**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 75 OF 2018**

**GM.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the decision and judgment of the Honourable A. Ndung'u, Resident Magistrate,*

*delivered on the 29th day of September 2017 in Shanzu, Sexual Offence Case No. 34 of 2016).*

**J U D G M E N T**

1. GM the appellant herein was aggrieved by the judgment delivered on 29/9/2017 Shanzu PM's Court Sexual Offence Case 34 of 2016 by Hon. A. Ndung'u (RM) where the appellant was convicted and sentenced to serve life imprisonment.

2. The grounds of Appeal in petition filed herein are stated as follows:-

**(i) That the trial Magistrate erred in law & fact in convicting the appellant to serve 15 years imprisonment without conducting a proper voire dire inquiry.**

**(ii) That the learned trial Magistrate erred in law & fact in convicting and sentencing the appellant relief on the insufficient evidence of a minor.**

**(iii) That the learned trial Magistrate failed to see that this appellants arrest had no connection with the offence at hand.**

**(iv) That the learned trial Magistrate did not consider that the arresting officer did not testify in court to prove the same allegations, failure to which was a miscarriage of justice.**

**(v) That the learned trial Magistrate erred in totally rejecting the appellant's sworn defence which was strong and the truth**.

3. In amended grounds of appeal filed on 27th October 2020 the appellants grounds were stated as:-

**(i) That the learned trial Magistrate erred in law and fact in convicting the appellant by failing to consider that crucial witnesses were not called to testify.**

**(ii) That the learned trial Magistrate erred in law & fact by ignoring the numerous inconsistencies and contradictions in the prosecution evidence.**

**(iii) That the learned trial Magistrate erred in law & fact by failing to consider that the source of arrest was not proved and poor investigations.**

**(iv) That the learned trial Magistrate erred in law and fact by failing to consider the defilement case was not proved beyond any reasonable doubt.**

**(v) That the learned trial Magistrate erred in law & fact by failing to consider appellants sworn defence and mitigation.**

**(vi) That the learned trial Magistrate erred in law & fact when he failed to consider section 109 of the Evidence Act and Section 199 of the Criminal Procedure Code.**

4. The charge against the appellant was contrary to Section 20(1) of the Sexual Offences Act No. 3 of 2006. Particulars were that Gwaya Mrema on the 22nd day of March 2016 at [particulars withheld] area in Kisauni Subcounty within Mombasa County intentionally caused his penis to penetrate the anus of SLL a child aged 9 years who to his knowledge was his stepson.

5. In the alternative the appellant was charged with offence of committing an indecent act with a child contrary to Section 11(i) of the Sexual Offences Act No. 3 of 2006.

6. The prosecution's case was that PW 3 herein, the mother of the complainants suffered an epileptic fit on the 22nd March 2016, the Appellant who was her husband and step father to the complainant's took advantage of her loss of consciousness and got out of the bed in their one roomed house and went to where the 2 complainant's were sleeping on a mattress on the floor and undressed PW 2 and defiled her and also inserted his penis in the anal area of PW 1 who felt pain and cried out and that startled PW 3 who came to find the appellant lying naked where the 2 children were lying on the floor.

7. PW 3 raised alarm and called neighbours after which she went to report to the police at Nyali Police Station and they were referred to Coast Provincial General Hospital where Dr. Muindi examined them and filed P3 forms which Dr. Tima Nassir PW 5 produced as P3 (a) & (b) PRC form. PW 5 examination on PW 2 established her hymen was broken. PW 1 had an anal healing scar at 6' O'clock.

P3 form for PW 1 – Exp 2.

P3 form for PW 2 – Exp. 1

PRC form for PW 2 – Exp. 4

PW 5 testified that the children were examined on 24th March 2016.

8. PW 4 P.C. Virginia Wanjiku conducted investigations and when the appellant who was at large was arrested by members of public on 31/3/2016 he was arraigned in court and charged.

9. The appellant was placed on defence and he said that PW 3 went to where he was digging a well at 9.00am on 31/3/2016 with a letter which the village elder took a motorcycle which was used to escort him to the police station.

10. That PW 3 went to bring the children and on return he was placed in the cells and on 1/4/2016 he was taken to court. He said he had been in remand since he was arrested and he didn't know if his 6 children were going to school. He said he used to dig wells for a living and use the income to provide for his wife and children.

11. In cross examination, appellant said that PW 3 had been his wife for 4 years and that he had raised PW 1 and PW 4 although they were not his biological children. He said they lived in a one bedroom house with only one door. He said he used to sleep on a mattress on the floor with PW 3 while the children slept on the bed. He said he didn't sleep with the children on the mattress on the floor. He said PW 1 and PW 2 were taught to lie by FIDA.

12. This appeal was canvassed way of written submissions. The appellant's submissions were that the village elder who originated his arrest did not testify. He also argued that the other crucial witnesses who did not testify and who were said to have been peeping during the time the offence was committed were Mama S and Mama N. The appellant questioned why the neighbours didn't arrest him instantly.

13. The appellant argued that the evidence of PW 1 & PW 3 was contradictory and that he was fabricated because he withdrew his support for the children of PW 3. He submitted that PW 3 actions in having her charged was malicious. He relied in the case of **Mwakalu Mwanzegele Mtenzi vs Republic CR. Appeal No. 9 of 2018 and Bukenya vs Uganda (1972) E.A. 549** to support his stand/position that:-

**"Prosecution is duly bound to make available all witnesses to establish the truth even if their evidence may be inconsistent to its case otherwise failure to do so may in unappropriate case lead to appropriate case lead to reference that the evidence of uncalled witnesses would have tended to be adverse to the prosecution".**

14. The appellant also submitted that source of arrest was not proved and investigations were poor. He said he was with the village elder everyday and if he committed the offence on 22/3/2016 he should have been arrested immediately. He said the investigating officer didn't also visit the scene of crime or investigate the neighbours and the village elder to prove allegations. He contended that this amounted to miscarriage of justice.

15. The appellant further argued that the offence of defilement was not proved beyond all reasonable doubt and that merely having hymen broken is not proof of defilement. He said from evidence on record PW 2 said she was not taken to hospital and that the children were only taken to the hospital for purposes of filing PRC and P3 form after 2 days of alleged offence.

16. He said the 2 children were coached to incriminate him. He said that he stopped supporting PW 3 when he found her in the house with another lover. He said if there was penetration into PW 2's genital organ she could have suffered a tear.

17. The appellant also asked the court to consider his sentence in regard to the Francis Muruatetu petition as well as petition No. 24 of 2019 –

Yusuf Shunzu vs Republic. The appellant submitted in ground (4) that the prosecution case was full of contradictions and inconsistencies that rendered the prosecution case weak, incoherent and unreliable in a court of law.

18. He referred to evidence of PW 1 & PW 2 as opposed to PW 3 as to time of offence and whether PW 3 was in the house sleeping when offence occurred or whether she was chatting with other woman outside the house. He also said that it was not clear what PW 2 said was used to penetrate her vagina whether 'vijiti', fingers or penis. He said whereas PW 1 & PW 2 said the incident happened on only one day the P3 indicates it was diverse dates.

19. He said this is an indication that he was being fabricated. He said their P3 the doctor indicated that there were no exhibits e.g. clothes or beddings with blood stain. He said the doubt and incredibility has been raised in prosecution case and it was done due to mischief by his arresters.

20. He argued that he gave sworn defence which was truthful. He said that at the time of alleged offence he had separated from PW 3 and was living elsewhere and that is why they looked for him at his place of work. He said his mitigation was also not considered.

21. The Respondents in submissions opposed the appeal. The prosecution argued that the degree of consanguinity was proved between PW 1 & PW 2 and the appellant. PW 3 confirmed she had lived with the appellant as wife and husband and the appellant in his defence confirmed that PW 1 & PW 2 were his children as he raised them up to for 4 years when he cohabited with their mother PW 3. That under Section 22(1) of Act No. 3 of 2001 half father is considered to be within the prohibited degrees of consanguinity.

22. The Respondent also argued that penetration on both PW 1 & PW 2 was corroborated by the Medical evidence – PRC form and P3 form where it was established PW 1 had a healing scar at 6 O'clock in the anal orifice and that PW 2's hymen was broken. That the trial court found that the medical evidence corroborated the evidence of PW 1 & PW 2 that they were defiled.

23. It was submitted that the appellant was identified positively as the perpetrator of the offence and the trial Magistrate evaluated the defence alongside prosecution evidence and properly concluded that appellant committed the offence. That the trial Magistrate also weighed the evidence of the appellant that PW 1 & PW 2 were coached to fabricate him and said that he had opportunity during cross examination of PW 1 & PW 2 to show the children had been coached by Fida but he didn't do so. The trial Magistrate concluded that the allegation that the children were coached was an afterthought and baseless.

24. The prosecution also argued that the village elder, Mama S and Mama N whom the appellant claimed were not called to testify were not material witnesses and that section 143 of the Evidence Act empowers the prosecution to call as many or as little number of witnesses needed to prove a certain fact. It was argued that the appellant acknowledged he was arrested by the village elder and that no negative inference can be imputed by the failure of calling the said village elder.

25. On sentencing the Respondent submitted that Section 20(1) of the Sexual Offences Act provides for imprisonment for a term not less than ten years. The appellant was however sentenced to suffer life imprisonment considering gravity of the offence. The Respondent relied in the holding in ***Charles Ndirangu Kibue vs Republic [2016] eKLR*** where it was held that sentencing is discretion of the court. It was argued that the sentence by the trial court was neither harsh nor excessive and the same was within the law.

26. That there was no reason to disturb, the sentence considering the fact that PW 1 on top of being left with lifelong psychological scars has been left with a physical scar as a reminder of the beastly act of the Appellant. The Respondent urged that the appeal be dismissed.

**Determination**

27. This being a first appeal this court as held in the case of **Kiilu & Another V. Republic [2005] 1 KLR 174** has an obligation to re-evaluate and re-look at the evidence in the trial court afresh and consider whether the trial magistrate's decision was based on the principles of law and on evidence.

28. The burden of proof in criminal cases is beyond reasonable doubt as was held by Lord Denning in **Miller v Minister of Pensions [1947] 2 ALL ER 372 – 373** as follows:

> **"That degree is well settled. It needs not reach certainly, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favour which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice."**

29. In our criminal justice system, an accused person has no duty to prove anything on allegations that are criminal in nature and brought against him or her by the state. The burden of proof lies solely on the prosecution except in instances where there are admissions by the accused person.

**Failure to call crucial witnesses to testify**

30. The appellant contended that the prosecution failed to call crucial witnesses to testify. Reliance was placed in the case of **Mwakalu Mwanzengele Mtenzi-vs-Republic**. The prosecution on the other hand, submitted that the witnesses referred to by the appellant were not material witnesses in the case. I have perused the record and find that there is no indication of whether the people referred to by the appellant recorded their statements at the police station and therefore the court cannot force the prosecution to call witnesses who did not form part of the witnesses they intended to rely on. This case is not similar to the one relied to by the appellant in his submissions.

31. In **Alex Kinyua Murakaru v Republic [2015] eKLR** the court relied in Section **143** of the Evidence Act which provides as follows:-

> ***"No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact"***

32. The court went on and relied in ***Julius Kalewa Mutunga vs Republic*** the Court of Appeal held as follows:-

> ***"…As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive"***

33. The court in **Alex Kinyua Murakaru v Republic supra** also relied in ***Paul Mwangi Gathongo Vs Republic*** **[12] this court observed as follows:-**

> ***"But in the same vein the court was categorical to state that the prosecution is not expected to call a superfluity of witnesses. The adverse inference will only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly it will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case. My re-evaluation and analysis of the evidence submitted in the lower court concludes that this is not a proper case for the court to make an adverse inference because as concluded below, the evidence tendered was sufficient to prove the facts in issue***

34. I therefore agree with the finding in the aforementioned case and find that there is no basis to draw an adverse inference on the failure by the prosecution to call the said persons referred to by the appellant as witnesses.

**Source of arrest not proved and poor investigations**

35. The appellant contended that the source of arrest in this matter was not well established to have any connection with the offence in question. He further stated that the village elder had previously told him that his ex-wife was complaining he had stopped supporting her.

36. The issue of maintenance of PW 3 as reason why he was arrested, issue of him finding PW 3 with a man in the house was deemed untrue during cross examination of PW 3. The issue of why and when he was arrested. After perusal of the record, I find that these issues did not come out in the appellant's defence and/or cross-examination of the prosecution witnesses in the trial court.

37. If the appellant had an issue with his arrest, it would have come out in his defence, PW 3 said that the appellant disappeared immediately after the incident when they went to report to the police thus explaining the need for the police to first trace him and thereafter arresting him.I find that the appellant is trying to introduce new evidence at this stage and therefore the appeal fails on this ground.

**Whether there were numerous inconsistencies in the prosecution evidence**

38. I am guided by the provisions of **Section 124 of the Evidence Act** which provides as follows;

> **"Corroboration required in criminal cases**
>
> **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:**
>
> **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."**

39. Pw 1 testified that the said incident happened in the evening when he was sleeping with PW 2 on the mattress and their mother was outside telling stories. PW 2 on the other hand testified that the incident happened at night when she was sleeping with PW 1 and their mother was outside telling stories. The question that comes to mind now is at what time this offence occurred. PW 3 stated that the offence happened at night at around 09.00 p.m. when they were sleeping. I find that the evidence of PW 1, 2 and 3 were clear and consistent as was observed by the learned trial magistrate in his judgment.

40. PW 3 and appellant were living in a one roomed house with PW 1 & PW 2. As much as there is inconsistency in time, the offence occurred on same night as narrated by PW 1, PW 2 and PW 3. PW 3 stated that she was woken up by a scream by PW 1 and she found the appellant lying on the mattress on the floor where the children were sleeping, he had tied a lesso around his waist. Medical evidence confirmed the allegations by PW 1 & PW 2 and the fears of PW 3 that appellant defiled the children. That if the children were coached, medical examination should have fund the children were not defiled. I therefore find that the inconsistency in time was not fatal.

**Were the minors defiled**

41. That PW 1 testified that he is 9 years old and on 22nd March, 2016 he was in the house sleeping together with his sister PW 2 in their one roomed house. At this time, his mother was outside telling stories with other people. He went further to state that PW 1 and PW 2 slept on a

mattress on the floor while PW 3 and the appellant slept on the bed and there was no curtain separating where they slept rom where their parents slept.

42. PW 1 stated that he woke up suddenly and found the appellant where PW 2 was and he tried and continued to sleep. It was also PW 1's evidence that the appellant then went to him and put something in his anus, he however did not know what the appellant put in his anus but he felt pain behind. It is the evidence of PW 1 that when his mother came, he told her that he was feeling pain in his anus. He stated that he was asleep when the appellant did it, he screamed then his mother came with the neighbor and the appellant wore his clothes in a hurry.

43. PW 2 on the other hand stated that in March, 2016 she was sleeping on the mattress on the floor together with PW 1 when her clothes were removed by the appellant, then the appellant also removed his clothes and he did tabia mbaya in her vagina. She stated that the appellant used the thing he uses to urinate here in front and she felt a lot of pain. She told her mother what had happened. She also stated that no one else has done tabia mbaya to her and that the appellant did it one time.

44. It was the evidence of PW 2 that the incident took place at night. PW 3 stated that on 22nd March, 2016, at around 08.00 p.m. she was asleep in her house together with PW 1, PW 2 and the appellant. She stated that she is epileptic and she had an epileptic fit. She states that around 09.00 p.m. the children started crying when she woke up, the accused was down where the children were sleeping and there was no lighting in the room. She switched on a tin lamp and saw the appellant on the floor with only a lesso around his waist. She states that PW 1 who started crying first had no clothes on and was lying on his stomach and the appellant ws inserting his penis in the child anus and PW 2 was lying naked next to them. She decided to call the neighbors and report to the village elder.

45. That when she talked to PW 1, he told her that the appellant was defiling him through the anus and PW 2 told her that the appellant inserted sticks in her vagina and on further inquiry, she said the appellants fingers.

46. PW 4 Dr. Tima Nassir a medical officer at Coast General Provincial Hospital produced the P3 form and PRC form for PW 2 as Prosecution Exhibit 1, & 4. Dr. Tima Nassir testified that the general medical history alleges that PW 2 was defiled twice by the appellant. She also testified that the approximate date of injury was 6 months before filing of the P3. That from the P3 she could see that from examination of genitalia, PW 2's hymen was broken with scar formation.

47. That in light of the above, I find that it is clear that the children were defiled and the prosecution proved this beyond any reasonable doubt, therefore the appeal fails on this ground.

**On sworn defence and mitigation**

48. I find that in his defence, the Appellant testified that he knows PW 1 and PW 2 as children he has raised. It was the appellant's testimony that they lived in a one room house and he would sleep on the mattress on the floor together with PW 3 while the children slept on the bed. He further testified that he did not sleep with the children on 22nd March, 2016.

49. On cross examination he stated that children can be coached to lie by those living with them. I find that the accused had an opportunity to show the trial court that the children were lying during cross examination of the minor but he failed to do so. I have gone through the record and I find that the learned trial magistrate considered the appellants defence in page 3 of the said judgment. The appellant's submission that he was separated from PW 3 and was living somewhere else that is why she had to look for him at his place of work was not raised in the appellant's defence before the trial court.

50. Section 109 of the evidence act provides that, the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. In the case before us, the prosecution proved its case beyond reasonable doubt. I will not therefore interfere with conviction of the trial court. In regards to sentence, Section 22 (1) of the Sexual Offences Act provision is life imprisonment when victim is less than 18 years. However, in consideration of Supreme Court decision in **Francis Muruatetu** petition that mandatory maximum sentences deny the court to exercise discretion in sentencing.

51. In consideration of the appellant's mitigation during sentencing hearing and appeal herein, I would find that a term of 20 years would be sufficient punishment. I therefore substitute the trial court's sentence of life imprisonment and sentence the appellant to twenty years imprisonment. Since the appellant had been in remand custody since 1.4.2016. The appeal is dismissed in its entirety. The sentence should run from 1.4.2016.

It is so ordered.

Right of appeal 14 days.

**Dated, Signed and Delivered in open court this 11th day of February, 2021**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**