REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei J

CRIMINAL APPEAL 34 OF 2018

WAMBUA MUTINDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Being an appeal form the conviction and sentence by Hon. K. Kibellion (SRM) in **Machakos Chief Magistrate's Court Criminal S.O.A. No. 3 of 2017** delivered on 10th October, 2017)

JUDGEMENT

1. This appeal arises from the conviction and sentence of Hon. Kibellion – SRM in **Machakos Chief Magistrate's Court Criminal S.O.A No. 3 of 2017**. The Appellant herein **Wambua Mutinda** had been charged with the offence of defilement contrary to section 8 (1) as read with section 8(2) of the Sexual Offences Act. No. 3 of 2006. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act.

2. The particulars of the main charge are that on the 26th day of February, 2013 in Mwala Sub-County within Machakos County, intentionally caused his penis to penetrate the anus of 'KM' a boy aged six (6) years. The particulars of the alternative charge are that on the 26th day of February, 2013 in Mwala Sub-County within Machakos County, intentionally touched the anus of 'KM' aged six (6) years with his penis.

3. The Appellant had pleaded not guilty to the charges warranting a trial in which the Respondent called five (5) witnesses in support of its case. After the trial the learned trial magistrate convicted the Appellant and sentenced him to serve life imprisonment.

4. Aggrieved by the said conviction and sentence the Appellant lodged this appeal. Vide memorandum of appeal filed on 13/04/2018 the Appellant's grounds of appeal can be collapsed into three grounds namely:

> ***(i) That the learned trial magistrate erred in both law and evidence by convicting him yet the prosecution had not proved its case beyond reasonable doubt.***
>
> ***(ii) That the learned trial magistrate erred in law and fact by failing to consider his defence.***
>
> ***(iii) That the learned trial magistrate erred in law and fact when he failed to consider the period spent in custody by the appellant.***

5. This being a first appeal this court must re-evaluate and analyze the evidence presented before the trial court and to come to its own independent conclusion but bearing in mind that it did not have the benefit of seeing or hearing the witnesses testify.

6. The complainant (**KM)** testified as **PW.1.** The trial court conducted a voir dire examination and established that he was a minor with significant intelligence though did not understand the meaning of an oath. The minor was directed to give unsworn evidence. The evidence of the complainant is that on the material date he was herding the family cows when an employee of a neighbour one Mulonzi called him and informed him that he wanted to show him something. He agreed to accompany the said person towards a nearby valley only for the said person to wrestle him onto the ground removed his clothes and then defiled him. He testified that he tried to scream but the man held his mouth and warned that he would kill him if he informed anyone about the incident. He went on to state that he felt pain on his anus and subsequently had difficulty in relieving himself. He later reported to his guardians and informed them that his assailant was an employee of Mulonzi but that he had not known his name and went ahead to point him out in court. On cross examination, he confirmed that the appellant was the one who had defiled him.

7. **PW.2** was **FMM**. He testified that the complainant was his grandson and who informed him that an employee of Mulonzi a neighbour had defiled him while he was herding the family cows. Upon receipt of the information he alerted the Nyumba Kumi elders in the village as well as the Assistant Chief. He stated that the appellant was later arrested. He added that he took the complainant to Nairobi Women Hospital Kitengela and later to Makongeni police station where a P.3 form was issued. On cross – examination, he stated that the appellant had only worked at Mulonzi's home for three weeks. He denied framing up the Appellant.

8. **PW.3** was **BM** the grandmother of the complainant. She stated that on 27/02/2017 she prepared the minor for school by bathing him when she noticed a swelling on the boy's anus. She alerted the boy's grandfather (PW.2) who alerted the authorities. It was her evidence that the minor informed her that he had been defiled by a person who worked at the home of Mulonzi. She added that the appellant was the only worker employed at the home of Mulonzi at the time. On cross – examination, she stated that the complainant had informed her that the appellant was the perpetrator. She also confirmed having seen the complainant's swollen anus. She denied the appellant's allegation of a frame up.

9. **PW.4** was **Susan Mbithe** a clinical officer attached at Wamunyu Health Centre. She testified on a P.3 form that was filled upon examination of the complainant on 27/02/2017. She stated that the complainant had difficulty walking and had pain on the anal region. On examination she noted the anus was tender and painful on touch. There were bruises around the anus and that there was some yellowish anal foul smelling discharge. A rectal swab was conducted which revealed red blood cells discharge and bacterial infection. She approximated the age of the injuries to be one day old. Her finding was that sodomy had taken place. She produced the P.3 form, treatment notes and lab report form as exhibits.

10. **PW.5** was **No.83953 PC. Robert Mwangi** who testified that the complainant was escorted to Wamunyu police patrol Base on 27/02/2017. He stated that the Appellant had already been apprehended by members of the public and he escorted the complainant and the Appellant to Wamunyu Health Centre for checkup. He also organized for an age assessment on the complainant who was established to be aged 6 years. He established that the complainant had known the appellant who was an employee of Mulonzi a neighbour. He produced the age assessment as an exhibit.

11. The trial court established that a prima facie case had been established. The appellant on being put on his own defence, opted to keep quiet and let the court decide based on the evidence recorded. He also opted not to submit.

12. Parties agreed to canvass the appeal via written submissions. Learned counsel for the Respondent raised two issues for determination namely whether the prosecution proved its case beyond reasonable doubt and secondly whether the charge was defective.

On the first issue, it was submitted that the three ingredients of the offence namely age of the complainant, proof of penetration and positive identification of the appellant were established. On the age, it was submitted that the same was proved by PW.4 who conducted an age assessment and established age to be 6 years and this was corroborated by PW.2 and PW.5. On penetration, it was submitted that the evidence of the complainant gave out the appellant as the assailant.

On second issue, it was submitted that the charge was proper as the appellant understood the charge he was facing as he pleaded thereto and participated in the trial. Learned counsel urged the court to dismiss the appeal.

The Appellant on his part submitted on the three essential ingredients of the offence namely age of the victim, proof of penetration and positive identification of the appellant. He submitted that no birth certificate was produced so as to conclusively proof the age and that a doctor who prepared the age assessment was not called. On penetration and identity of the perpetrator, it was submitted that the same was not proved as the appellant's alleged employer was not called to confirm if indeed the appellant worked there. Finally, it was submitted that the evidence adduced did not support the charge in that whereas the witnesses talked of 26/02/2017 as date of incident the charge sheet talked of 26/02/2013. The appellant faulted the trial magistrate for finding in his judgement that the error was due to a typographical mistake curable under Section 382 of the Criminal Procedure Code.

13. I have considered the evidence adduced before the trial court as well as the submissions presented. The issues for determination are as follows:

(i) Whether the prosecution proved its case beyond reasonable doubt.

(ii) Whether the charge was defective.

(iii) Whether there were any constitutional infractions affecting the Appellants rights to a fair trial.

(iv) Whether the sentence was appropriate.

14. As regards the first issue, the charge being one of defilement the prosecution was under duty to prove the three essential ingredients namely age of the complainant, proof of penetration and lastly positive identification of the appellant as the perpetrator.

On the issue of the age of the victim, evidence was received from the complainant and her grandparents as well as a doctor and the investigating officer (PW.1 – PW.5). There was an age assessment which indicated the victim to be aged 6 years old. This then left no doubt that the complainant was a minor and aged below 18 years' age bracket.

Even though the appellant has challenged the same as no birth certificate was produced, I find the production of the age assessment report and the evidence of the guardians and the doctor to be sufficient. I find the same was proved by the prosecution.

On the issue of penetration, the same has been defined under Section 2 of the Sexual Offences Act to mean the partial or complete insertion of the genital organ of another person into the genital organ of another person. The evidence of the complainant and his guardians plus the doctor proved that there was penetration of the complainant's anus. During the examination, the doctor noted that the anus was tender and painful on touch and that the same was swollen. The doctor also noted some bruises around the anus. A P.3 form was produced as an exhibit. I am satisfied that the ingredient was proved by the prosecution. As regards the issue of positive identification of the appellant as the perpetrator, the complainant in his testimony claimed that the Appellant was working at the home of one Mulonzi who was their neighbour. The complainant's guardians also confirmed that indeed their neighbour Mr. Mulonzi had hired the appellant as a worker and had only worked for three weeks. Indeed, the complainant confirmed that there was no eyewitness to the incident since it was only him and the Appellant at the time. The Appellant in his submissions faulted the prosecution for failing to call the said Mulonzi to testify so that the issue of his involvement could be cleared off. The complainant in his evidence confirmed that he did not know the names of the appellant although he had known him before as an employee of one Mr. Mulonzi. Both the complainant's guardians (PW.2 and PW.3) confirmed that they did not know the Appellant's names but that he was the only worker at Mulonzi's home. As the Appellant has denied the charge it was incumbent upon the prosecution to ensure that the Appellant's identity as the perpetrator was established beyond any shadow of doubt. Indeed, the clan elder and assistant chief who are said to have assisted in the arrest of the appellant were not called to testify. Again the Appellant's employer Mr. Mulonzi could have been called to confirm that the Appellant was his only employee at the time so as to leave out the possibility that there might have been other persons involved. The evidence is also silent as to whether the complainant was in the company of the village elder and assistant chief during the arrest of the appellant and to confirm that he duly pointed him out as his assailant. The complainant merely informing his guardians that he had been assaulted by Mulonzi's worker was not enough since he did not know the name of the attacker. It was necessary for the police to have conducted an identification parade so as to leave no doubt about the identity of the appellant as the perpetrator. The appellant faced serious charges and hence the prosecution was expected to meticulously present the requisite evidence. Hence I am not satisfied that this ingredient was properly established by the prosecution as there is some doubt created.

15. As regards the second issue, section 134 of the Criminal Procedure Code provides the guidelines regarding charges being brought against offenders as follows:-

> "***Every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or offences with which the accused is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.***

From the above, the charge preferred against an accused person should disclose an offence known in law and it should be clear and unambiguous so as to enable the accused to understand the charge he or she is facing. In the circumstances of the appellant herein the charge revealed that allegations were being levelled against him as having defiled the complainant by penetrating his anus using his penis. The allegation was not ambiguous in any way and the court record indicates that the said charge was read over to the appellant and translated in Kikamba language to which the appellant entered a plea of not guilty thereto. The appellant duly cross examined some of the witnesses. I find the charge was not defective in any way as presented by the prosecution at the time of plea. However, an issue cropped up at the tail end of the proceedings and judgement regarding the correct date of the incident after the entire evidence had been received. An attempt to rectify the anomaly has been made by the trial magistrate in his judgement dated 10/10/2017. I will address the same in my analysis on the third issue.

16. As regards the third issue, the appellant in his submissions has claimed that there were infractions by the trial court which violated his rights to fair trial under Article 50 of the Constitution. The Appellant has made a raft of accusations against the trial court for instance not informing him of the seriousness of the charge and failing to ensure that he was given statements of witnesses as well as being accorded legal representation and further that he was not informed that it was necessary to present a defence. Looking at these accusation, I am not persuaded that the trial court violated any of the rights of the appellant since the trial court being a neutral umpire could not be expected to come in and direct the appellants as to how to conduct his defence. The ruling on a case to answer clearly put the appellant notice that he was required to make a defence. If he chose to elect to remain silent then he cannot now turn around and blame the trial court for the turn of events. He was fully cognizant of the entire charge and proceedings until the conclusion. The issue of witness statement is not raised by the Appellant in the proceedings and in any case the appellant on 24/04/2017 indicated to the court that he was ready to proceed with the case and which then implied that he had all the requisite material and information necessary to aid him in conducting his defence. On the issue of lack of legal representation, I find the Appellant's claim not merited in that the courts are inundated with myriads of cases and that legal representation is only on a need basis due to lack of resources. The charge herein did not fall in the category of those like murder and robbery with violence which attract death sentences upon conviction. In any case the appellant duly participated in the trial from start to finish and there is no evidence disclosed in the proceedings that he had been handicapped in any manner.

The only infraction that can be seen is on the trial court's judgement when the learned trial magistrate noted that the offence as per the charge sheet took place on 26/02/2013 while the evidence adduced indicated it to have taken place on 26/02/2017. According to the learned magistrate the error did not go to the root of the case to cause any prejudice to the appellant and curable under Section 382 of the Criminal Procedure Code. I find the learned trial magistrate clearly went into error. The evidence presented related to an offence which took place on 26/02/2017 while the charge sheet talks about 26/02/2013. Even after all the witnesses had given their testimonies no effort was made by either the prosecution or the trial court to amend the charge sheet. It was therefore unprocedural for the learned trial magistrate to attempt to wish away the said discrepancy and resort to Section 382 of the Criminal Procedure Code. It was mandatory to call for an amendment of the charge so as to pave way for recalling of witnesses to give further evidence and the appellant to get an opportunity to cross-examine them. Once the respective cases for the prosecution and defence closed and a judgement rendered, the discrepancy in the charge sheet regarding the date of incident still remained as a sore thumb. The learned trial magistrate upon establishing that the evidence did not support the charge was to acquit the appellant. It is trite that for a charge to be proved the facts and evidence must support the said charge and to disclose the offence alleged. In this case the evidence clearly indicated that the offence took place on 26/02/2017 while the charge sheet indicated it as 26/02/2013. I find the error is not one curable under section 382 of the Criminal Procedure Code as the Appellant stood prejudiced since his right to cross – examine witnesses over the said discrepancy was not accorded to him. Neither the trial court nor the prosecution sought to recall the witnesses to shed light on the correct date of the incident. The trial magistrate's action in seeking to correct the anomaly on the dates using Section 382 of the CPC clearly violated the appellant's rights to a fair trial. The trial magistrate should have found that the evidence adduced did not support the charge and to proceed to give the Appellant the benefit of doubt and acquit him of the charges since the case had not been proved beyond reasonable doubt.

17. Having arrived at the above conclusion, a finding on the third issue remains moot.

18. From the above analysist the appeal against conviction must succeed. The next issue that comes to mind is whether a retrial will be necessary. An order for a retrial can be ordered if it will not cause prejudice to an appellant and should not result in a situation where the prosecution will use it to seal gaps in their case. In the present circumstance of the appellant a retrial is likely to cause prejudice to the appellant if an order for a retrial is made. I find the justice of the case does not warrant an order for a retrial.

19. In the result it is my finding that the conviction of the Appellant by the trial court was unsafe meriting the same to be interfered with. The Appellant's appeal has merit and is allowed. The conviction is hereby quashed and the sentence set aside. The Appellant is ordered to be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at Machakos this 28th day of May, 2020.

D. K. Kemei

Judge