REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 17 OF 2019

PETER KYALO WAMBUA .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal from the conviction and sentence of the Principal Magistrate Court at Kithimani delivered on 30.8.2018 by the Senior Resident Magistrate Hon G.O. Shikwe in Criminal Case SO 57 of 2016*)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

PETER KYALO WAMBUA.....ACCUSED

JUDGEMENT

1. The appellant was charged, tried and convicted with an offence of defilement contrary to **section 8(1)** read together with **section (8)(2) of** the **Sexual Offences Act, 2006**. There was also an alternative charge of indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act**. The particulars of the main count were that the appellant on the 20th Day of August, 2016 Yatta Sub-county within Machakos County intentionally caused his penis to penetrate the anus of MM a child aged 11 years.

2. The evidence was as follows; **Pw 1 MM** after the court conducted a *voir dire* and was satisfied that he could testify on oath testified that he was 11 years old and on 20.8.2016 he was on his way home from an event organized by his aunt when the appellant at around 7 pm dragged him to his house and used his penis to sodomize him and threatened to kill him if he told anyone. He told the court that he screamed out of pain and he told his teacher one Stephen Kitony who made a report and made his mother aware of what happened. He stated that he was taken to hospital and had a P3 form. On cross examination, he testified that there was no one on the road at the time.

3. **Pw 2 JMM** testified that he was the child's father and was alerted by Pw1's teacher on 1.9.2016 that Pw1 had been defiled and given Kshs 50/- then asked not to tell anyone by the perpetrator. He testified that Pw1 reported the incident to the said teacher on 20.8.2016. He testified that the child was born on 21.1.2015 as evidenced by the health card (MFi2).

4. **Pw 3 John Nzioka** a Clinical Officer at Matuu Level Four Hospital told the court that he had a P3 form that he filled on 13.10.2016 pursuant to a report of sodomy that was said to have occurred on 20.9.2016. He stated that the rectal examination was negative but could be due to passage of time and that Pw1 could have healed making it difficult to reveal anything. He produced the P3 form as exhibit.

5. **Pw4, SK** the head teacher of *[particulars withheld]* testified that on 1.9.2016 at 7.00 am he was called by a colleague who informed him that he had rescued a boy from *[particulars withheld]* out of a house belonging to the appellant. The boy turned out to be Pw1 who had been in the company of PK. It was his testimony that he interrogated Pw1 and K and who informed him that a man had hired a house for them and gave them Kshs 50/- and defiled them during the August Holidays. He told the court that Pw1's parents also confirmed to him that Pw1 was not at home on the material day. Pw4 reported to the police and the appellant was arrested. On cross examination, he testified that Pw1 informed him that this was not the first time that the appellant had conducted his bestial actions on him.

6. **Pw 5** was **SK,** and after a voir dire was conducted on him and after the court was satisfied of his competence to testify he was sworn in. It was his testimony that in 2015 he used to live with the appellant in his house at Sofia market. He told the court that he met the appellant on the road and who gave him food and took him to his house then sodomized him. He told the court that he met Pw1 in the appellant's house. He told the court that he saw the appellant sodomize Pw1 in his presence and on another day he came with another boy from Kibwezi. He told the court that he was able to witness everything because they were in the same room. He stated on cross examination that he saw a boy visit the appellant's house on 20.8.2016 at night and he also saw the appellant giving him money.

7. **Pw6 Pc Matilda Wanjeru** told the court that on 12.10.2016 she was called by Sofia AP camp and who informed her that there was a suspected defiler together with four boys. She stated that she visited the scene and the AP camp where she took the appellant and the four boys. She added that Pw1 reported to her that on 20.8.2016 at SM the appellant took him to his house where he found a boy called Stanley Kioko. She testified that it was reported to her that the appellant defiled both of them and in the morning he gave him Kshs 50/-. She told the court that she took both boys to Matuu Hospital together with the appellant and they were all examined and P3 forms were filled. On cross examination, she testified that the appellant was identified by Pw1 and Pw5.

8. The court found that a prima facie case had been established against the appellant sufficiently to require him to make a defence and he was placed on his defence. Section 211 was explained to the appellant who elected to give an unsworn statement and did not call witnesses. **Dw.1 the appellant** testified that on 12.10.2016 he went to a hospital in Matuu for a meeting and on return at 2 pm he met two people who took him to Sofia AP camp from where he learnt of the allegations. He denied the charges he was facing.

9. The trial court after considering Section 124 of the Evidence Act and the case of **Mohammed v R (2006) 2KLR 138** found that the appellant was positively identified by Pw1 as corroborated by the evidence of Pw5 who witnessed the appellant defiling Pw1**.** The court found that there were no material findings by the clinical officer since the tests were conducted after a long period of time. The court discredited the appellant's evidence for being a denial that did not challenge the evidence against him and resultantly found the appellant guilty of defilement contrary to Section 8(1)(2) of the Sexual Offences Act and after considering mitigation observed that the case related to a series where the appellant had already been sentenced. The appellant was sentenced to 20 years imprisonment.

10. The appeal was canvassed vide written submissions. It is the appellant's case that the trial court went into error in failing to conduct a voir dire. The appellant submitted that penetration was not proven by the evidence and that the medical evidence revealed that genital examination was normal and rectal examination was negative. The appellant submitted that there were inconsistencies in the prosecution case because Pw1 told the court that there was no one on the road but Pw5 testified that he witnessed the appellant sodomize Pw1. The appellant assailed the trial court for failing to consider his defence. The appellant urged the court to exercise its discretion and reduce his sentence as was in the case of **Evans Wanjala Wanyonyi v R (2019) eKLR and George Kuria Mwaura v R (2019) eKLR.**

11. The state submitted on four issues. On the issue of conduct of a voir dire, counsel submitted that there are no hard and fast rules on how a voir dire was to be conducted and that the trial court properly conducted a voir dire before allowing Pw1 to testify. On the issue of whether the case was proven, counsel submitted that the age of Pw1 had not been challenged. It was submitted that Section 2 defines penetration as insertion of a genital organ into the genital organ of another and the account of Pw1 as witnessed by Pw5 proved penetration under Section 2 of the Sexual Offences Act. It was submitted that in the absence of corroborative medical evidence there was no prejudice as the same could be proven by circumstantial evidence. Reliance was placed on the case of **Kassim Ali v R (2006) eKLR.** On the issue of contradictions, counsel placed reliance on the case of **Philip Nzaka Watu v R (2016) eKLR** and submitted that the contradictions to the effect that the appellant was alone with Pw1 did not prejudice the appellant. On the issue of the defence of alibi, counsel submitted that the appellant's defence did not exonerate him from the offence. Counsel urged the court to dismiss the appeal and uphold the conviction and sentence of the trial court.

12. This being a first appeal, the court is under legal obligation to re-evaluate, re-assess and re-analyze the evidence on the record and make its own findings and conclusions except having in mind that it did not have the advantage of hearing or seeing the witnesses testify. (See **Okeno V R (1972)EA 32)**

13. The court has carefully considered the petition of appeal as amended and submissions presented by both parties. The grounds of appeal may be collapsed into three grounds:

a. That the trial Magistrate erred in law by convicting the Appellant for the offence of defilement in the absence of proof of the elements of the offence to the required standard;

b. That the trial magistrate erred in convicting the appellant and yet he failed to conduct a voir dire;

c. That the trial magistrate failed to consider the defence of alibi raised by the appellant

14. Having considered this appeal, the evidence on record and the rival submissions, the issues for determination are firstly whether the prosecution proved its case beyond reasonable doubt; Secondly whether the appellant was convicted of the offence of defilement despite failure to conduct a voir dire; Thirdly whether the trial court considered the defence of the appellant.

15. In cases of defilement the following are to be proven:

1. ***The age of the child.***

2. The fact of penetration in accordance with section 2(1) of the Sexual Offences Act; and

3. That the perpetrator is the Appellant

16. The age of the child was proven vide the health card that was tendered in evidence and the appellant had not objected to its production. The said card marked MFI2 is in the names of Pw1 who was born on 25.1.2005 meaning that at the time of commission of the offence, he was aged 11 years as indicated in the charge sheet. Penetration is defined Under Section 2(1) the sexual offences act as the partial or complete insertion of the genital organs of a person into the genital organs of another person and "genital organs" includes the whole or part of male or female genital organs and for purposes of this Act includes the anus. From the evidence of Pw1 as corroborated by the evidence of Pw5 who saw the act and Pw.6 who collected Pw1 and Pw5 after they were rescued are all pieces of direct and circumstantial evidence

respectively that proved the 2nd element of the offence.

17. On the issue of identification of the appellant, the account of Pw1 of the unfortunate happenings of the day as corroborated by the evidence of Pw5 and Pw6 all created circumstances favourable for identification. The only witness to the incident was Pw5 and he was the only eye witness to the incident. I**n Abdalla Bin Wendo and Another v. R. (1953), 20 EACA 166** cited with approval **in Roria v. R. (1967) EA 583** the court made a number of observations with regard to the evidence of a single eye witness:

(a) ***The testimony of a single witness regarding identification must be tested with the greatest care.***

(b) The need for caution is even greater when it is known that the conditions favouring a correct identification were difficult.

(c) Where the conditions were difficult, what is needed before convicting is 'other evidence' pointing to guilt.

(d) Otherwise, subject to certain well known exceptions, it is lawful to convict on the identification of a single witness so long as the judge advises himself to the danger of basing a conviction on such evidence alone and is satisfied that the witness was truthful. The record is clear that the trial court was satisfied with the evidence of Pw1 and I see no reason to interfere with his reasoning.

18. The appellant's defence did not cast any doubt upon the evidence by the prosecution which left no doubt about his identification as the perpetrator. I find that the appellant was properly identified as the perpetrator.

19. The appellant has averred that the voir dire was not properly conducted. I am unable to agree with the appellant. There is no statutory procedure or established uniform format that is followed by judicial officers to help them decide on whether the child should testify on oath or not on oath or not at all since determining the intelligence of the child is left to the good sense of the trial judge or magistrate alone. It is common knowledge that children develop in stages as they develop a sense of right and wrong, and will be desperate for praise and approval. It is possible for the trial magistrate to have made an assessment of the complainant and thus formed an opinion that the he could testify on oath. Indeed the complainant gave evidence on oath and was duly cross examined by the appellant at length. If that was the position then it matters not that a voir dire test was not done as the appellant suffered no prejudice in the process.

20. Though the record does not reveal the questions that were asked there are answers that were recorded therefore a voir dire was conducted. The basis of the learned magistrate's opinion to swear in Pw1 and Pw5 is evident as he recorded only the answers to what can be presumed as a reply to the questions put to Pw1 and Pw5. There is evidence of dialogue from the proceedings on record, and it is also clear from the evidence of Pw1 and Pw5 that they had a sense of understanding and indeed were able to identify the person who hurt them. I am convinced that the trial magistrate rightly exercised his discretion as to whether Pw1 and Pw5 should take oath or not**.** This means that the appellants attack on the lack of a voir dire fails completely.

21. The appellant has faulted the trial court for failing to consider his defence. First of all, I note that the appellant did not give an account of where he was on the material day. He only told the court that he was arrested the 12th. I agree with the trial court's finding because the prosecution evidence places the appellant at the scene of the crime and therefore his defence cannot be relied upon. Further though I did not see the witness, I am not convinced that he was telling the truth and in this regard I am guided by the case of **Dinkerrai Ramkrishan Pandya v R [1957] EA 336** where the East Africa Court of Appeal cited the case of ***Coughlan v Cumberland (3) (1898) 1 Ch. 704 where Lindly MR, Rigby and Collins L.JJ observed*** that "when the Question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; **and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on credibility of witnesses whom the court has not seen**.

22. In light of the foregoing analysis I am satisfied that the prosecution evidence proved their case beyond reasonable doubt; that the appellant's defence is not credible and I support the rejection of the same by the trial magistrate and dismiss the appeal against conviction.

23. The Sexual Offences Act provides under Section 8(2) that "A person who commits an offence of defilement with a child aged 11 years or less shall upon conviction be sentenced to life imprisonment. Section 8(3) provides that "A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years." From the record and as observed in paragraph 16 above Pw1 was born on 25.1.2005 meaning that at the time of commission of the offence, he was aged 11 years as indicated in the charge sheet.

24. The court convicted the appellant under Section 8(2) of the Sexual Offences Act and yet passed a sentence that is not provided for under the said section. However following the decision of the Supreme Court in the case of **Francis Karioko Muruatetu & Another V. R (2017) eKLR** several courts have reviewed minimum sentences imposed under the Sexual Offences Act. I would therefore imagine that the trial magistrate had based his sentence upon guidance of the above authority. I have no reason to disturb the said sentence since it is not excessive in the circumstances save only to add that since the appellant remained in custody throughout the trial then the he should benefit from the provisions of section 333(2) of the Criminal Procedure Code by having the sentence commencing from the date of arrest namely 12.10.2016.

25. In the result, it is my finding that the appellant's appeal on conviction lacks merit and is dismissed. The appeal on sentence partly succeeds to the extent that the sentence of twenty (20) years shall commence from 12.10.2016.

It is so ordered.

Dated and delivered at **Machakos** this **30th** day of **April, 2020**.

D. K. Kemei

Judge