REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 135 OF 2016

LUKA KANYITA MWAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against both the conviction and the sentence of Chief Magistrate Hon. W. Kagendo delivered on 24th August, 2016 in MOLO CM Criminal Case Number 743 of 2013 Luka Kanyita Mwai v Republic)

J U D G M E N T

1. The main issues for determination in this appeal are whether the conviction of the appellant for the offence of **defilement Contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act No. 3 of 2006** is sustainable on the strength of the evidence adduced before the trial court, and whether the life sentence imposed by the trial court is excessive.

2. The appellant was convicted and sentenced on 24th August, 2016 in **Senior Principal Magistrate's Court Molo Criminal Case Number 743/2013**. He filed appeal and supplementary grounds through his counsel David Mong'eri Advocate on 5th July, 2017 listing seven (7) grounds of appeal.

> *1. **THAT** the learned trial Magistrate erred in law and fact in convicting the Appellant while relying on the contradictory evidence of the prosecution witnesses.*
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> *2. **THAT** the learned trial Magistrate erred in law and fact in convicting the Appellant and yet there was no eye witness and no identification was done.*
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> *3. **THAT** the learned trial Magistrate erred in law and fact by overlooking the fact that the evidence relied on was not watertight to justify a conviction.*
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> *4. **THAT** the learned trial Magistrate erred in law and fact in sentencing the Appellant to life imprisonment which was excessive.*
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> *5. **THAT** the learned trial Magistrate erred in law and fact by shifting the burden of proof to the Appellant.*
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> *6. **THAT** the learned trial Magistrate erred in law and fact by failing to consider the strong defence and submission by the Appellant.*
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> *7. **THAT** the learned trial Magistrate erred in law and fact by relying in the insufficient evidence of the prosecution and further that identification was not properly done.*

3. It had been alleged that on 7th May 2013 at [particulars withheld] Village Kuresoi District, Nakuru County he intentionally caused his penis to penetrate the vagina of (CWM) a child aged five (5) years, or in the alternative had committed an indecent act with the child by intentionally touching her vagina with his penis.

4. At the time of the hearing the child was in class one (1). Upon conducting a *voire dire* examination, the trial magistrate formed the view that she was intelligent to know what was true/false, but would not be sworn on account of her age. She told the court she knew the appellant as Luka and that he was not a good person. That on the material day she as playing with L and B when he called her, made her sleep on the bed, removed her pants, removed his thing and did *tabia mbaya* to her in her groin area. When she told him she was feeling pain he let her

go. Her mother came and found her outside the accused's house and she told her mother what the accused had done. Her mother quarreled Luka and the two engaged in a fight. Thereafter that she was taken to the police station then to hospital.

5. PW2 RK was a resident of the same plot as the accused and the complainant's family. On 7th May, 2013 at 2.00 p.m. she was seated outside the plot. Some children were playing there. She saw the complainant come and entered the compound. She thought the complainant was going to their (complainant's) house. After sometime the complainant's sister one L came looking for her. PW2 told her she had seen CWM the complainant enter the compound. L went in to look for her. Soon thereafter she came back and told PW2 that the complainant was in the accused's house and the door was locked. PW2 then went and called out the accused but there was no response but she was of the view that he was inside and he had refused to respond and since the door was locked from inside. She and L went to look for CWM's mother who was working in a hotel nearby. When they returned they found CWM outside Luka's door and that is when CWM's mother took her and went to examine her.

6. On cross examination Roda said that CWM entered the compound alone, that she was not there when the door to accused's house was opened, that she knew the accused was inside the house because it was locked from inside.

7. PW3 MNM was the victim's mother. She testified that CWM was born on 20th August, 2008 and the accused was their neighbour. On the material date her daughter L went to call her from her place of work that CWM was locked inside Luka's house. She ran home. On reaching outside Luka's door she found the victim, while Lukas was inside the room. She took the victim to her place of work, a hotel then to the hospital and the police station. At the police station the child narrated what happened to her.

8. On cross examination she said that L called her from the hotel, that she met R outside her hotel and the victim outside accused's door, while accused was inside, she met a police officer whom she told what happened and the accused was brought to the hospital.

9. PW4 No. [xxxx] PC Naftali Maina testified that he was the investigating officer, he was on duty on 9th May, 2013. The case was minuted to him for investigation. The accused was in custody at that time. The complainant was brought to the station at 6.00p.m. with a P3 already filled. He recorded her statement. She was five (5) years old. She told him her defiler's name was Luka. He charged the accused on 10th May 2013. On cross examination he told the court that P3 showed that she had been defiled.

10. PW5 Doctor Biketi John testified on behalf of Doctor Thaiti who had examined the victim and filled the P3 form. The P3 showed that on examination there was vaginal hyperemia, swelling and redness, but no bleeding or discharge, no spermatozoa. There were pus cells indicative of an infection. The child was five (5) years. She complained of defilement, having been cheated by the defiler to follow him to his house, he had sex with her. She felt pain and cried. The P3 was filled two (2) days after the alleged offence.

11. On cross examination the doctor said the child was treated on 9th May 2013, however the P3 had the hospital stamp, but did not show the time they had come to the hospital.

12. The prosecution closed its case.

13. In his defence the accused gave an unsworn statement of defence. He said he was playing pool when he was arrested by a General Service Unit (GSU) officer. He accompanied the officer to the police station where he learnt about the case of child herein. He testified that the investigating officer had relationship with the mother of the child, that R (PW2) was intimidated to say what she did. He denied committing the offence.

Submissions

14. On behalf of the appellant it was argued that the evidence was contradictory and unreliable. That the child had told the court that she was playing with two (2) others when accused went and called her, that she went with him to his house leaving the two (2) playing, that these two saw her leave with him. However PW2 R gave evidence to the contrary, that the child came alone, entered the compound and disappeared inside, only for the sister to come looking for her and for them to "find" her inside the house of the accused. The child also testified that her mother confronted the accused and they fought outside his house. PW3 said that she found the child outside the door of the accused's house while the appellant was inside. She never mentioned any confrontation with the appellant. The mother said she took the child to Molo Police Station. The investigating officer said that the complainant was brought to Keringet Police Station where the accused was already in custody. The appellant relied on **Paul Kanja Gitari v Republic [2016] eKLR** on the proposition that the evidence was so inconsistent it could not be relied on.

15. It was also submitted for the appellant that the evidence of the complainant and her mother was that they went to hospital the same day. However the P3 and PW5's testimony was that she was treated two (2) days after the alleged defilement. According to the P3 there was an attempt to penetrate. That the findings in the P3 were that the injury was caused by a blunt object, that the injuries included a torn hymen, a swollen red vagina, but no tears or discharge or bleeding.

16. For the state Ms Nyakira opposed the appeal submitting that all the ingredients of the offence had been proved. The age of the child was proved to be of below the age of 11 years. That the mother's testimony was that she was born on 20th August 2008. That the Doctor also formed the opinion that the child was between the age of 6 and 9 years old. Secondly that the penetration was proved. That the child testified how it was done and the doctor confirmed that a forceful act had been committed against the child as there was redness and swelling of the vagina. That the evidence was clear as to who had committed the offence as the child knew the accused person and she said he was their neighbour. That Luka was well known to the child and her mother. She urged the court to find the conviction was sound and to uphold the sentence.

17. As a first appeal court, I am required to re-examine and re-assess the evidence on record and draw my own conclusions. See **Okeno v**

Republic (1972) E.A. 32 where the court stated:

> *"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination* ***(Pandya v Republic (1957) E.A. 336)*** *and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion.* ***(Shantilal M. Ruwala v R. (1957) E.A. 570).*** *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 finding and conclusion; it must make its own findings and draw its own 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, See* ***Peters v Sunday Post, (1958) E.A. 434)"***

18. The Court of Appeal in **Peter Kanja Gitari** had this to say;

> *"Of immediate concern to us is the fact that the learned judge, even after advising herself on her duty as a first appellate court to subject the entire evidence to a fresh and exhaustive examination before arriving at its own independent conclusions per* ***KIILU & ANOTHER VS. REPUBLIC*** ***[2005] 1KLR 174,*** *which she cited, does not seem not have discharged that duty as the appellant was entitled to expect. Had she done so, she would have questioned the veracity of PW2's testimony on the point for it seems to us quite incredible that the said witness, with all of her suspicions, would not only have left* ***JMK*** *at the appellant's home in the first place but also accepted his word for she says, that* ***JMK*** *emerged from the appellant's house. We do not see that the learned judge questioned why the PW2 did not satisfy her obscurity or confirm her suspicions by simply entering the appellant's house to see if* ***JMK*** *was indeed there. She might then have caught him in the act, if there was.*

19. The circumstances surrounding the alleged offence are what set the stage for the offence and there can only be one stage, otherwise doubt sets in. Was the complainant called by the appellant from her play with L and B or did she just go in by herself? If L was playing with her and saw her leaving with the appellant why would she come later looking for her? L was not called to testify as to how she knew that the child was inside the appellant's house. R evidence is simply that she knew the child was inside the house of the appellant because it was locked from inside and the appellant refused to respond when she called him. The complainant's mother did not testify that the appellant was in the house when she came to pick the child nor did she talk to him. The arresting officer did not testify as to where he found the appellant and whether he searched his house.

20. PW3 stated that she found the child outside the appellants house and the appellant was inside the room. However she did not testify as to how she knew that Luka was inside the room. She did not see him or speak to him. Her evidence in fact contradicted the only evidence that may have put Luka at the scene. The complainant PW3 confronted Luka. The person who is alleged to have done it said absolutely nothing about it. So where did the complainant see this confrontation? Was it the same day or another day?

21. PW3 testified that she met a police officer to whom she reported what Luka had done. She did not say whether this was on her way home or on her way to the hospital from home. Her testimony was that Luka was immediately taken to the hospital. This Police officer did not testify to tell the court where he found the appellant. There is no evidence that the appellant upon arrest was taken to the hospital as the Doctor told the court that Luka was not examined and there was no P3 filled for him.

22. Not a single witness saw Luka that day. Not PW2, nor PW3. Not even the arresting officer places Luka at the scene. What we are presented with is a locked door allegedly with someone inside the house named Luka.

23. The only testimony is that of the child. That it is Luka who called her from where she was playing. This narrative was repeated at the hospital. However it is not supported every other evidence on record. In fact each of the other prosecution witnesses negates the complainant's testimony.

24. The appellant's defence that was he was arrested at Kamwaura in a pool house at Kamwaura remained unchallenged. This is because the arresting officer did not testify to say where he had arrested him from, or who identified the appellant for the arrest. This is because neither R, nor the complainant's mother, nor the complainant was present when the appellant was arrested. There is no evidence that upon arrest the child was asked to identify the appellant as the person who had defiled her. This was important because she was not present when he was arrested. The investigating officer did not visit the scene to confirm that the testimony of the scenario where the offence is alleged to have happened.

25. According to the complainant's mother she did not speak to the child outside Luka's house she just rushed to her to the hospital. That it is at the police station that the child narrated her story. The child however told a different story. That her mother found her outside Luka's house, told her what had happened and she fought with the accused.

26. The testimony of the police officer who testified was for two days after the incident. He said he was on duty on 9th May 2013. The complaint was brought at 6:00pm on that day. He only received an already completed P3. He did not receive the initial report. Did not know when the appellant was arrested, did not investigate the case.

27. Clearly the evidence placing the appellant at the scene is inconsistent creating doubt as to whether he was there, and as to whether he was properly identified by the witnesses in this case as the perpetrator. These inconsistencies cannot be said to be idle as they contribute to the credibility of the totality of the case for the prosecution.

28. In **Paul Kanyi Gitari v R (2016) eKLR** the Court of Appeal dealing with a similar case held;

> *"The state of the evidence tendered with all of its inconsistencies means that the appellant's complaint that some vital witnesses were not called is also not idle. It is of course trite that there is no number of witnesses required for the proof of a fact.*

*See **Section 143** of the **Evidence Act.** However, it has long been the law that when the prosecution calls evidence that is barely adequate, then the failure to call vital witnesses may entitle the court to draw an inference that had such witnesses been called, their evidence would have been adverse to the prosecution case. See **Bukenya & Others v Uganda** [1972] EA 549."*

Failure to call the arresting officer and L left a gap in the case for the prosecution that only raises the inference that their testimony would not have supported the case for the prosecution.

29. On the issue of penetration, it was argued from the appellant that that was not proved. The prosecution relied on the evidence of the child, and the P3 report as filled by the doctor. The child's testimony was;

"I was playing with L and B. The accused came where we were. He called me and took me to his house. He did tabia mbaya. He made me to sleep on the bed. He removed my pants. He removed his thing and did tabia mbaya here (touches her crotch) I told him I was feeling pain and then he released me. I went outside"

There was no effort to establish penetration from the child. The term *tabia mbaya* has acquired some notoriety in sexual offences cases to mean sexual intercourse. However the prosecution had the duty to get the evidence from the child who was found capable of giving evidence, of telling the story, to describe in her own words what the accused had done. Touching the area around her crotch cannot be said to describe penetration as defined by the **Sexual Offence Act** ***"penetration"*** *means the partial or complete insertion of the genital organs of a person into the genital organs of another person.* While it is not expected that a five (5) year old will give graphic description of what genital organs and their functions, it is accepted that a child can describe those organs in the language that the child knows. Considering the various sexual offences that can arise from contact with a child this evidence was too vague to support an allegation of defilement, and was prejudicial to the accused as it left the rest to the imagination of the court.

30. The prosecution produced a P3, it was expected to support the case for the child's testimony. The P3 starts by saying that there was no blood or discharge noted on the clothes or underwear. The general history '*Reported by the mother she was defiled by a person known to her 'Luka' who lured her to the house and undressed her and tried to penetrate her until she felt pain'* Despite stating that there was an attempt to penetrate, the P3 goes on to state that the hymen was torn, but no active bleeding, no discharge or blood seen, except for vaginal hyperemia *(an excessive accumulation of blood in the vagina).* The doctor said that this was indicative of a forceful act. That the doctor's conclusion was 'alleged defilement' did not draw the conclusion that there was defilement caused by penetration. Or what could have caused the broken hymen.

31. The case was not investigated at all. The police officer was assigned the case on 9th May, 2013. He found the accused in custody. He received the already completed P3. Recorded the child's statement and charged the accused on the basis of the child's statement and the P3. To him it was an open and shut case because the P3 proved penetration and the child told him she was five (5) years and identified the accused as the defiler. He did not concern himself with anything else.

32. Was the child's testimony capable of belief expected under the proviso to **Section 124 of the Evidence Act**? The case was heard by two different magistrates. One heard the first four witnesses, the other the doctor and the appellant's defence. The latter wrote the judgment so she did not have the advantage of observing the complainant's demeanour. Nevertheless it was scanty of detail as to how the offence was committed leaving a lot to imagination. Being contradicted by her own mother did not help the situation.

33. Hence this in this case, the prosecution fell short in presenting sufficient evidence to prove the charges facing the appellant. The age of the appellant was established, penetration was not proved and the identity of the perpetrator was not established. The appeal succeeds. The conviction is quashed, the sentence set aside. The appellant is set at liberty unless otherwise legally held.

Dated, delivered and signed at Nakuru this 27th day of February, 2020.

Mumbua T. Matheka

Judge

In the presence of

Court Assistant Edna

Mr. Kamau for state

Ms Ayuma for Mr. Mongeri for appellant

Appellant present