REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 105 OF 2019

BENJAMIN KAMINDWA MWAKAVI ……..…….…. APPELLANT

-VERSUS-

REPUBLIC ……..…..……..……..…… RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. L. D. Ogombe (SRM) in Makueni Senior Principal Magistrate's Court Criminal Case No. 214 of 2017 delivered on 18th March, 2019).

JUDGMENT

1. **Benjamin Mwakavi Kamindwa** the Appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant on diverse dates between 9th - 10th day of April 2017, at [Particulars withheld] primary school, Kaumoni sub-location, Kilala location in Makueni district within Makueni county intentionally and unlawfully caused his penis penetrate the anus of **EMM** a child aged 13 years.

2. He also faced an alternative count of committing an indecent act with a child contrary to section II of the Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant on diverse dates between 9th – 10th April 2017 at [Particulars withheld] primary school, Kaumoni sub-location, Kilala location in Makueni district within Makueni county intentionally and unlawfully caused his penis touch the anus of **EMM** a boy aged 13 years.

3. He denied the charges and the matter proceeded to full hearing with the prosecution calling five (5) witnesses. The Appellant gave an unsworn statement for his defence and called one witness.

4. He was finally convicted on the main count and sentenced to serve twenty (20) years imprisonment. He has filed this appeal against the judgment and cites the following as his grounds: -

a) **That,** the trial Magistrate erred in law and fact by failing to find that the elements of the offence (*penetration*) were not conclusively proved to warrant a conviction.

b) **That,** the prosecution did not prove its case beyond reasonable doubt.

5. A summary of the prosecution is that Pw3 **EMM** a boy then aged 13 years ran away from home on 9th April 2017 when the mother wanted to discipline him for coming home late. He went and sat under some tree. At 9:00 pm he went to [Particulars withheld] primary school in an open classroom and sat on a chair. The school watchman whom he identified as the Appellant came there with a torch and told him he was going for a board. He left and returned with a wooden board which he placed on the floor. He removed the jacket he was wearing and placed it on the board. He invited Pw3 to sleep there with him and he inclined.

6. He suddenly felt the Appellant lying on his back. He promised to be giving him money. The Appellant removed his trousers and pant and inserted his penis into Pw3's anus. He had sex with him the whole night. In the morning he gave him Kshs.35/=. The Appellant first went to check if there were people before asking him to leave through the back of the classroom. He advised him to buy mandazi with the money he had given him which he did.

7. From there he went to roam in Kilala where he stayed until when he returned to [Particulars withheld] primary school as he was still afraid of the mother. He again went to the classroom and sat on a chair. The Appellant came there and repeated what he had done to him the previous night. He persuaded him not to leave promising to be giving him Kshs.50/= and also bringing girls for him to have sex with. He again inserted his penis in his anus for the whole night. The next morning, he gave him nothing and he directed him to pass at the back of the classroom as his brother had come looking for him.

8. He left for Itangini and while there, he met his brothers M and D who took him to their father at [Particulars withheld]. He informed his

father what had happened to him and the matter was reported to Makueni police station. He was then taken to Makueni referral hospital for treatment. He was in a lot of pain in his anus. Pw3 said he had known the Appellant as the school watchman.

9. Pw1 **MMM** is the father of Pw3. He arrived home on 9th April 2017 8:00 pm and did not find Pw3. He was told what had transpired by his wife. The next day in the evening he was told the boy had been spotted heading to Kilala. He was finally found on 11th April 2017 in Itangini and brought home and he reported to him what the Appellant had done to him. He called the Appellant who came and he denied ever seeing Pw3. He had the Appellant arrested.

10. Pw2 **John Muema Nganda** is the area assistant chief who received the report from Pw1. He found the Appellant at Pw1's home. He interrogated both Pw1 and the Appellant and arrested the latter whom he took to the police station.

11. Pw5 **Dr. James Vincent Kiuluku** examined Pw3 on 12th April 2017 and confirmed that the boy had been sodomised. The internal region of the anus had lacerations at 9:00 o'clock. He confirmed that the boy had been sodomised by a foreign body through his anus. He produced the P3 and PRC forms (EXB2 and 3) respectively. The boy was sent for counselling.

12. Pw4 **No. 93378 P.C (W) Masika Roselyne** was given the report and she interviewed Pw3 who told her what had happened. She took Pw3 and the Appellant to hospital. The rest is as been stated by the rest of the witnesses.

13. The Appellant in his unsworn defence said he was arrested after being asked by Pw1 to help him trace his missing son. This was at 6:00 am while at his work place where he served as a watchman. He went to Pw1's home where Pw2 was called. He was accused of being with Pw3. That Pw1 told Pw3 to say yes to all that Pw2 would ask and that is what the boy did. He was arrested and taken to the police station. He denied the charge saying the child was found at Itangini market.

14. His witness Peter Mule Mwakavi said he had never heard of the Appellant being accused of having committed such an offence. He said he had known the Appellant since childhood. That he had heard that the boy had been chased away by the parents. He confirmed that the Appellant used to be a watchman at a school and the boy went to sleep there. He maintained that the Appellant had been framed.

15. The appeal was canvassed by way of written submissions. The Appellant argues that there was no proof of penetration of Pw3's anus. He says the presence of laceration in the anus was not proof of penetration, since the examining witness said there was no physical injury on the boy. He refers to some cases of misdiagnosis. He refers to them as the **East Berkshire Case, Dewsbury case** and **Oldham** case.

16. He next argues that the prosecution did not prove its case beyond reasonable doubt. For this, he relied on the case of **R –vs. Kikering Arap Koske and Anor (1949) 16 EACA 135; Abanga** *alias* **Onyango –vs- R Criminal Appeal No. 32 of 1990 (UR); R vs Lifchus (1997) 3SCR 320 and Bater –vs- Bater 1950 ALL ER 458 and 459.** He wondered why Pw1 went back to the school if he had been defiled the previous night.

17. The appeal was opposed by the Respondent through the written submissions by learned counsel Mrs. Monica Owenga. She submits that the complainant's age was confirmed to have been 12 years and his evidence was not rebutted by the Appellant's evidence which was unsworn. She contends that the evidence of Pw3 and the medical evidence confirmed penetration of the boy's anus. Finally, she submits that there was no doubt that the Appellant was well known to Pw3 as a watchman at the school. She supports the sentence meted out to the Appellant and asks the court not to interfere with it.

Analysis and determination

18. This is a first appeal and this court has a duty to re-analyse and re-consider the evidence tendered and arrive at its own conclusion. See **Okeno –s- R (1972) EA 32; Kiilu & Anor –vs- R (2005) I KLR 174 and David Njuguna Wairimu –vs- R (2010) eKLR.**

19. Upon considering the evidence on record, grounds of appeal, both parties' submissions, authorities cited and the law, I find the main issue for determination to be whether the prosecution proved all the ingredients in a case of defilement.

(i) Age of complainant

20. The particulars show the complainant's age as 13 years. Pw3 was the complainant. He said he was 14 years as at the time of testifying (*11/9/17*) having been born on 8th January 2004. A birth certificate No. 696312 issued on 8th October 2004 was produced as EXB1. It shows he was born on 8th January 2004. The offence is alleged to have been committed on 9th – 10th April 2017. It confirms that Pw3 was 13 years plus three months at the time of the offence. I therefore find age to have been proved.

(ii) Was penetration proved?

21. The Sexual Offences Act 2006 defines penetration as:

> "***Penetration"*** means the partial or complete insertion of the genital organs of a person into the genital organs of another person. The Court of Appeal in the case of **Sahali Omar –vs- R (2017) eKLR** held that:
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> "***Penetration whether by use of fingers, penis or any other gadget is still penetration as provided for under the Sexual Offences***

Act."

22. Pw3 testified on how he ran away from home on the material night and took refuge at [Particulars withheld] primary school where the Appellant was a watchman. He explained in detail what transpired that night and the following night. He also told the court that he went back to the school the following night because of fear of his mother. That answers the Appellant's question on why Pw3 went back to the school if he had been sodomised the previous night. The record shows that in cross examination the Appellant did not even ask the boy anything about the alleged defilement.

23. When the boy was traced in Itangini and brought home to the father (Pw2) on 11th April 2017 evening he immediately explained to the father what had been done to him and necessary action was taken.

24. Pw3's evidence is further supported by the medical evidence. **Dr. James Kiuluku** (Pw5) observed that Pw3 had external physical injury which the Appellant had dwelt on. He said the inner region of the anus had laceration at 9:00 o'clock. This was an internal injury and not a physical injury to be seen on the outside of the anus. He explained the lack of physical injury to be as a result of the several times the boy had been sodomised.

25. In cross examination this is what the doctor said:

> "*The victim had injuries in his anus. This was clear that he had been sodomised."*

Pw3 told the court that the object that had been inserted into his anus was the male organ namely penis. There was therefore over whelming evidence that Pw3 anus had been penetrated.

(iii) Was the perpetrator identified?

26. In his evidence, Pw3 gave the Appellant's name and said he was the watchman at [Particulars withheld] primary school which the boy attended. He therefore knew him. He said on the first night the man came to him with a torch and they talked. They parted the next morning after checking to confirm that there were no people around. On the second night it was the same story and he left in the morning. From this, it's clear that Pw3 was not dealing with a stranger but a person he knew well.

27. Further to this, when Pw3 arrived home he immediately without hesitating told his father (Pw1) what he had been through and he gave the name of the perpetrator. He did not hide anything or wait until the next day. Pw2 went for the Appellant the next morning while he was still at school. This confirms that indeed Pw3 gave him the full information including the name of the perpetrator.

28. In his evidence the Appellant explained how he had been arrested. He also confirmed that the school neighbor's Pw1's home. His witness (Dw2) said how the Appellant was a very good person. One thing he also confirmed is that Pw3 had gone to sleep at the school. He said this in his evidence in chief and in cross examination. The Appellant's evidence is purely escapist and full of mere denials.

29. The Court of Appeal in the case **of Karanja & Anor –vs- R (2004) 2KLR 140, 147 (Githinji J.A Onyango Otieno & Deverrel Ag. JJA)** stated the following on identification:

> "The law as regards identification under difficult conditions is now well settled. In the case of **Cleophas Otieno Wamunga –vs- R Court of Appeal No. 20 of 1989 at KSM,** this court states as follows: -
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> > "*We now turn to the more troublesome part of this appeal, namely the Appellant's conviction on counts 1 and 2 charging him with the robbery of Indakwa (Pw1) and Lilian Adhiabmbo Wagunde (Pw3). Both these witnesses testified that they recognized the Appellant among the robbers who attacked and robbed them … what we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the Appellant. Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated* ***by Lord Widgery, C.J in the well-known case of R –vs- Turnbull (1976)3 ALL E.R 549 at page 552*** *where he said: -*
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> > > "*Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."*

30. I have carefully considered the evidence on record and note that the Appellant never denied having been on duty at the school on the nights of 9th and 10th April 2017. All that he ways is that he never saw Pw3 at the school. It means he knew him. In his defence and cross examination he did not allude to any grudges or anything that would have made Pw1, Pw2 and Pw3 lie against him.

31. Pw3 was able to repeatedly narrate his ordeal to Pw1, Pw2 and the trial court. His evidence appears to have been firm and unshaken even during cross examination and I have no reasons to doubt him. I find that the Appellant was positively and properly identified by way of

recognition by Pw3. When Pw3 told Pw1 about the Appellant he right away knew whom he was talking about and that's why he went for him early the next morning of 11th April 2017. Even his own witness (Dw2) confirmed to the court that Pw3 had spent the night at [Particulars withheld] primary school where the Appellant was a watchman.

32. I am satisfied that Pw3 was defiled and he was a minor aged 13 years then. The Appellant was properly identified as the perpetrator.

33. The Appellant upon conviction on 18th March 2019 was sentenced to twenty (20) years imprisonment. When asked to mitigate, all he told the court was that he was innocent. Section 8(3) Sexual Offences Act provides for a mandatory minimum sentence of twenty (20) years which was meted out on the Appellant.

34. The record also shows that the Appellant first appeared for plea on 13th April 2017 and he was in custody upto the date of conviction and sentence. It's not shown whether this factor was considered at the time of sentencing. I will consider it.

35. The upshot is that the appeal against conviction is dismissed. The sentence of twenty (20) years is set aside and substituted with a sentence of fifteen (15) years imprisonment from date of conviction.

Orders accordingly.

Delivered, signed & dated this 25th day of June 2020, in open court at Makueni.

H. I. Ong'udi
Judge