the complainant stated that he was 8 years old, and also the evidence of PW2. It was further argued that identity of the perpetrator was established. According to the prosecution counsel, the appellant lived in a house opposite that of the complainant's aunt and the complainant and his brother used to go watch movies in the house the appellant was staying. She urged that this appeal be dismissed.

10. I have considered this appeal, submissions and the decisions cited. I have also considered the impugned judgment and the trial court's record. This being a first appeal, it is the duty of this court, as the first appellate court, to reevaluate, reanalyze and reconsider the evidence afresh and come to its own conclusion on it. The court should also bear in mind that it did not see the witnesses testify and give due allowance for that. (See ***Okeno v Republic*** [1972] EA 32).

11. In ***Kiilu& Another v Republic*** [2005]1 KLR 174, the Court of Appeal held that:

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of

hearing and seeing the witnesses."

12. In ***Kamau Njoroge v Republic*** [1987] eKLR, the Court of Appeal also stated:

> ***"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect."***

13. The Supreme Court of India underscored this duty in ***Garpat v State of Haryana*** (2010) 12 SCC 59, stating that:

> ***"The first appellate court and the High court while dealing with an appeal is entitled and obliged as well to scan through and if need be re-appreciate the entire evidence and arrive at a conclusion one way or the other."***

14. PW1, the complainant, testified on oath after voire dire examination, that in December, 2017 he went to visit his aunt together with his mother and siblings. Their Uncle, M, also joined them after schools had closed. M used to go to the appellant's house. One day he (AK) went to the house with his younger brother where they watched movies. The appellant suggested that they have sex but the witness refused. As he was leaving, something tripped him and he fell down. The appellant covered his mouth, put him on the bed, tied his hand with a black tape, undressed him and sodomised him. When he was eventually untied, he went to the toilet, wiped himself with tissue and went away. The appellant threatened him that he would beat him if revealed to anyone what had happened.

15. The appellant again sodomised him another day and when he went home, his mother asked him why he was not happy but he said nothing. She washed him and saw something on his back. She asked him what it was but again he said nothing. He however later told her what the appellant had done to him. She took him to hospital. The appellant in all sodomised him on three times. In cross-examination, the witness stated that on the first day he went with M to watch a movie at the appellant's place and the appellant asked him to go so that he could sodomise him. He stated that he feared to tell his mother what had happened.

16. PW2 SNG, mother to the complainant, testified that on 5th December, 2017 she visited her sister (PW3) with her children, including the complainant. On 22nd December, 2017 after lunch, she noticed that PW1 was quiet and sad. He had gone to the toilet and stayed longer than usual. She followed him and he told her that he was unable to pass stool. She saw white a substance on him and when she asked him what it was, he declined to tell her what had happened. Later at night, she woke up PW1 and threatened to throw him down the balcony if he did not tell her what she had seen on him. That was when opened up and he told her that the appellant had sodomised him. She woke up her sister and they went to the police station to report the matter. They were asked to take PW1 to hospital where he was admitted from 23rd to 27th December, 2017. He was still on medication at the time of her testimony on 29th November, 2018. In cross-examination, she told the court that a part from the complainant and M, there was no other man in her sister's house. The complainant lived alone in the house and she had come with her children came to Kitengela on 6th December, 2017.

17. PW3, LKK, aunt to the complainant, testified that on 5th December, 2017 PW2 and her children as well as M visited her. M left on 23rd December, 2017. The appellant had also come to visit a neighbour who had moved to that house in November. On 23rd December, 2017, the complainant looked sad and had lost appetite. PW2 woke her up at about 3 a. m and informed her what the complainant had told her. They went to the police station from where they were referred to the hospital. PW1 was admitted. According to the witness, PW2 forced the complainant to tell her what had happened to him. In cross-examination, the witness stated that Miller left for Samburu on the morning of 22nd December, 2017.

18. PW4 No. 61248 IP, Margaret Wanjira of Kitengela police station, gender office, testified that on 23rd December, 2017 she found a report of defilement of a child aged 8 years. The complainant was taken to hospital and was admitted. A P3 form was issued to him and was filled on 24th December, 2017. Age assessment done on the complainant found he was 8 years old. The appellant was arrested and charged. He produced the age assessment as PEX 5.

19. PW5 Dr. Geoffrey Wagura, who had previously worked at Kajiado County Referral hospital, testified that he had a PRC for the complainant that was filled on 24th December, 2017 at Nairobi Women Hospital Kitengela branch. On examination on 23rd December, 2017, there were bruises on external anus, bruise on the base about 3.0 cm. There were bruises at 11.00 and 1 o'clock anterior position and 6 o'clock posterior position. He signed the form which he produced as PEX 2. He also filled the P3 form on 24th December, 2017 and produced it as PEX 3. In cross-examination, the witness stated that the victim said the act had taken place on 21st December, 2017

20. When put on his defence, the appellant gave a sworn testimony and denied committing the offence. He stated that he travelled to Nairobi on 6th December, 2017 and went to stay with his cousin in Kitengela. He met M who lived opposite their house and M used to visit them with two children. He also met the complainant's mother who used to call them for lunch. The complainant's father was a friend to his cousin and would visit them once in a while. He told the court that he heard a commotion in PW3's house and the following day, the complainant's father went to their house and told his cousin that the complainant's mother had an affair. The appellant confirmed that he had heard about it. The following day PW2 asked him what he had told the complainant's father and she cautioned him. The following week, the complainant's aunt told the security guard to lock him into the room. He heard her tell someone "we have arrested him." Police came, arrested him and took him to the police station.

21. On 26th December, 2017 he recorded a statement and DNA samples were taken from him. In the meantime, M had travelled to Samburu on 22nd just before he had been cautioned. He was charged with the offence. He denied committing the offence and maintained that he was framed up because he had disclosed PW2's affair.

22. The trial court considered the above evidence and was satisfied that the appellant had committed the offence. It convicted him as charged prompting this appeal. The court stated:

> ***"The medical report produced in court by PW5, Dr. Geoffrey Wagura indicate***[s]***, that the complainant sustained bruise injuries to his anus. There were tears at 11.00 o'clock and 1 o'clock anterior position of his anus. Penetration is therefore proved by this evidence. It is also the evidence of PW2 that the complainant was not able to pass stool normally. He had a lot of pain while passing stool. He also looked sad and socially withdrawn.***
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> ***Identification of the perpetrator is also water tight. Accused lived alone in the house opposite that of the complainant's aunt. It is not in issue that the child used to watch video in the accused (sic) house while accompanied by his uncle or young brother. The accused admits the same.***
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> ***The accused (sic) defence of frame up is an afterthought because he did not ask any question at cross examination on PW2 whom he alleged to have framed him up. PW2 said he was with the sister and a brother m when they visited PW3. PW3 said she lived alone in the house. The evidence of husband to PW2 or 3 does not feature anywhere in the evidence on record. I dismiss the defence. I find the prosecution has proved their case beyond reasonable doubt."***

23. It is this finding that the appellant has faulted. He has blamed the trial court for holding that the prosecution had proved its case beyond reasonable doubt.

24. I have considered the appeal and reevaluated the evidence on record. There is no denial by the appellant that the complainant was defiled. As correctly stated by the trial court, the fact of defilement is clear from the evidence of the complainant, PW2 and PW5, the doctor. The question as I understand it from the appellant's grounds of appeal and submissions, is the identity of the perpetrator of the crime.

25. The appellant's case was that M who lived in PW3's house used to visit the house he was staying in with two children. The appellant therefore faulted the trial court for finding that he had been properly identified as the one who committed the crime because he lived alone in the house opposite that of the complainant's aunt. According to him, this was an insufficient ground for concluding that he must have been the perpetrator of the crime. He also argued that the trial court did not state that it believed that the complainant was telling the truth and record reasons for that belief as required by section 124 of the Evidence Act.

26. Sexual offences ordinarily require corroboration. However, the proviso to section 124 allows a court to convict on the sole evidence of a victim of sexual assault if it believes that the witness is telling the truth. The section provides:

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:***
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> ***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"*** (emphasis)

27. The proviso allows a conviction if for reasons to be recorded, the court believes the victim is telling the truth. The trial court stated that the identity of the perpetrator was clear because the complainant used to go to the appellant's house where he was alone.

28. In ***Martin Okello Alogo v Republic*** [2018] eKLR, it was held that before convicting an accused person on the evidence of a single identification witness, the trial court should warn itself on the possibility of mistaken identity. It is true that only the complainant testified on the fact that it was the appellant who defiled him which the trial court believed. Although the court did not state that it believed the truth of the complainant's testimony, it could only convict the appellant because it believed his evidence. It would have been proper for the trial court to state that it believed his evidence and warn itself of the danger of convicting on that evidence alone regarding the attacker. However, failure to do so did not, in my view, cause the appellant any prejudice because the complainant knew the appellant and used to go to his house during the day.

29. The appellant also argued that since the complainant lived with M and would accompany him to watch movies in the house he lived in, M was a possible suspect. He questioned why he left on 22nd December, 2017, a day before his arrest. He also wondered why the complainant opened up on the issue only after M had left. It was the appellant's argument that the complainant was pressured PW2 to disclose the incident which meant M could have been the perpetrator. Given the circumstances, he argued, a DNA test should have been conducted to establish the identity of the perpetrator. In his view, M a necessary witness who was not called and the court should have drawn a negative inference from that failure.

30. I have considered the appellant's arguments above. The evidence from both the complainant and the appellant is that the complainant went to the appellant's house in the company of M and his younger brother. According to the complainant, he was sexually assaulted in the house the appellant was staying. There was no suggestion by the appellant that the attack happened elsewhere. He has not even alleged that it was m who assaulted the complainant at his house to cast suspicion that he was aware of that M did it. His only argument was that since M used to accompany the complainant to watch movies, he could have done it. He however did not say where it could have happened, if at all.

31. The appellant merely raised an argument without laying any basis for suggesting that M could have been the perpetrator of the crime. For that reason, I do not agree that the trial court was in error for stating that his identity had been proved. The complainant explained how he was tripped and fell down after which the appellant tied him and defiled him. He may have been threatened by PW2 to reveal what had

happened to him, but that did not mean his testimony that it was the appellant who defiled him was not true.

32. The appellant again argued that it was necessary to call the M as a witness given that he had prominently featured throughout the proceedings and was, therefore, a crucial witness. There was no evidence that the complainant was defiled in M presence. I have gone through the record but could not trace where it was stated that the complainant was defiled in the presence of M.

33. It is also true that the law obligates the prosecution to call all necessary witnesses to establish the truth in a criminal case, even though some of those witnesses' evidence may be adverse to its case. In ***Donald Majiwa Achilwa & 2 Others v Republic*** [2009] eKLR it was held that the prosecution has an obligation to to call all necessary witnesses to establish the truth in a case, even if evidence of the witnesses may be adverse to its case.

34. I am unable to agree with the appellant that failure to call m was fatal to the prosecution's case. As already adverted to, there was no mention that M knew about the defilement which would make failure by the prosecution to call him as a witness lead to an adverse inference to its case. Had there been such evidence, he would have become a material witness and failure to call him would easily lead to an adverse inference. That however is not the case here.

35. The appellant further argued that PW2 framed him up because he had reported her to the complainant's father for her unfaithfulness and she had warned him about it. According to the appellant, that was what led to his arrest and prosecution. The trial court dealt with this aspect in its judgment and concluded that the defence of frame up was an afterthought because the appellant did not ask any questions on that issue when he cross examined PW2. She found no evidence of a husband to either PW2 or PW3 anywhere in the evidence on record**.**

36. I have reevaluated the evidence on record and found no record of questions on whether there was a husband in PW3's house where PW2 and her children as well as M were guests. I am unable to agree with the appellant that PW2 could have framed him up on that ground.

37. From what I have stated above, having gone through the record, considered the evidence and the trial court's finding of fact. I am unable to fault it in any respect. The Appeal on conviction is therefore dismissed.

38. Regarding sentence, the appellant argued that the life sentence imposed against him was harsh and against the principles established in ***Francis Karioko Muruatetu & another v Republic*** *(supra)* which declared mandatory sentences unlawful. It is true that the trial court sentenced the appellant to the maximum and only sentence provided for.

39. In the **Muruatetu case**, the Supreme Court held with regard to section 204, a mandatory sentence, that:

> ***"[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right."***(emphasis)

40. The trial court ignored this principle when it imposed life sentence against the appellant. The court also failed to consider the appellant's mitigation that he was a student. It never made any comment about this mitigation. Consequently appeal against sentence is allowed.

41. The record also shows that the appellant was arrested on 27tth December 2017. He was however released on bond and was out during trial.

42. In the end, appeal against conviction is dismissed. Appeal against sentence is allowed. The life sentence imposed against the appellant is hereby set aside. Taking into account the appellant's age and the fact that he was a student when he was arrested and charged, he is hereby sentenced to seven (7) years imprisonment.

Dated, signed and delivered at Kajiado this 22nd day of January, 2021.

E.C MWITA

JUDGE