REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 23 OF 2018

JAMLECK GITARI KIBARA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate Court at Lamu Criminal Case No. 151 of 2017 by Hon. V. K. Asiyo (RM) dated 2nd May 2018)

JUDGEMENT

1. The Appellant was charged with defilement contrary to section 8 (1) as read with section 8(4) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on diverse dates between 25th May 2017 and 10th June 2017 at [particulars withheld] village, Hindi Division of Lamu West District within Lamu County, the Appellant intentionally caused his penis to penetrate the vagina of IDK a child of 16 years.

2. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the offence were that on diverse dates between 25th May 2017 and 10th June 2017 at [particulars withheld] village, Hindi Division of Lamu West District within Lamu County, the Appellant intentionally touched the vagina of IDK a child of 16 years old with his penis.

3. The prosecution called five witnesses in support of their case. PW1 IDK, the complainant, gave a sworn statement and told that she was 16 years but she had stopped going to school due to lack of school fees. She said that the Appellant was her husband and that they were married in April 2017. That she moved into the Appellant's house from April till June 2017 living as husband and wife and that they engaged in sexual intercourse regularly and it was consensual. She told the court that her parents were not happy with the Appellant as he had not asked them for permission to marry her but on her part she had met the Appellant's parents. She said that her uncle took them to the Administration police Camp at Hindi and the Appellant was arrested. She was then taken to King Fadh hospital where she was examined and an age assessment done. She told the court that the Appellant was 20 years old and that he was her husband and she loved him.

4. PW2, SKN, was the complainant's father. He told the court that he knew the Appellant since he had taken his daughter. He said that PW1 left home on the 3rd March 2017 and he did not know where she had gone so he reported the matter to the chief, AP and the police. That on the 10th June 2017 his brother PW3, found PW1 and the Appellant at a shop and arrested them and took them to Hindi police post where they were re-arrested. That he interrogated PW1 who told him that she was married which he disapproved since she was still young and he wanted her to go back to school.

5. PW3 JCN was the complainant's uncle and PW2's brother. He told the court that the Appellant who was his neighbour had stolen the complainant. That on the 26th March 2017, PW2 informed him that the complainant was missing and that he had reported to the authorities. That on 10th June 2017, he found the complainant with the Appellant and he apprehended her. That the complainant told him that she had eloped with the Appellant and they were now married. He took them to the AP camp at Hindi and called his brother (PW2).

6. Nicholas Charo Lewa (PW4) was the clinical officer at King Fadh hospital and he filled the P3 form. He stated that the complainant was examined on the 10th June 2017. That there were no bruises or lacerations on the external genetalia but the hymen was broken. The test carried out were negative for any diseases or pregnancy. He concluded that penetration had been achieved. He produced the P3 form (P.Exh2), the post rape care form (P.Exh 3) and treatment notes (P.Exh4). He also produced the age assessment report (P.Exh4) which indicated that the complainant was 16 years old.

7. P.C. Bonaya Mohamed (PW5), was the police officer attached to Mokowe police post and he testified in place of P.C. Ndegwa, the IO, who had been transferred to Narok. He told the court that he knew, PW2, the complainant and the Appellant when they went to the station on

the 10th June 2017. That the complainant was taken for age assessment and was also issued with a P3 form.

8. The trial court found that the Appellant had a case to answer and the Appellant was put on his defence. The Appellant gave a sworn statement that on 10th June 2017 while heading to Bobo from Hindi, two men stopped him and inquired about a girl who had been sent to the shops but had not returned. He told them that he had not seen the girl but they still arrested him and took him to Hindi A.P camp where he was re-arrested and handed over to police officers from Mokowe police post. The Appellant claimed that PW3 had a grudge with his parents and had promised to punish them. He produced a letter from the chief (D.exh 1) which he claimed stated that his parents would be punished.

9. At the end of the trial, the learned magistrate found the Appellant guilty. He convicted and sentenced him to imprisonment for 15 years.

10. The Appellant being aggrieved by the conviction and sentence lodged his homemade amended petition of appeal on the 30th September 2019. His three grounds of appeal were that he was not provided with witness statements before the trial; that there was no evidence linking him to the commission of the offence as the medical evidence was inconclusive, and; that section 124 of the Evidence Act was not applicable as the demeanour of the witnesses was not recorded.

11. The Appellant filed written submissions on the 30th September 2019 in support of his appeal. His submissions were to the effect that the prosecution failed to provide him with witness statements before he took plea in contravention of Article 50(2) (b)(c) and (j). He stated that he was issued with the witness statements on the 22nd August, 2017 while he took plea on the 12th June 2017. He urged that the court had a duty to protect the rights of an accused person. For these propositions, he relied on the cases of **Amos Karuga Karatu vs Rep (2008) eKLR and Albanus Mwasia Mutua vs Rep (2006) eKLR**.

12. Secondly, the Appellant submitted that the trial magistrate erred by relying solely on the evidence of the complainant which had gaps and that the medical evidence did not link him to the offence. He submitted that the trial court erred in relying on the fact that the complainant's hymen was missing arguing that the complainant's hymen could have been raptured by any other means and not sexual intercourse. He relied on **PKW vs Rep Nyeri Criminal Appeal no 186 of 2010.**

13. Finally, the Appellant submitted that the trial magistrate erred in invoking section 124 of the Evidence Act as he failed to record the demeanour of the complainant during trial.

14. The Respondent opposed the appeal in its entirety through written submissions filed on the 5th November 2019. In summary, the Respondent's submissions were that the Appellant was furnished with witness statements before trial; that penetration had been proved by medical evidence which showed that the complainant's hymen was torn, and; that the magistrate correctly invoked section 124 of the Evidence Act after considering that there was no other witness to corroborate the evidence of the complainant.

15. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusions. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanour of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. See **Okeno v R (1972) EA 32, Eric Onyango Odeng' v R [2014] eKLR.**

16. I have considered the grounds of appeal, the respective submissions, and the record. The issues for determination in this appeal are whether the Appellant's fair trial rights were violated by not being issued with witness statements; whether the prosecution proved its case beyond reasonable doubt; and; whether the sentence though lawful was appropriate in this case.

17. On the first issue, the Appellant contends that he was not issued with the witness statements until after the trial had began.

18. Article 50 (2)(j) of the Constitution provides that:-

> ***"to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;"***

19. In **Thomas Patrick Gilbert Cholmondeley Vs. Republic [2008] eKLR,** the Court of Appeal pronounced itself thus:-

> ***"We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under……. our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial; all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items."***

20. The importance of furnishing an accused person with witness statements was aptly highlighted in **Joseph Ndungu Kagiri v Republic [2016] eKLR** where Mativo J, held that:-

> ***"Article 50(2)(j) correctly interpreted means that an accused person should be furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence in advance. The sole purpose of doing so is so is to avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence at the opportune time both in cross-examination and in his defence… 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…."***

21. In the present case, after plea was taken on 12th June 2017, the court on its own motion directed that the Appellant be supplied with

copies of the witness statements and the charge sheet. When the matter came up for hearing on 3rd July 2017, the Appellant informed the court that he was ready to proceed with the hearing. However, later when the matter came up for further hearing on 24th July 2017, the Appellant informed the court that he did not have the witness statements. The court proceeded to adjourn the matter and directed the Appellant to be supplied with the statements. When the matter came up for hearing on the 22nd August 2017, the Appellant acknowledged that he had received the witness statements and charge sheet and asked for an adjournment to study them, which the court granted.

22. From the record, the court played its part and directed the Respondent to furnish the Appellant with the witness statements. When the matter came up for hearing the first time, the Appellant never informed the court that he had not been supplied with the statements but proceeded with the hearing. It is trite that in certain circumstances an accused person has a duty to inform the trial court when his rights to a fair trial have been breached.

23. In **Francis Macharia Gichangi & 3 Others v Republic [2007] eKLR,** the Court of Appeal stated that:-

> ***"Constitutional provisions like any other legal provisions are enforceable on the basis of the material placed before the court. Whether or not any of the provisions of the Constitution have been violated is a question of fact. Should a court take it that there has been a violation without complaint or evidence of violation being placed before it? In certain cases violations may be obvious. In others there is a need for a complaint and the presentation of evidence to bring this out.***
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> ***While, as stated above, the court has a duty to enforce constitutional provisions, there is a reciprocal duty on the part of an accused person to indicate to the court, for instance, that he is not able to understand the language of the proceedings… These place an implied duty on the accused to inform the court whether or not he is able to follow the proceedings…"***

24. Similarly, the Court of Appeal in **Hadson Ali Mwachongo v Republic [2016] eKLR** held thus:-

> ***"We are equally satisfied that the appellant's constitutional right to a fair trial was not violated. The record does not indicate the appellant raising any issue pertaining to access to witness statements. On the contrary, he is recorded informing the court that he was ready for the hearing of the case. When he was put on his defence 18th April 2011, he informed the Court that he was ready for his defence but later stated that he needed to be provided with "the charge". The trial court adjourned the proceedings and directed that the proceedings be typed and supplied to the appellant. On 3rd June 2011 the record shows that the court noted that the typed proceedings were ready and directed that the appellant be supplied with copies in readiness for hearing of his defence on 8th July 2011. On the latter date the appellant indicated that he was ready for the hearing of his defence. In short, the appellant's complaint regarding denial of access to witness statements is simply not borne out by the record. As this Court stated in Francis Macharia Gichangi & 3 Others v. Republic, Cr. App. No. 11 of 2004 it is to be reasonably expected that an accused person who claims that his or her trial rights have been violated will at the very least raise the issue with the trial court."***

25. Guided by the above authorities, I find that the Appellant failed to inform the trial court that he had not being supplied with witness statements on the first date of hearing. There was no way the trial court could have known that he did not have the witness statements. From the record, the trial court was also ready to ensure that the Appellant's right to a fair hearing was protected. This is evidenced by the adjournments it allowed to enable the Appellant to receive the witness statements and to prepare for hearing once the prosecution provided them. I find that this ground fails.

26. The second issue, is whether the case against the Appellant was proved. In this respect, it cannot be gainsaid that the prosecution must prove all the three elements of defilement being the age of the complainant, proof of penetration and the positive identification of the perpetrator. **See Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013 [……..]eKLR.**

27. It is trite that in sexual offences the age of the complainant is relevant for two purposes. Firstly, it is meant to prove that the complainant was below 18 years establishing the offence of defilement and, secondly; it establishes the age of the complainant for purposes of sentencing. See **Moses Nato Raphael v Republic Criminal Appeal No. 169 OF 2014 [2015] eKLR**.

28. In **Thomas Mwambu Wenyi v Republic Criminal Appeal NO. 21 OF 2015 [2017] eKLR** the Court of Appeal cited with approval **Francis Omuromi Vs. Uganda, Court of Appeal Criminal Appeal No.2of 2000** which held that:-

> ***"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence …."***

29. In this case, the complainant told the court that she was taken for age assessment at King Fadh hospital which was corroborated by PW5. Nicholas Ewoi (PW4) the clinical officer at King Fadh hospital produced the age assessment report (P.exh 4) dated 12th June 2017 which indicated that the complainant was 16 years old. This corroborated the evidence of the complainant that she was 16 years old having been born in the year 2001. I find that the age of the victim was satisfactorily proved.

30. On the issue of penetration, it is trite that courts mainly rely on the evidence of the complainant which is corroborated by medical evidence as was held in **Dominic Kibet Mwareng vs. Republic Criminal Appeal No 155 OF 2011 [2013] eKLR** where the court stated that:-

> ***"…In cases of defilement, the Court will rely mainly on the evidence of the Complainant which must be corroborated by medical evidence..."***

31. In this case, the complainant (PW1) told the court that she got married to the Appellant in April 2017 and moved into his house. She stated that they lived together as husband and wife and had sexual intercourse regularly by the Appellant putting his penis into her vagina.

32. Medical evidence was adduced by PW4, Nicholas Charo Lewa, the clinical officer. He produced the complainant's P3 (P.Exh 2) which indicated that the she had normal external genitalia with no bruises or lacerations and that her hymen was missing. He told the court that there was penetration.

33. With respect to the medical evidence outlined above, the Appellant submitted that it did not link him to the offence. While that is true, a proper analysis of the evidence would show that the evidence of the complainant that she had had sexual intercourse with the Appellant coupled with the medical evidence proves that there was penetration. It is the law that that a court can convict on the sole evidence of a victim of sexual assault under section 124 of the Evidence Act as long as the court is convinced the victim is telling the truth and records reasons for such belief. See **Arthur Mshila Manga v Republic Criminal Appeal No. 24 of 2014 [2016] eKLR.**

34. The learned trial magistrate in his judgment reminded himself of his duty under section 124 of the Evidence Act to record the reasons he believed the complainant. He then went to state that the complainant was clear and concise and she struck him as an honest witness. Additionally, the Appellant failed to cross-examine the complainant. I have no basis to doubt the observation of the trial magistrate with respect to the demeanour of the witness.

35. The Appellant however, further contended that the trial magistrate wrongly invoked the provisions of section 124 of the Evidence Act. It was his submission that the demeanour of the witness was to be recorded during the trial and not in the judgment.

36. The question of where to record the demeanour of the witness was considered in **Williamson Karimi Njogu v Republic [2016] eKLR** where Limo J held that:-

> ***"The Appellant has faulted the trial magistrate for making the observation about the credibility of the witness belatedly at the stage of judgment and contended that the demeanor of the witness should have been recorded in the body of the proceedings as per the findings of a decision in the case of ROSEMARY MICHERE MITHAMO -VS- R [2010] eKLR. I have looked at the decision and with due respect to the finding in that decision there are many schools of thought on where a trial court should record the demeanor of a witness. There is a school of thought that the demeanor of a witness that how he/she behaves while testifying should be recorded in the body of the proceedings but in brackets to show that it is an observation by a trial court. Another school of thought has it that the demeanor should not be part of the proceedings and should not therefore be in the body of proceedings but off the marginal lines to show that it is an observation made by the trial court besides what the witness is actually stating. The other school of thought is that the demeanor if it is important to the findings of the trial court should be recorded elsewhere on a separate sheet that will only help the trial court to remember the demeanor once it retires to write the judgment. In my considered view, there is no hard and fast rule on this. I am not persuaded that recording the demeanor of a witness in the judgment is belated or improper. What is important is the observation made by a court on a demeanor of a witness but where it is made or recorded in my view is immaterial."***

37. I associate myself with the above and find that the complaint raised by the Appellant is not sufficient to oust the evidence of the complainant which the court believable. Indeed it was a telling admission that the Appellant asked the complainant's father (PW2) to forgive him.

38. On the issue of identification, it is trite that the best evidence of identification is that of recognition as was held by the Court of Appeal in **Francis Muchiri Joseph – V- Republic [2014] eKLR** where it stated that:

> ***"In LESARAU – v-R, 1988 KLR 783, this court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name…."***

39. In the present case, the complainant told the court that she got married to the Appellant in April 2017 and lived with him in his house as husband and wife from April to June when they were arrested by PW3. She stated that she even met the Appellant's parents. Further, she told the court that she still loved the Appellant and that he was still her husband. The Appellant did not dispute the evidence of the complainant. He chose not to cross-examine her. This was therefore a clear case of recognition rather than identification of a stranger.

40. In the final analysis, Having found all the elements of the offence proved, I uphold the conviction.

41. On sentence however, in light of the Supreme Court decision ***Francis Karioko Muruatetu & another – v- Republic [2017]eKLR*** the mandatory nature of sentences in the Sexual Offences has been brought to question. Recent jurisprudence dictate that while minimum sentences remain lawful courts should impose appropriate sentences taking into consideration the circumstances of each case. See **Dismas Wafula Kilwake vs. Republic [2018]eKLR.**

42. I have taken into consideration the circumstances of this case. The complainant was adamant that she was not forced into the sexual relationship but that they eloped and got married. During trial, the complainant stated that she loved the Appellant and declared that he was still her husband. On the part of the Appellant, he is a young man who was only 20 years old at the time of the offence and was remorseful. His remorse was evident when he asked PW2, the complainant's father, to forgive him.

43. In addition, the Appellant when taking plea alluded to the fact that he did not know the complainant was a minor when he stated that *"I looked at her and thought she was older. I never asked her age."* It is quite possible that if the Appellant raised this as his defence he may have benefited from the provision of section 8 of SOA. It is not lost to the court that the Appellant was unrepresented and possessed no legal knowledge of the defence available to him.

44. I have anxiously considered the sentence vis-à-vis the fact of “marriage” in this case. I have come to the conclusion that it would be unjust to incarcerate the Appellant for 15 years for what appears to have been an ill-informed budding romance and moral indiscretion on the part of both the Appellant and the complainant. While not ignoring the sanction of the law, I will temper justice with mercy and set the Appellant free. I consider the period served sufficient.

45. The Appellant is set at liberty forthwith unless otherwise lawfully held.

46. Orders accordingly.

Judgment delivered, dated and signed at Garsen this 26th day of February, 2020.

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R. LAGAT KORIR

JUDGE

In the presence of:

S. Pacho Court Assistant

The Appellant in person

Mr. Onderi for the Respondent