REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL APPEAL NO. 25 OF 2020

MAXWELL MANGALA BULUMA *alias* **BOI.....APPELLANT**

VERSUS

REPUBLIC.....RESPONDENT

(*From original conviction and sentence by Hon C.C. Oluoch (CM) in the Senior Principal Magistrate's Court at Mavoko in* ***Criminal Case Number (S O) 24 of 2018*** *vide judgement delivered on 24.1.2020*)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

MAXWELL MANGALA BULUMA *alias* **BOI.....ACCUSED**

JUDGEMENT

1. The Appellant herein, **MAXWELL MANGALA BULUMA alias BOI**, a main charge of the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. The alternative charge was in respect of the offence of committing an indecent act with a child contrary to section 11(1) of the said Act. He was convicted on the main charge and on 10.2.2020 he was sentenced to serve thirty (30) years' imprisonment.

2. Being dissatisfied with the said conviction and sentence, the appellant raised the following grounds as supplemented where he challenged the trial magistrate for: -

a) Failing to summon essential witnesses.

b) Failing to find that there were no independent corroborative witnesses.

c) Failing to comply with section 169(1) of the CPC.

d) Convicting him yet the prosecution case was not proven beyond reasonable doubt.

e) Denying the appellant, a chance to cross examine the complainant,

3. The court was urged to allow the appeal and that the appellant be retried.

4. The appellant submitted that penetration was not proven; that identification was not proven. The appellant took issue with the failure of Mama Kijana to testify and cited the case of **Bukenya & Others v Uganda (1972) EA 549**. The appellant faulted the trial magistrate for failing to consider the appellant's defence of alibi. While appreciating the provisions of section 124 of the Evidence Act, it was submitted that the court failed to give reasons why it believed the complainant. Reliance was placed on the case of **John Mutua Munyoki v R (2017) eKLR**. It was submitted that the court ought not to order a retrial because though the appellant was denied a chance to cross examine the

appellant, a retrial would occasion injustice to him. Reliance was placed on the case of **Muiruri v R (2003) KLR 552**.

5. In reply, counsel for the prosecution conceded to the appeal. It was submitted that the failure to allow the accused a chance to cross examine the complainant (Pw2) was fatal and in placing reliance on the case of **Nicholas Mutula Wambua v R Criminal Appeal 373 of 2006** the court was urged to order a retrial.

6. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo v Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held 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".***

7. In support of the prosecution case, there were four witnesses lined up. **Pw1** was **JK**, the victim's mother who tendered in court the birth notification of the victim and told the court that when she was washing the victim, she informed her that she was feeling pain in her private parts. She testified that Pw2 informed her on Sunday that Boyi defiled her and she took the child to hospital for examination and later reported the matter to the police station.

8. Pw2 was the victim and after a voir dire was conducted the court permitted her to give unsworn evidence. She testified that the appellant defiled her and that she had felt pain. There was no cross examination.

9. **Pw3** was **Pc Maryann Miako** who testified that a defilement case was reported to her by the mother of the victim who presented a birth notification. She testified that the appellant was identified as the perpetrator and that he was arrested.

10. **Pw4** was **George Njuguna**, a clinical officer from Nairobi Women's Hospital who testified that the victim was examined by Ken Miriti, whose handwriting he was familiar with. He testified that the examination revealed that the victim's hymen was broken and the P3 form was tendered in evidence and marked Pexh3.

11. The trial court found that the appellant had a case to answer and was put on his defence. He opted to give sworn evidence and called four witnesses. He testified that in August 2018 he went for a funeral at home; that he travelled on 17.8.2018 and returned on 3.9.2018. He testified that on 3.10.2018 he was arrested by the police.

12. **Dw2** was **JN**, the appellant's grandmother who testified that she was with the appellant at the funeral.

13. **Dw3** was **JO** who testified that she is the appellant's mother and that on 17.8.2018 she travelled with him for a burial and arrived on 18.8.2018; that the burial was on 19.8.2018. She testified on cross examination that the appellant arrived home on 18.8.2018 in the morning and could not remember when he travelled back to Nairobi.

14. **Dw4** was **Johnstone Buluma**, an elder brother to the appellant. He testified that the appellant left home on 17.8.2018 alone and that the burial of the family member was on 18.8.2018. He testified that he used to find the appellant in Mama Jane's home and in cross examination he testified that the complainant's mother was a friend to the appellant.

15. **Dw5** was **Joab Opemi Wakiaga** who testified that the appellant is his son. He told the court that the appellant boarded a vehicle on 17.8.2018 and arrived home on 18.8.18 in the morning. He testified that he heard that the appellant had been arrested for defiling a neighbour's child.

16. I have considered the evidence presented before the trial court and the grounds of appeal as well as the submissions of the appellant and the respondent's counsel. I find the following issues necessary for determination namely: -

> ***a. Whether the alibi raised by the appellant cast doubt in the prosecution case.***
>
> ***b. Whether there were procedural infractions that would vitiate the trial.***
>
> ***c. What orders may the court make?***

17. On the issue of the appellant's defence, where an accused raises the defence of alibi he has no duty to prove it. The duty lies on the prosecution to disprove a defence of alibi and place the accused at the scene of crime as the perpetrator of the offence (see **Ssekitoleko v Uganda (1967) EA 531**). To disprove the defence of alibi raised by the appellant, the prosecution relies on the testimony of P.W.2 who was the victim. Where prosecution is based on the evidence of an identifying witness under difficult conditions, the court must exercise great care so as to satisfy itself that there is no danger of mistaken identity (see **Abdalla Bin Wendo and another v. R (1953) E.A.C.A 166; Roria v. Republic [1967] E.A 583**). In the instant case the victim knew the appellant as they were neighbours and it seems that the fact that they knew each other was used to pin him down. I am not convinced that the sexual act took place between the appellant and the victim on the material day as the appellant's witnesses evidence is in agreement that on the 18.8.2018, the appellant had gone for a burial. The prosecution failed to dislodge the said alibi.

18. On the issue of procedural infractions and their effect, the appellant pointed out and I note that there was no cross examination of Pw2.

19. It is trite law that a defendant has a right to cross examine a witness. This is stated in the proviso to section 150 of the Criminal Procedure

Code that states

> ***"Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness."***

20. In addition, section 302 of the same Code states as follows;

> *302. Cross-examination of witnesses for prosecution*
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> *The witnesses called for the prosecution shall be subject to cross-examination by the accused person or his advocate, and to be re-examination by the advocate for the prosecution*

21. The Court of Appeal in the case of Gailord **Yambwesa Landi v Republic [2019] eKLR** was faced with a similar issue and it rendered itself thus;

> *"In the case of **Nicholas Mutula Wambua vs Republic, MSA CRA No. 373 of 2006**, this Court cited with approval the decision of the Supreme Court of Uganda in Sula vs Uganda [2001] 2 EA 556 thus;*
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> *"The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross-examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined.... It would appear that misconception arises from a view that because accused persons are not cross-examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined".*
>
> *And recently, in the case of **Paul Kinyanjui Kimauku vs Republic [2016] eKLR**, this Court whilst addressing a similar issue further observed thus;*
>
> *"…the record reveals that following the evidence of G that was unsworn, the appellant was not given the opportunity to cross-examine the witness. This was a clear violation of the appellant's right to a fair trial. Under Article 50(2) of the Constitution, every accused person has a right to a fair trial. This includes the right of an accused person to challenge the prosecution evidence through cross-examination. Therefore, an accused person is entitled to cross-examine any person who testifies as a prosecution witness. This is so even in the case of a minor witness giving unsworn evidence. A witness including a minor witness, unlike an accused person has no right to refuse to answer questions or not to be subjected to cross-examination. Thus, there is a clear distinction between an accused person who opts under Section 211 of the Criminal Procedure Code to give unsworn evidence in his defence, and a minor witness who gives unsworn evidence as the latter must be cross-examined."*
>
> *……DK testified as PW2 and gave unsworn evidence. The record further shows that after DK testified, the appellant did not cross-examine her, but instead, the court went on to hear the evidence of PW 3, without either DK or her mother who was the court appointed intermediary being subjected to cross examination by the appellant.*
>
> *Clearly there was a misstep or omission on the part of the trial court. It was the appellant's right to test the child's evidence through cross examination. In this case the court had appointed an intermediary to assist the child. Having made such appointment, there was all the more reason for the trial magistrate to ensure that DK's evidence was subjected to cross examination. The election on whether to cross-examine or not is the prerogative of the accused and not of the witnesses or of the court. And the record does not show the appellant was afforded the opportunity and elected not to cross examine the child. In view of this apparent lapse in the trial process, we are satisfied that the appellant was not afforded a fair hearing, which was contrary to the stipulations of the Constitution and the law.*

22. I have come to a conclusion that there was infraction in taking Pw2's evidence as it was not subjected to cross examination. Learned counsel for the Respondent has sought for an order for a retrial. I am convinced that there is doubt in the evidence against the appellant. I would then have to consider whether or not to order a retrial.

23. As was stated in the case of **Ahmed Ali Dharmsi Sumar vs Republic 1964 E.A 481** and restated in **Fatehali Manji vs The Republic 1966 E.A. 343**:-

> ***"In general a re-trial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the Prosecution to fill up gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial Court for which the Prosecution is not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to the accused person."***

24. The Court of Appeal in the case of **Mwangi v Republic [1983] KLR 522 held** as follows;

"…several factors have therefore to be considered. These include:

1. A retrial will not be ordered if the conviction was set aside because of insufficient evidence.

2. A retrial should not be ordered to enable the prosecution to fill up the gaps in its evidence at the first trial.

3. A retrial should not be ordered where it is likely to cause an injustice to the accused person.

4. A retrial should be ordered where the interest of justice so demand.

Each case should be decided on its own merits."

25. I am not satisfied that the prosecution evidence against the appellant would sustain a conviction, despite the infraction on the taking of evidence of Pw2. I find a retrial would not serve the interests of justice in view of the fact that the prosecution did not manage to dislodge the appellant's alibi coupled by the fact that the appellant had not been accorded an opportunity to cross examine Pw2. A retrial ought not to be allowed if the same will enable the prosecution to fill up gaps in their case against the appellant. As doubt has already been created, then the benefit of the same ought to be given to the Appellant in any event.

26. In the result, it is my finding that the Appellant's appeal has merit. The same is allowed. The conviction is quashed and the sentence is set aside. The Appellant is ordered to be set at liberty unless otherwise lawfully held.

It is so ordered.

Dated and delivered at Machakos this 19th day of January 2021.

D. K. Kemei

Judge