REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[Coram: A. C. Mrima, J.]

CRIMINAL APPEAL NO. 34 OF 2019

JAMES PESA OLWANDE *alias* **JADUONG.....APPELLANT**

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence by Hon. C. M. Kamau, Senior Resident Magistrate in Rongo Senior Resident Magistrate's Court Criminal Case No. 28 of 2018 on 9/05/2019)

JUDGMENT

1. The Appellant herein, *James Pesa Olwande alias Jaduong*, was charged with a total of six counts under the **Sexual Offences Act, No. 3 of 2006**. Two of the counts were on *Defilement*. Each of the counts of defilement had an alternative count of *committing an indecent act with a child.* The Appellant was also charged with two counts of *committing an act of penetration within the view of a child*.

2. The Appellant admitted the first count which was on the offence of defilement against one MLJ then aged 14 years old. He however denied the rest of the counts.

3. The Appellant was convicted on his own plea of guilty on the offence of defilement which he admitted and was sentenced to 30 years in prison. He was tried on the rest of the counts.

4. At the end of the trial, the Appellant was found guilty of two more counts. They were in respect of the offences of committing an act causing penetration within the view of a child and that of committing an indecent act with a child. He was sentenced to 10 years' imprisonment on each of the two counts. The sentences were to run consecutively.

5. Being dissatisfied with the convictions and sentences, the Appellant timeously preferred an appeal by filing a Petition of Appeal on 20/05/2019.

6. Directions were taken and the appeal was disposed of by way of written submissions. The Appellant complied. He submitted that none of the offences he was found guilty for were proved in law. He denied that he pleaded guilty and contended that the plea of guilty was not unequivocal. He also contended that the trial court further erred in sentencing. The Appellant prayed that the appeal be allowed, convictions quashed and sentences set-aside.

7. **Mr. Kimanthi** Senior Principal Prosecution Counsel opposed the appeal and submitted that the

offences were proved beyond any peradventure. He prayed that the appeal on convictions and sentences be dismissed since the sentences were legal.

8. This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okeno vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

9. I have carefully considered this matter. I have read and understood the proceedings before the trial court as well as those before this Court. I will first deal with the issue as to whether the plea of guilty was unequivocal.

10. The Appellant was first arraigned before the Senior Resident Magistrates Court at Rongo on 29/10/2018. He was then charged with 5 counts. They were two counts of *defilement* and one count of *committing an act causing penetration within the view of a child*. Each of the courts of defilement had an alternative count of *committing an indecent act with a child*.

11. According to the record the Appellant only pleaded to three counts. They were one count of defilement with its alternative count and the count of committing an act causing penetration within the view of a child. The Appellant denied all the three counts when he was called upon to plead to. The record is however silent why the Appellant only pleaded to three counts instead of the five counts preferred against him.

12. Around a month later, the initial charges were substituted with the leave of the court and on consensus of the Appellant. That paved way to the six counts which the Appellant admitted to one of them and denied the rest.

13. The charge of defilement which the Appellant was found guilty of was contrary to **Section 8(1)(3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that '*on the 28th day of July 2018 at about 1600 hrs. at [Particulars Withheld], unlawfully and intentionally caused your penis to penetrate the vagina of MLJ a girl aged 14 years.'*

14. The record indicated that the charge and its particulars were read to the appellant in English/Kiswahili and interpreted to the Appellant in Dholuo language which language the Appellant had earlier on indicated to understand.

15. When called to respond the Appellant admitted the charge by stating that ***'It is true that I did that act.'*** A plea of guilty was righty entered.

16. The facts of the case followed immediately. The facts were to the effect that the Appellant lured the complainant, MLJ, who was playing with her sister, into his house wherein the Appellant had sexual intercourse with the complainant. It was stated that the complainant conceived out of the intercourse and that such was confirmed sometimes in October 2018 when the complainant fell ill. The matter was reported to the police and the Appellant was arrested and subsequently charged. Several exhibits were produced.

17. When the Appellant was called to respond to the facts, this is what he stated:

"The facts are true."

18. The Appellant was then convicted on his own plea of guilty. The Appellant then tendered his mitigations. The prosecution presented the appellant's criminal history as a first offender. The appellant was then sentenced to 30 years' imprisonment.

19. The Appellant submitted that the plea was not unequivocal since he did not admit to the defilement charge. He was surprised to learn that he was summarily sentenced to a log term of imprisonment.

20. The State in opposition submitted that the plea was unequivocal. It was further submitted that the language used was the one chosen by the Appellant and that the sentence was within the law. This Court was urged to dismiss the appeal since the law was adhered to accordingly.

21. Due to the centrality of the issue of plea-taking, I will first revisit the law on that subject. **Section 207** of the Criminal Procedure Code states as follows:

> ***207 (1) The substance of the charge shall be stated to the accused person by the Court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to plea agreement;***
>
> ***(2) If the accused person admits the truth of the charge otherwise than by plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary;***
>
> > ***Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.***

13. The above provisions have previously been subjected to Court's interpretation. The procedure and steps to be taken in taking a plea of guilty were clearly laid down in the case of **Adan -vs- R (1973) EA 445** and in the Court of Appeal case of **Kariuki –vs- R (1954) KLR 809** as follows: -

> ***(i)*** **the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.**
>
> ***(ii)*** **the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.**
>
> ***(iii)*** **the prosecution should then immediately take the facts and the accused should be given an opportunity to change or explain the facts or to add to any relevant facts.**
>
> ***(iv)*** **If the accused does not agree to the facts or raises any question of his guilt in his reply it must be recorded and change of plea entered.**
>
> ***(v)*** **If there is no change of plea, a conviction should be recorded as well as a statement of facts relevant to sentence and the accused reply.**

14. Further in the case of **Kariuki -vs- R (supra)** the Court went on and stated that:

> ***The narration and interpretation of the facts of the alleged offence before the entry of a conviction and asking the appellant if he agreed with the fact is evidence of the precaution which the trial magistrate adopted to ensure that the appellant fully understood the charge before pleading.***

15. And in the case of **Atito -vs- R (1975) EA 278** the Court also held that the narration of facts supplemented the explanation by the trial magistrate of the ingredients of the offence.

16. Upon the promulgation of the Constitution of Kenya in 2010, the people of Kenya gave unto themselves an elaborate Bill of Rights under Chapter Four thereof. **Article 50** thereof deals with the right to a fair hearing and in **sub-article (2)(b)** it states that: -

> ***(2) Every accused person has the right to a fair trial, which includes the right-***

(a)……..

(b) to be informed of the charge, with sufficient detail to answer it.

17. I have perused the record before the subordinate court. I am satisfied that the Appellant understood the plea-taking proceedings. Had the matter not proceeded for trial on the other counts I am of the view that the Appellant would have had to really strive to convince the Court that the plea was unequivocal. However, my attention was drawn to the testimony of the complainant, MLJ during the trial.

18. The complainant, MLJ, testified in support of the other counts which the Appellant had denied. She testified as PW3. Her evidence was to the effect that the offences were committed inside the house of the Appellant and in the presence of her sister (LMJ) and herself. That version of evidence was contrary to the facts as tendered and admitted. The facts did not mention the presence of LMJ. when MLJ was inside the house of the Appellant.

19. In its judgment the court however found that the evidence of MLJ duly corroborated the evidence of LMJ. Based on the evidence of MLJ and that of LMJ the court found the Appellant guilty of the offence of committing an act causing penetration within the view of a child.

20. The inevitable question which now calls for an answer is how could two different versions of the same issue be both correct. There are now two scenarios which come to the fore. The first one is that if the facts as presented were correct then PW3 lied to the court in her testimony. The other scenario is if the evidence of PW3 was correct then the facts were wrong. A reasonable doubt is hence eminent.

21. This Court is alive to the fact that the evidence of PW3 (MLJ) was tested by the Appellant in cross-examination. The facts were not. It is on taking into account the totality of the whole issue that I am unable to agree that the facts as presented were correct.

22. Having so found, the facts as presented could not sustain any conviction. I hereby find and hold that the plea of guilty was not unequivocal. The appeal against the conviction on the plea of guilty is hence allowed. The conviction on the offence of defilement of MLJ is quashed and the sentence of 30 years' imprisonment is accordingly set-aside.

23. I will now deal with the challenges in respect to the convictions in respect to the counts of committing an act causing penetration within the view of a child and that of committing an indecent act with a child.

22. **Section 11(1)** of the **Sexual Offences Act** creates the offence of *committing an indecent act with a child*. It states that:

11(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term not less than ten years.

Section 2(1) of the said **Act** defines an **'indecent act'** as follows:

'Indecent act' means an unlawful intentional act which causes: -

(a) ***Any contact between any part of the body of a person with the genital organ, breast or buttocks of another, but does not include an act that causes penetration;***

(b) ***exposure or display of any pornographic material to any person against his or her will.***

23. Therefore, the main ingredients of the offence of committing an indecent act with a child are: -

(a) Proof that the victim is a child in law;

(b) Proof that there was contact between any body part of the accused person with the genital organ, breast or buttocks of the child victim (but that act must not be an act that caused penetration) or proof of exposure or display of any pornographic material to a child;

(c) Proof that the act(s) in (b) was/were intentional;

(d) There should be no legal justification in the act(s) complained of.

24. The particulars of the offence of committing an indecent act with a child against the Appellant were as follows: -

On the 28th day of July 2018 at about 1600 hrs. at [Particulars Withheld], unlawfully and intentionally touched the vagina of LMJ a girl aged 11 years.

25. The age of LMJ was settled by an Age Assessment Report. The contents were not challenged. PW1 was hence aged 11 years old and a minor in law.

26. As to whether there was any contact between any body part of the Appellant with the genital organ, breast or buttocks of LMJ which act however did not cause any penetration, I must revert to the record.

27. LMJ testified as PW2. She stated that the Appellant attempted to penetrate her private parts in vain. MLJ who testified as PW3 stated that the Appellant ***'used his penis to touch her (L.M.J.) vagina…'***

28. The evidence of LMJ (PW2) was amply corroborated by that of MLJ (PW3). The witnesses testified before the trial court which observed their demeanors. The court believed them. I have as well reviewed their evidence and there seem to be nothing impugning their demeanors. As an appellate Court I am called upon to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to my own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and I must give allowance for that. I therefore concur with the trial court on the assessment of the evidence.

29. As to whether the Appellant was framed by PW2 and PW3, and without shifting the burden of proof, the Appellant did not cross-examine any witness to demonstrate how and for what reason he might have been framed. The trial court dealt with the issue quite well and rightly rejected the defence.

30. The upshot is that the Appellant was properly found guilty of committing an indecent act with LMJ. The appeal on the conviction is hereby dismissed. I will deal with the issue of sentence later.

31. There is also the conviction on the offence of committing an act causing penetration within the view of a child. The particulars of the offence were as follows: -

On the 28th day of July 2018 at [particulars withheld], unlawfully and intentionally caused your penis to penetrate the vagina of MLJ within the view of LMJ a girl child aged 11 years.

32. I have already found that the defilement of MLJ was not proved. In that case therefore there is no way the Appellant could be said to have penetrated the vagina of MLJ in the presence of LMJ.

33. The appeal against the conviction in respect of the offence of committing an act causing penetration within the view of a child is hereby allowed. The conviction is quashed and the sentence of 10 years' imprisonment is hereby set-aside.

34. The Appellant has succeeded in quashing two convictions out of three. As the conviction on the offence of committing an indecent act with a child was sustained I will consider the sentence.

35. The Appellant was sentenced to 10 years' imprisonment. The court indicated that it granted the sentence which was the minimum sentence in law. That approach was outlawed by the much-celebrated

case of **Francis Karioko Muruatetu & Another vs. Republic (2017) eKLR**.

36. However, upon re-consideration of the circumstances under which the offence was committed alongside the mitigations I am satisfied that the sentence of 10 years' imprisonment was fair and reasonable. I do not see the need of resentencing the Appellant. I will hence not set the sentence aside. The appeal on sentence is hereby disallowed.

18. Having found that the plea of guilty was unequivocal in respect to the count of defilement and that the offence of committing an act causing penetration within the view of a child could not stand in the absence of proof of the offence of defilement, I must now consider if the Appellant is to be retried on the counts of defilement and committing an act causing penetration within the view of a child.

19. The principles upon which this Court can order a retrial are well settled. The Court of Appeal in the case of **Ahmed Sumar vs. R (1964) EALR 483** offered the following guidance:

> ***....in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficient of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; .....***

20. The Court of Appeal likewise had the following to say in the case of **Samuel Wahini Ngugi v. R (2012) eKLR**:

> ***The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:***
>
> > *It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.……In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person*
>
> ***That decision was echoed in the case of Lolimo Ekimat vs. R, Criminal Appeal No. 151 of 2004(unreported) when this Court stated as follows:***
>
> > *…the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it.*

21. I must now apply these principles to this case. The offences are serious and have a life-long effect on the victims. Whereas there is ample evidence which could prove the Appellant's culpability I am constrained to consider the age of the Appellant.

22. The Appellant was 80 years old at sentencing. He is now serving the 10 years' imprisonment term. He will be around 90 years old or 87 years old at the end of the term depending on whether he will benefit from remission.

23. The Appellant is an older member of the society in accordance with **Article 57** of the **Constitution.** Even without a conviction on defilement the Appellant will still have parental responsibility to the child of M.L.J. which he is likely to have fathered. This case therefore presents a scenario where the Appellant

ought to be accorded an opportunity to pursue the well-being of the child he fathered. Subjecting the Appellant to another trial and eventually to another term of imprisonment will not be in the best interests of the Appellant's child.

24. I therefore opt not to order a retrial. The Appellant shall serve the sentence of 10 years' imprisonment as passed by the trial court.

25. Having considered the issues raised by the Appellant, this Court now makes the following final orders: -

(a) The appeal against the offence of defilement of MLJ is hereby allowed. The conviction is quashed and the sentence of 30 years' imprisonment set-aside.

(b) The appeal against the offence of committing an act causing penetration within the view of a child is hereby allowed. The conviction is quashed and the sentence of 10 years' imprisonment set-aside.

(c) The appeal against the offence of committing an indecent act with a child is hereby dismissed. The conviction is sustained and the sentence of 10 years' imprisonment upheld.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 22nd day of May 2020

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

James Pesa Olwande *alias* **Jaduong,** the Appellant in person.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Evelyne Nyauke – Court Assistant