REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO 61 OF 2020

PETER CHEGE KIMANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against both the conviction and sentence arising from Criminal Case No. 23 of 2016

in the Chief Magistrate's Court at Kikuyu, Hon. Z. W. Gichana and judgment delivered on 15/8/2019)

JUDGMENT

1. **Peter Chege Kimani,** the appellant hereof was charged before the Kikuyu Magistrate's Court with the offence of defilement contrary to Section 8(1) (3) of the Sexual Offences Act No 3 of 2006. He was also charged with the alternative offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.

2. After trial, before the Kikuyu Magistrate's Court, the appellant was convicted on the main charge and was acquitted on the alternative charge. On conviction the trial court sentenced the appellant to serve 20 years imprisonment. The appellant has filed this appeal against his said conviction and sentence.

3. The complainant **EWG** was two months shy of her 7th year birth day. The offence against her was committed on 22nd April 2016 and she was born, according to her birth certificate, on 22nd June 2009.

4. After *voire dire* examination by the trial magistrate EWG testified without taking an oath. The essence of her evidence was that on the material date of the offence, at night, while she was visiting her aunt L home, she went to the toilet, situated outside the house. On her way back to the house she found the appellant, whom she named Peter. EWG proceeded to narrate how the appellant took her by force to the calf's house (shed). The appellant placed his hard on her mouth and proceeded to insert his finger and then his penis into her vagina. EWG indicated by pointing out to the trial court where the vagina was. EWG then stated:

> *"I had a night dress and Peter removed my short and pant. He lifted my dress. He inserted his part of the body between my legs. He threatened to kill me if I told anyone what had transpired."*

5. EWG informed the trial court that she knew the appellant as he worked at that home of her aunt L.

6. **TWN** (PW2) (hereafter Tabitha) was employed as a house help of EWG's grandmother. EWG lived with that grandmother because she is an orphan. Tabitha was on short leave and resumed her duty on 29th April 2016. On her return and on 30th April 2016 EWG informed Tabitha that she was feeling pain in her private parts. On Tabitha inquiring what the issue was EWG began to cry. On being questioned EWG at first refused to explain why she was experiencing pain but was later open to MG (hereinafter M) PW5.

7. M, an aunt of EWG, stated in evidence:

> *"I went to his (sic) house and found EWG and I was told to look at her private parts. She was swollen. The child (EWG) told me that Peter is the person who had defiled her."* M identified the said Peter as the appellant who was before the court. Margaret on being cross examined by the appellant stated:

> *"I found the child EWG with blood. There were rushes/lacerations in between her legs. Blood was coming from her blood (sic)*

parts. I was the first one to examine the child. Her pants had blood stains."

8. EWG was examined on 1st May 2016 at Kiambu level 8 hospital. The clinical officer of that hospital on examining EWG found that she had broken hymen, lacerations around and at the vaginal opening. He estimated the age of that injury to be about 8 days.

9. EWG was also examined at Nairobi Women hospital on 30th April 2016. The medical report of that hospital showed EWG hymen was broken and there was evidence of vaginal penetration.

10. The appellant when called upon to defend himself gave sworn testimony. After testifying of how he was arrested on 30th April 2016. He stated that he worked for L (EWG's aunt) and her husband for two years. He however knew his employers even before he begun to work for them. He was employed to deliver food stuff and green groceries to customers of his boss.

11. On being cross examined appellant stated he lived one kilometer away from the home of his boss. Her confirmed he knew EWG. On the night in question appellant stated that he and his boss were out supplying their customers farm produce from 8 a.m. up to 11.00 p.m. In answer to a question the appellant stated:

"*The child (EWG) identified me as her assailant but I think she was prompted to do so."*

12. The appellant then denied that he worked for his boss daily but rather that he waited for his boss to either call him or pick him from his house. He however confirmed that, that was his daily job.

14. This is the first appellant court. The duty of this court, as such, was considered by the Court of Appeal in the case **Joseph Njuguna Mwaura & 2 others v Republic [2013] eKLR** and stated thus:

"*See **David Njuguna Wairimu V Republic [2010] eKLR** where the court, relying on the holding of the Court in **Okeno v R (supra)** held that*:

"[The duty of the first appellate court] is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."

15. The appellant filed his grounds of appeal on 11th November 2020 but through his written submissions filed on 10th December 2020, in support of his appeal, presented other grounds of appeal. I shall proceed on the assumption that the grounds of appeal previously filed are abandoned and that the appellant in its stead adapts the grounds in his written submissions. In summary those grounds of appeal require this court to find out whether the elements of the offence of defilement were present; whether the appellants rights under Article 50(2) of the Constitution were violated; whether there were crucial exhibits not produced by the prosecution; whether the trial court ignore appellant's alibi defence; whether the prosecution's case was adversely affected by contradiction in its witnesses' evidence; whether failure of EWG reporting in time affected the prosecution's case; whether the trial court failed to evaluate the evidence and relied on uncorroborated evidence; and whether the prosecution discharged its burden of proof.

13. In my discussion below I will, where convenient, combine those grounds of appeal.

14. The basis upon which the appellant argued that his Constitutional rights under Article 50(2) (j) were violated was that he was not given the prosecution's witness statements and that when a new trial magistrate took over the trial he was denied the right to recall EWG to cross examine her.

15. The appellant was arraigned before the trial court on 3rd May 2016. On that date he pleaded not guilty to both the main and the alternative charge. Thereafter his case was mentioned before the court and on 27th May 2016 when the appellant prayed for prosecution's witness statements to be availed to him. The trial court granted appellant his prayer. The case was mentioned on subsequent dates and again on 16th September 2016 the appellant prayed for prosecution to provide him with witness statement. The trial court once again granted him his prayer. After one other mention of his case the appellant's trial was ready to commence on 13th October 2016. When the prosecution informed the court, on that day, that it was ready to start the trial, appellant stated:

"Am not ready. I have not been given witness statements."

The prosecution on informing the trial that the witness who was to testify (EWG) was a minor and seeking that her testimony be heard, the trial court without Ruling on appellant's application that he was not ready to proceed for lack of prosecution's witness statements began to conduct *voir dire* examination of EWG, and received her testimony. The court record would therefore seem to support appellant's submissions that he was not supplied with prosecution's witness statements when the evidence of EWG was received.

16. That finding however should be viewed with the lenses of what transpired during the long protracted trial before different Magistrates. It would seem that appellant took advantage of the protracted trial before different Magistrates to variously and inaccurately allege that he had not been supplied with prosecution's witness statement whilst forgetting that he had at other previous times confirmed being served with those witness statements. To demonstrate this, I will, as far as possible, highlight those applications, for prosecution's witness statements by

appellant as follows:

v 16.9.2016 Order for witness statement to issue to the appellant made by the trial court.

v 13.10.2016 Appellant informed the trial court he had not received prosecution's witness' statements.

v 18.11.2016 Appellant confirmed the prosecution's witness statements had been availed to him.

v 9.2.2017 Appellant confirmed he was ready to proceed with the prosecution's case. On this date PW2, PW3, PW4 and PW5 testified. On that date appellant sought and was by the trial Resident Magistrate Hon. G. Onsarigo granted the prayer that EWG be recalled.

v 31.3.2017 the prosecution sought and was granted by the trial Resident Magistrate Hon. G. Onsarigo leave to proceed with the trial before another Magistrate.

v 15.6.2017 before the new trial Magistrate Hon. H. Mwendwa R.M. the appellant prayed for prosecution to supply him with witness statements. The trial court granted that prayer.

v 30.6.2017 the court granted appellant's prayer to be supplied with prosecution's witness

v 6.7.2017 Hon. H. Mwendwa R.M. informed appellant of his rights under Section 200 Criminal Procedure Code when the appellant elected for the trial to start afresh. On the basis upon which the appellant argued the court granted him the prayer to recall for cross examination PW2 to PW5 but exempted EWG due to her tender age. Again, it would seem at the request of appellant prosecution was ordered to supply its witness statements to appellant.

v 20.7.2017 Again the court ordered prosecution to provide appellant with the charge sheet, first report and witness statement of the Investigating Officer (I.O.).

v 14.9.2017 Appellant confirmed to the court on 20.7.2017 he was supplied with prosecution's witness statements. It would however seem that he was not supplied with the charge sheet and the court record of that date shows that appellant was supplied with a copy of the charge sheet by the court but the court made a further order for prosecution to supply appellant with Investigating Officer's statement. Appellant did confirm, he had been supplied with the Post Rape Form (PRC) and the Medical Examination Form (P3 Form) and the treatment notes of EWG.

v 29.12.2017 Appellant stated to the court he had not been supplied with the documents previously ordered by the court.

v 10.1.2018 the trial court granted appellant's prayer to be supplied with Investigating Officer's statement.

v 29.1.2019 the trial was taken over by another Magistrate Hon. Z. W. Gichana SRM. Appellant elected for the trial to proceed from where it has stopped. On that date the court ordered appellant to be supplied with Investigating Officer's statement.

v 21.2.2019 The Prosecution called Investigating Officer to testify. Appellant cross examined the Investigating Officer without complaining of not having his statement.

v 21.3.2019 To doctors were called and they testified.

17. With the above reproduction it becomes clear that appellant was not always candid in his request for witness statements. At one time he confirmed he had witness statement only later to make a request, again, for the same witness statement. It does seem with the sheer volume of work that the Magistracy has to cope with and also because the prosecution was represented by different counsels that there was no proper follow up by the court or by the prosecution to recall the appellant's previous confirmation that he had been supplied with witness statement. It is because of the above there raises doubt in my mind whether indeed appellant had not been served with the statement of EWG, when she testified.

18. The reason appellant gives for submitting that his rights were violated is because, he says, he would have cross examined EWG on the fact that there was another farm worker, at the home, who may have committed the offence of defilement.

19. The above reason is unpersuasive. This is because EWG's aunt, known as Leah, whose home EWG was defiled did testify. The appellant did not direct his cross examination to suggest the defilement was committed by anyone else. If appellant's defence was that it was the other worker at that home who committed the defilement, he failed to so state in his defence. It is thereafter an afterthought for appellant in this appeal to so allege that the crime was committed by other worker. That defence is for those reasons rejected.

20. Article 50(2) (j) of the Constitution provides that an accused person has a right to be informed, in advance, of the evidence the prosecution intends to rely on. This right has been recognized by the courts as was in the case **Domenic Kariuki v Republic [2018] eKLR** thus:

"*The case of R v Ward[17] is clear that the duty of disclosure is a continuing one throughout the trial. Furthermore, the words of Article 50(2)(j) that guarantee the right "to be informed in advance" cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused and this right of disclosure is protected by the accused being*

informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with the other rights that constitute the right to a fair trial. Article 50(2)(c) guarantees the accused the right, "to have adequate facilities to prepare a defense."

This means the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his or her defence. This position had also been stated in R v Stinchcombe [18] where the Supreme Court of Canada observed, "The obligation to disclose was a continuing one and was to be updated when additional information was received."

I find that failure to provide the appellant and his co-accused with the prosecution witness statements in advance as provided for under Article 50(2)(j) violated their constitutional right to a fair trial and vitiated the entire trial and its immaterial that they were ultimately acquitted. In my view, under no circumstances should a fair trial be jeopardized."

21. As I stated before there is doubt that appellant's Constitutional right to be presented with the prosecution's witness statement was violated. This because he more than once contradicted himself when applying for those statements to be supplied to him.

22. Even if I had found that his said right was violated it needs to be noted that not all violations of Constitutional rights will lead to an acquittal. This was clearly the holding by the Court of Appeal as discussed in the case **Julius Rotich v Republic [2019] eKLR** thus:

*"13. In **Simon Ndichu Kahoro v Republic NRB CA Criminal Appeal No. 69 of 2015 [2016] eKLR, the** Court of Appeal was confronted with the issue as to whether the failure to give the accused statements was fatal. In that case, although the trial magistrate ordered that the statements be furnished, the trial proceeded without the appellant being furnished with the statements. The court held that accused's right to a fair trial were violated on that account but it made the following observation:*

We should not be understood to be setting up a general principle or precedent that every breach of Article 50 of the Constitution, 2010 should automatically result in an acquittal of an accused person. Each case must be considered in the light of its own special circumstances as consequences of breach of fair rights to fair trial depend on all the surrounding circumstances of a case."

23. In the light of doubt I entertained, on whether appellant had the witness statements, and because the question he submits he was unable to ask EWG could have been put to EWG's aunt L (PW 3) I decline to find that appellant's right to obtain prosecution's witness statement was violated.

24. Hereafter I shall discuss the remaining grounds of appellant's appeal.

25. The essential ingredient of defilement is penetration. Prosecution through the evidence of PW7 clinical officer at Kiambu Level 8 hospital a clinical officer at Nairobi Women's Hospital gave clear evidence of the result of examination on EWG which, as PW8 stated, showed vaginal penetration. The offence of defilement was proved by that evidence which evidence was supported by medical reports submitted during the trial.

26. The age of EWG was proved by her birth certificate that was produced in evidence. As stated before EWG was two months shy of her 7th birthday when the offence was committed.

27. Appellant has argued that prosecution failed to produce EWG's panty which was PW5 said was stained with blood.

28. My response to that submission is that I have examined the testimony of EWG. Though she was of the tender age EWG's evidence was very clear of what happened to her on the night in question. EWG plainly testified of how appellant, whom she named without hesitation to be Peter, took her by force and defiled her. She further stated that appellant after defiling her threatened to kill her if EWG told anyone what she had done. It is no wonder that EWG did not disclose to her aunt Leah what happened to her but waited until the house help Tabitha returned from her short leave and she confided in her of her ordeal with tears.

29. If appellant seeks refuge in the fact that EWG blood stained panty was not produced I will remind him of the proviso of Section 124 Evidence Act which exempts the necessity of corroborative evidence in the case of Sexual offence.That proviso is in the following terms:

"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."

30. As stated before EWG candidly and honestly testified on what happened to her on the night in question. The trial court, in view of the above, rightly convicted the appellant on the basis of her evidence which evidence was corroborated by the medical evidence which proved defilement. A case in point is on corroboration in sexual offences cases is **Williamson Sowa Mbwanga v Republic [2016] eKLR, where it was held that:**

"The import of the proviso to section 124 of the Evidence Act is that the trial court can convict an accused facing a charge of defilement solely on the evidence of the victim, if for reasons to be recorded, the court is satisfied that the victim is telling the truth. Medical evidence is not mandatory under that proviso, a position which was reiterated thus by this Court in GEORGE KIOJI V. REPUBLIC, CR. APP. NO. 270 of 2012 (Nyeri):

> *"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."*

31. The fact that EWG delayed in reporting the offence is explained by the threat made by the appellant.

32. The defence offered by the appellant that he was not in the compound of aunt Leah's house is in my view not believable. It is contrived. The appellant did not put the question of his absence in the compound of that home to the prosecution's witnesses. Indeed, the evidence of PW4 placed the appellant on the compound on the night in question. Although the offence occurred at around 7.30 p.m., and it may therefore have been dark, aunt L confirmed that there is security light in the compound. EWG testified the appellant, whom she knew as Peter grabbed her and defiled her. In view of the presence of these security lights and the close proximity between EWG and appellant, as he committed the offence, there can be no doubt of mistaken identity. Appellant was identified by EWG.

33. In my view there was sufficient evidence to support appellant's conviction. The prosecution proved beyond reasonable doubt the guilt of appellant. The prosecution well met that criminal standard of proof. The criminal standard of proof is not beyond a shadow of doubt. That criminal standard of proof was considered in a Canadian case, which I find persuasive, of **R. v. Villaroman, 2016 SCC 33 (CanLII), [2016] 1 SCR 1000** thus:

> *"The reasonable doubt instruction describes a state of mind — the degree of persuasion that entitles and requires a juror to find an accused guilty: Berger, at p. 60. Reasonable doubt is not an inference or a finding of fact that needs support in the evidence presented at trial: see e.g. Schuldt v. The Queen,* 1985 CanLII20 (SCC)*, [1985] 2 S.C.R. 592, at pp. 600-610. A reasonable doubt is a doubt based on "reason and common sense"; it is not "imaginary or frivolous"; it "does not involve proof to an absolute certainty"; and it is "logically connected to the evidence or absence of evidence": Lifchus, at para. 36. The reasonable doubt instructions are all directed to describing for the jurors how sure they must be of guilt in order to convict."* (underlining my emphasis)

34. The criminal standard of proof, as I stated above, is beyond reasonable doubt which does not mean proof beyond a shadow of doubt. This was the holding in the case **Miller V Minister Of Pensions 1947 2 ALLER 372 as follows:**

> *"That degree is well settled it needs not reach certainty but must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of doubt. The law could prevail to protect their community if it admitted fanciful possibilities to deflect the cause 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 witnesses the sentence of course it is doubt but nothing short of that will suffice." (underlining my emphasis)*

35. The trial court's conviction is, for the reasons stated above, upheld.

36. On sentencing, the appellant has appealed against his sentence of 20 years imprisonment. Appellant's mitigation was considered by the trial court. The trial court also considered the adverse effect the offence had on EWG, a child who was almost 7 years old. EWG was found by the trial court to have endured emotional trauma. In considering appeal against sentence I am guided by the case **R. v. Pearson, 2002 NBQB 218 (CanLII)** as follows:

> *". . . sentencing is the public pronouncement of punishment administered by the authority of the court as trustee of the public's confidence. It ought to be imposed in a way that applies the rule of law, tempered with justice, administered with the knowledge, good conscience, instincts and experience of the judge and guided where appropriate by persuasive or binding precedent. In my view, the essential purpose of sentencing is to maintain respect for the law by which society chooses to regulate itself, thereby ensuring the peaceful enjoyment, order and safety of its citizens. The community expects the court to enforce its standards, to denounce unlawful conduct and to deal firmly but fairly with those persons convicted of crime. In determining a fit and proper sentencing, well-recognized principles have come to be applied in this jurisdiction. The primary consideration is always protection of the public. In addressing that primary concern, the sentencing judge is obliged to ask whether such protection may best be achieved by specific deterrence of the offender, general deterrence of those similarly disposed, rehabilitation of the offender, or some combination thereof.*

37. In this court's view the offence committed by the appellant against EWG, an orphaned child, requires this court's denunciation. The sentence of 20 years sufficiently shows societal denunciation. The sentence of the trial court cannot for those reasons attract interference by this court.

38. Accordingly, the appellant's appeal against conviction and sentence is declined and dismissed save that in calculating the appellant's sentence the period the appellant was in custody awaiting the conclusion of his trial shall be considered in computation of his sentence as provided under Section 333(2) of the Criminal Procedure Code.

SIGNED AND DELIVERED VIRTUALLY THIS 18th DAY OF MARCH 2021.

MARY KASANGO

JUDGE

18th March 2021

Before Justice Mary Kasango

C/A - Kevin

Appellant – Present

For the Respondent – Christine Kathambi

COURT

Judgment virtually delivered in their presence.

MARY KASANGO

JUDGE