REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 215 OF 2017

ALEX JUMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence by Hon. J.N. Nang'ea, Chief Magistrate, delivered on 2nd August, 2017 in Mombasa Chief Magistrate's Court Criminal Case No. 2330 of 2016).

JUDGMENT

1. The appellant was convicted for the offence of sexual assault contrary to Section 5(1)(a) of the Sexual Offences Act No. 3 of 2006. That was after the Trial Court found that the charge of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act had not been proved beyond reasonable doubt.

2. The Trial Court also found that the charge of indecent act contrary to Section 11(1) of the Sexual Offences Act had not been proved either. The said Court invoked the provisions of Section 186 of the Criminal Procedure Code and made a finding on the charge of sexual assault.

3. The said Court then proceeded to sentence the appellant by stating as follows-

> "The offence is serious and committed against a child. The offender is sentences (sic) to 12 (twelve) in prison (sic) for the offence which has ben (sic) convicted. He has 14 days to appeal." (emphasis added).

4. The foregoing reveals that the Trial Court in the proceedings did not indicate if it had sentenced the appellant to 12 years or 12 months or 12 weeks imprisonment. It is however apparent from the appellant's grounds of appeal and written submissions that he was sentenced to 12 years imprisonment. This court draws the inference that the Trial Court pronounced the sentence of 12 years imprisonment in court but due to an inadvertent error on its part, it forgot to write the word *"years"* after the words *"12 (twelve)"* in the Trial Court's original handwritten proceedings. The typed proceedings are a true reflection of the original handwritten proceedings. This court will come back to the issue of the sentence at the tail end of this Judgment.

5. On 22nd August, 2017 the appellant filed his grounds of appeal. He later filed his petition of appeal on 14th December, 2017. On 3rd October, 2019 the appellant filed amended grounds of appeal, with leave of the court. They are to the effect that Section 19 of the Oaths and Statutory Declarations Act was violated, that the offence of sexual assault was not proved beyond reasonable doubt, and that the sentence of 12 years imprisonment was excessive.

6. His other grounds of appeal are that the charge sheet was amended during the time of his Judgment contrary to Section 214 of the Criminal Procedure Code, that the source of his arrest was not established, that there were mass contradictions in the case by the prosecution and that his reasonable defence was not considered.

7. In his written submissions, the appellant stated that *voir dire* examination was not properly conducted and ran counter to the decision in **John Muiruri v Republic** [1983] KLR.

8. The appellant submitted that there was a contradiction between the evidence of the victim (PW1) and her mother (PW2) as to the identity of the person who defiled her. He stated that PW1 testified that the appellant inserted his fingers in her vagina but she told her mother that it was A who inserted fingers in her vagina. The appellant submitted that PW2 testified that the chief advised her to complain to the police because PW1 mentioned one *Musyoka* as having defiled her. He was of the view that the allegation by PW1 of stating that he inserted his fingers in her vagina was an afterthought and it should be disregarded.

9. The appellant relied on the case of **Tekerali Korongozi & Others v Republic** 1952 19 EACA 259 on the veracity of 1st reports which in most cases are usually accurate when matters are still fresh to a complainant as opposed to reports which are made much later. He also relied on the case of **Kimanyi Ndungu v Republic** [1979] 1 KLR 282 on credibility of witnesses. He submitted that in this case, PW1 seemed to be a person of doubtful integrity. The appellant wondered how PW1 could have been sexually assaulted if her legs were tied together with a rope as stated in her testimony. The appellant relied on the case of **Hamisi Bakari and Another v Republic** [1987] KLR on the issue of credibility of witnesses and the need to be truthful to avoid injustice by having an accused person sentenced where the evidence is doubtful.

10. In submitting that he should benefit from contradictions in the evidence of PW1 and PW2, the appellant cited the case of **Bonface Chitsango Ngoba v Republic** [2018] eKLR.

11. The appellant stated that he was sentenced to 12 years imprisonment while the minimum sentence prescribed under Section 5 of the Sexual Offences Act is 10 years imprisonment. He submitted that the sentence of 12 years imprisonment imposed on him was excessive.

12. The appellant contended that the provisions of Section 214 of the Criminal Procedure were violated since he was convicted of sexual assault and not defilement. He argued that the Trial Magistrate ought to have called for an amendment to the charge. He claimed that his rights were violated. In so stating, he relied on the case of **Jon Cardon Wagner v Republic & 2 others** [2011] eKLR.

13. He submitted that one A and the members of the public who arrested him never testified to clear the doubt as to his arrest. He cited the case of **John Kenga v Republic** Criminal Appeal No. 118 of 1984. He prayed for his appeal to be allowed.

14. The office of the Director of Public Prosecutions through Ms Mwangeka, Prosecution Counsel, filed written submissions on 8th October, 2019. The claim by the appellant that *voir dire* examination was not conducted procedurally was refuted by the Prosecution Counsel who stated that these days the courts accept both the question and answer format as well as the recording of the child's answers only. She relied on the case of **Maripett Loonkomok v Republic** [2016] eKLR, to support her assertion.

15. It was submitted that in the present case, the Trial Court conducted *voir dire* examination and recorded the answers given by the minor. She further stated that the said court formed the opinion that she was possessed of sufficient intelligence but lacked the understanding of the meaning of an oath.

16. As to the issue of whether the offence of sexual assault was proved, Ms Mwangeka submitted that the medical evidence tendered proved that there was penetration of PW1's vagina and that the injuries sustained were consistent with the act of insertion of the appellant's fingers. She further stated that the Trial Court held that the minor's testimony was not discredited and that it withstood cross-examination by the appellant.

17. It was submitted that there was no contradiction in the evidence of the area chief who testified of having spoken to PW1 in private and that she informed him that a man called *Musyoki* or *Musyoka* had penetrated her. It was indicated that after the visit to the chief he advised her to report to the police as PW1 had mentioned that she had been defiled by *Musyoki*.

18. Ms Mwangeka pointed out that in the Judgment, the Trial Court relied on the provisions of Section 124 of the Evidence Act as he believed that PW1 had spoken the truth about the appellant's culpability. She indicated that PW1 could have feared revealing the truth to her relatives because of the threat which had been issued to her by the appellant.

19. It was submitted that the appellant was known to PW1's family and that the evidence by the prosecution was consistent, credible and corroborated. She was of the view that the conviction was safe. She stated that the sentence of 12 years imprisonment was not harsh as the minimum sentence for the offence of sexual assault is 10 years imprisonment which can be enhanced to life imprisonment

THE EVIDENCE ADDUCED BEFORE THE LOWER COURT

20. PW1 was a minor aged 11 years. She recounted that there was a day when she was sweeping outside A's parents' home when she met *Musyoki* who was A's neighbour at the door to his house. She stated that he pulled her into his house. That he then covered her mouth with a blue and red piece of cloth. She further stated that he tied her hands and legs with a rope. PW1 testified that he placed her on his bed and inquired if she was married. That he removed her clothes by force and lay on her stomach after removing all her clothing.

21. She indicated that he inserted his fingers into her vagina and she screamed for help. It was PW1's testimony that a neighbour called Dorothy knocked at the door and *Musyoki* stopped and allowed her to leave. She stated that she was taken to the chief's office and then to the Changamwe Police Station. She was thereafter taken to Coast Province General Hospital.

22. PW2 was LNK [name withheld]. She was PW1's mother. She said PW1 was 11 years old. It was her evidence that on 19th November, 2016 she was at their kiosk at around 4:00 p.m., when her mother LK [name withheld] alerted her that PW1 was walking in pain. On looking at PW1, she noticed that she was walking with her legs part. She told PW2 that she was feeling pain in her genitals. PW2 said that PW1 had tears and a milk like substance in her vagina.

23. PW2 stated that she took PW1 to Coast Province General Hospital (CPGH) for examination on 23rd November, 2016. That upon PW1 being examined, the Doctor said that she had been defiled. PW2 produced PW1's birth certificate before the lower court.

24. PW2 indicated that the appellant was known as *Musyoka* but his common name was *Erick*. She had known him for 5 months.

25. PW3 was the chief of Mikindani location. His evidence was that on 2nd November, 2016 a lady reported to him that her daughter's

vagina had been penetrated with a finger by her neighbours's child. PW2 stated that he spoke with the child privately and she told him that it was one *Musyoki* or *Musyoka*, who was their neighbour who had penetrated her vagina. He told the child's mother to report to the police.

26. PW4 was Dr. Gillian Njambi Muiruri of CPGH. She produced a P3 form which had been filled by Dr. Rampei whose signature and handwriting she was familiar with, as the two had worked together for 2 years. PW4 stated that the P3 form showed that PW1's hymen was broken. She also stated that fresh and healed scars were visible in her genitalia. PW4 also produced PW1's PRC form which was filled at CPGH.

27. PW5 PC James Muli was the Investigating Officer. His evidence was that on 22nd November, 2016 PW1 was taken to Changamwe Police Station by her mother, who reported that she had been defiled by *Musyoka*. He advised PW2 to take PW1 for medical examination. PW5 indicated that on 24th November, 2016 members of the public arrested the appellant and he re-arrested him. PW5 stated that PW1 told him that the culprit was *Musyoka* which was his popular name. PW5 stated that on being arrested, the appellant informed them that his real name was Alex Juma.

ANALYSIS AND DETERMINATION

28. The duty of the 1st appellate court is to analyze and re-evaluate the evidence adduced before the lower court and arrive at its own independent conclusion while bearing in mind that it has neither seen nor heard the witnesses testify and make due allowance for the said fact. See **Okeno v Republic** [1972] EA 32.

29. The issues for determination in this appeal are:-

i. If *voir dire* examination was properly conducted;

ii. If the failure by the prosecution to call some witnesses weakened its case;

iii. If the appellant was properly convicted as per the provisions of Section 5(1) of the Sexual Offences Act; and

iv. Whether the sentence imposed on the appellant can be regarded as being harsh or excessive.

If *voir dire* examination was properly conducted.

30. The appellant's contention was that the Trial Court did not record *voir dire* examination in a question and answer format. The position that appertained as at the time of the case of **John Muiruri v Republic** (supra) which the appellant relied on, has since changed and *voir dire* examination does not necessarily have to be recorded in a question and answer format.

31. In the case of **Patrick Kathurima v Republic**, Nyeri CRA 137 of 2014, the Court of Appeal after reviewing case law on the issue of the procedure to be adopted by courts in conducting *voir dire* examination stated thus-

"It is best though not mandatory in our context that the questions put and answers given by the child during voir dire examination be recorded verbatim as opined by the English Court of Appeal in Regina versus Compell (Times) December 20, 1982 and Republic versus Lalkhan [1981] 73 CA 190 for the benefit of the appellate court which must satisfy itself on whether that important procedure was properly followed."

32. In **Maripett Loonkomok v Republic** (supra), the Court of Appeal when considering the issue of how *voir dire* examination should be conducted stated thus-

" …….. We reiterate that the practice and procedure of testing the intelligence and sufficient knowledge and nature of the oath has been varied. For instance, in the past courts insisted that voir dire examination must be in the form of a dialogue, with the Trial Court recording questions posed to the child and the child's answers nearly verbatim in the first person before drawing its conclusions on the question of suitability of the child. See Johnson Muiruri [1983] KLR 447. The courts today accept both the question and answer format and the recording of the child's answers only. See James Mwangi Muriithi (supra). What is constant is that, whatever format the court adopts, it must be on record."

33. This court has considered the manner in which *voir dire* examination was conducted in this case and notes that although it was not done in a question and answer format, it was appropriately done as per the decision in **Marripett Loonkomok v Republic** (supra). The Trial Court cannot be faulted in that regard.

If the failure by the prosecution to call some witnesses weakened its case.

34. The prosecution failed to call one Dorothy and A to testify. PW1 said that Dorothy knocked at PW1's door after she screamed. Under the provisions of Section 143 of the Evidence Act, the prosecution does not need to call a multiplicity of witnesses to support its case.

35. On the above issue, the Court of Appeal in **Bukenya & Others v Uganda [1972] EA 549,** held as follows-

"(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

(ii) That Court has the right and duty to call witnesses whose evidence appears essential to the just decision of the case.

(iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."

36. The person whom PW1 referred to as Dorothy was not an eyewitness to the commission of the offence. PW1's friend by the name A was also not an eyewitness to the commission of the offence. The appellant's source of arrest was established by the PW5 who stated that he was arrested by members of the public for having committed the offence he was charged with and that he re-arrested him. The Trial Magistrate found that PW1 spoke the truth. He stated thus –

> "Although there are discrepancies in the prosecution evidence as pointed out above, I find the evidence of G.M to be undiscredited and withstood the accused person's cross-examination. Pursuant to the provisions of the proviso to Section 124 of the Evidence Act, I am satisfied that G.M spoke the truth of the accused person's complicity she could have feared to reveal the act to her relatives because of the threat she said the accused person issued to her it is apparent that the accused was known to G.M. and her family. In the result, I find proven that the accused was the one who sexually assaulted G.M. as alleged."

37. It is apparent that even in the absence of the evidence of Dorothy and A, there was other evidence on record which could be considered by the Trial Court. In view of the observation made by the Trial Magistrate that PW1 was truthful in her evidence, it is my finding that the prosecution did not withhold the evidence of Dorothy and A because they would have given evidence which would have been adverse to the prosecution's case.

If the appellant was properly convicted as per the provisions of Section 5(1) of the Sexual Offences Act.

38. The appellant claimed that the Trial Court should have called for amendment of the charge in order to convict him for the offence of sexual assault. The Trial Court relied on the provisions of Section 186 of the Criminal Procedure Code to convict the appellant for the offence of sexual assault. That was after finding that the charge of defilement and indecent act were not proved beyond reasonable doubt. Section 186 of the Criminal Procedure Code (CPC) provides as follows;-

> **"When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the Sexual Offences Act, he may be convicted of that offence although he was not charged with it."**

39. The above powers are conferred on Trial Courts and are invoked at the stage where a court is writing a Judgment. As such, a Trial Court cannot request a prosecutor to amend the charge at that stage as the court is by then the one seized with the powers of analyzing the evidence adduced and the defence made.

40. Under the provisions of Section 214 (1) of the CPC a charge cannot be amended after the closure of the prosecution case.

> **"Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge sheet as the court thinks necessary to meet the circumstances of the case."**

41. In this case, the Trial Magistrate found that an offence other than the ones the appellant had been charged with was committed. He was therefore duty bound to enter a conviction for the said offence which according to him was sexual assault. This court finds that the Trial Magistrate acted within the confines of the law when he invoked the provisions of Section 186 of the CPC.

42. The evidence on record indicates that the appellant whom PW1 referred to as *Musyoki* pulled her to his house, bound her legs with a rope covered her mouth, with a piece of cloth and forcefully removed her clothes. He then inserted his fingers in PW1's vagina. She screamed and a neighbor by the name Dorothy went and knocked on PW1's door and that was when the appellant stopped. PW1 did not report the incident to her mother (PW2). PW2's mother is the one who alerted her that PW1 was walking in pain. When she was asked by PW2 what the problem was, she informed her that her friend A had inserted fingers in her vagina.

43. When PW1 was taken to the chief to report the incident, she was questioned privately and that was when she revealed that the appellant was the one who inserted his fingers in her vagina. Medical evidence established that she had healing abrasions on her external genitalia. Her hymen was broken and she had a slightly lacerated fourchette. On being cross-examined, the Doctor stated that fingers can break the hymen. This court holds the position that the medical report was indicative of the fact that PW1 was sexually assaulted.

44. On the issue of the contradiction as to what PW1 told PW2 and the chief (PW3) as to who caused the injuries in her vagina, the Trial Magistrate resolved the issue when he stated that PW1 withheld the identity of the real culprit from PW2 because the appellant warned her not to report the incident.

45. PW1's evidence was that the appellant was commonly known as *Musyoki*. PW2 referred to the appellant as *Musyoka* and said that he was commonly known as *Erick*. She maintained the same position in cross-examination. PW3 could not recall if PW1 had told him if it was *Musyoki* or *Musyoka* was had penetrated her vagina. He could recall that PW1 said that the said person was their neighbour. On 12th July, 2017 the prosecutor amended the charge before the closure of the prosecution's case so as to include the name *Musyoka* as an *alias* of Alex Juma, to the charge sheet. PW5 said that the report he received from PW2 was that one *Musyoka*, who was their neighbour had defiled PW1. The court's finding is that Alex Juma was the same person who was referred to by witnesses as *Musyoka* or *Musyoki* or *Erick*.

46. On the issue raised by the appellant on the inconsistency in the evidence of PW1, it was resolved by the Trial Magistrate. This court has not been given any reason as to why it should depart from the holding of the said court which had the opportunity to see and hear the witnesses testify and observe their demeanour.

47. It is apparent from the record that the appellant warned PW1 not to report the incident. Since she was a minor, such a warning must have stopped her from coming out clean to PW2 when she inquired as to why she was walking with her legs apart. PW1 opened up when the chief (PW3) spoke with her privately. This court is not surprised by the conduct of PW1 as she was a child of 11 years of age. The Trial Magistrate addressed the said issue adequately.

48. The appellant remained silent when he was put on his defence. He cannot now claim that his defence was not considered since he opted to say nothing.

Whether the sentence imposed on the appellant can be regarded as being either harsh or excessive.

49. Back to the issue of the sentence imposed on the appellant, the Trial Court did not specify in writing if he sentenced the appellant to 12 years imprisonment. The appellant in his submissions however disclosed that he was sentenced to 12 years imprisonment. His committal warrant also shows that he was sentenced to 12 years imprisonment. Taking into consideration the nature of the offence, this court is of the view that a sentence of 10 years imprisonment will serve the ends of justice. I therefore substitute the sentence of 12 years with 10 years imprisonment.

50. Pursuant to the provisions of Section 333(2) of the Criminal Procedure Code, the sentence will be effective from 2nd August, 2017 when the appellant was first arraigned in court, since he was in prison remand during his trial. The appeal succeeds only to the above extent. The appellant has 14 days right of appeal.

DELIVERED, **DATED** and **SIGNED** at **MOMBASA** on this **30th** day of **September, 2020. Judgment delivered through Microsoft Teams online platform due to the outbreak of covid-19 pandemic.**

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Mr. Muthomi, Prosecution Counsel - for the DPP

Mr. Oliver Musundi - Court Assistant