REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 130 OF 2013

DAFTON MWAKISHA ..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(An appeal from the original conviction and sentence delivered on 22nd March, 2013 by Hon. Ruguru, Acting Resident Magistrate, in Mombasa Senior Resident's Magistrate's Court Criminal Case No. 1366 of 2012).

JUDGMENT

1. The appellant was convicted for the offence of defilement contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the night of 24th and 25th December, 2011 at [Particulars Withheld] area in Kisauni District within Coast Province, unlawfully and intentionally caused his penis to penetrate the anus of RN [name withheld] a boy aged 10 years. The appellant was sentenced to life imprisonment.

2. On 26th August, 2013 the law firm of D.N. Omari & Company Advocates filed a petition of appeal on behalf of the appellant raising the following grounds of appeal-

(i) That the learned Trial Magistrate erred in law and fact by convicting and sentencing the appellant to life imprisonment without clear and/or proper corroborative evidence;

(ii) That the learned Trial Magistrate erred in law and fact by not considering the defence adduced by the appellant despite the same being credible;

(iii) That the learned Trial Magistrate erred in law and fact by disregarding the evidence of the expert witness;

(iv) That the learned Trial Magistrate erred in law and fact by relying solely on the prosecution witnesses' evidence which was full of contradictions;

(v) That the learned Trial Magistrate erred in law and fact by convicting and sentencing the appellant without taking into account that the case was not properly investigated;

(vi) That the learned Trial Magistrate erred in law and fact by convicting and sentencing the appellant in the absence of his advocate who should have properly mitigated for him;

(vii) That the learned Trial Magistrate erred in law and fact by convicting and sentencing the appellant without considering the submissions filed; and

(viii) That the learned Trial Magistrate erred in law and fact by convicting and sentencing the appellant to life imprisonment in the absence of the age assessment report of the complainant,

3. The appellant filed written submissions on 22nd May, 2020. He claimed that his rights were violated as the charge sheet indicated that he committed the offence he was charged with on the night of 24th and 25th December, 2011 but it also showed that he was arrested on 25th April, 2012. He indicated that the charge sheet did not disclose the date when he was first arraigned in court. He was of the view that Article 49(1)(f) of the Constitution was not complied with, thereby rendering the trial a nullity.

4. The appellant contended that although the charge was amended, the Trial Court did not comply with the provisions of Section 214(1) of the Criminal Procedure Code as the new charges were not read out to him.

5. The appellant submitted that PW1 alleged that he was informed about the offence by the victim and he immediately informed one Mr. Abdallah, a village elder, who then led to his arrest. The appellant stated that the said village elder did not give evidence in court.

6. The appellant stated that PW1 did not indicate to the court how she knew him before the incident or give a description of the perpetrator of the offence so as to clear the doubt in the prosecution's case.

7. He took issue with the fact that the victim was taken to hospital for treatment first before the incident was reported to the police station. He thought that was unusual.

8. He submitted that a person by the name Sammy was not called as a witness, yet the complainant alleged the he was sodomised in his presence.

9. The appellant alleged that there were contradictions in the case by the prosecution as PW2 indicated that Mama Pidi was the one who was given the P3 form but PW1 said that she was the one who took the victim to hospital and later to the police.

10. He also submitted that the victim (PW2) alleged that he was sodomised by him on more than one occasion but no records of the said incidents were produced. The appellant contended that PW2's mother told PW2 what to tell the police whereas she was said to be insane.

11. The appellant submitted that the Sungungu (community policing) who were said to have arrested him were not called to testify. He prayed for his appeal to be allowed.

12. The Director of Public Prosecutions through Ms Mwangeka, Prosecution Counsel, filed written submissions on 28th May, 2020 to oppose the appeal herein. She stated that PW2's age was established by his Aunt who testified as PW1, who indicated that he was 10 years old. Ms Mwangeka stated that PW1 in his *voir dire* examination stated that he was 10 years old and the Doctor (PW3) also indicated that PW2 was 10 years of age. It was pointed out that an age assessment report was also relied on by the Trial Court in determining PW2's age. The case of **Thomas Mwambu Wenyi v Republic** [2017] eKLR was cited to show that medical evidence is of paramount importance in determining the age of a victim of defilement. It was submitted that in the absence of any other evidence, the Doctor was the only person who could professionally determine the age of PW2. It was asserted that the age of PW2 was sufficiently proved.

13. On the issue of penetration, Ms Mwangeka submitted that PW2's brother refused to open the door to their house on the night of 24th December, 2012. She further stated that the evidence adduced was to the effect that the appellant took PW2 and his friend Sammy to his house. He then took PW2 to his bedroom, put him on the bed, undressed him and as he lay on his stomach, he applied saliva on PW2's anus and defiled him. It was stated that the sodomy went on every day and the appellant would give PW2 money afterwards.

14. It was submitted that medical evidence adduced by the Doctor (PW3) was that upon anal examination, PW2 was found to have loose anal sphincter muscles due to constant injury to the anal muscle caused by a blunt object. PW3 assessed the degree of injury as harm. Ms. Mwangeka submitted that PW2's evidence that he had been sodomised was thus corroborated by the evidence of PW3.

15. It was submitted by the Prosecution Counsel that the appellant was well known to PW2 as their neighbor and identification was by way of recognition. She cited the case of **Anjononi v Republic** [1980] KLR, which states that recognition is more reassuring than the identification of a stranger.

16. The Prosecution Counsel also submitted that the appellant's claim that his constitutional rights were violated for allegedly not having been taken to court within 24 hours of his arrest was not an issue for this court to resolve on appeal, as that was a constitutional issue. She relied on the case of **P.N.O v Republic** [2016] eKLR.

17. On the alleged failure by the Trial Court to inform the appellant of his rights under the provisions of Section 214 of the Criminal Procedure Code, Ms Mwangeka stated that the charge was amended on 6th July, 2012 and by that time, the hearing of the case had not commenced as the 1st witness testified on 27th August, 2012. Further, the appellant's right to recall witnesses and further cross-examine them had not attached.

18. Ms Mwangeka submitted that the prosecution proved its case beyond reasonable doubt and that the evidence adduced was consistent and corroborated. She urged this court to uphold the conviction and sentence. She submitted that the issue of a grudge between PW1 and the appellant was not proved.

19. On 6th July, 2020 the appellant filed written submissions in response to the DPP's submissions. He asserted that there was a grudge between him and PW1 who was his former girlfriend because he refused to marry her.

20. The appellant stated that he was not medically examined to ascertain if he committed the offence. He claimed that the P3 form did not disclose any injury on PW2 as proof of penetration.

21. He contended that the evidence of PW2 was neither consistent nor truthful although the Trial Court was of a different opinion. In his view, the provisions of Section 124 of the Evidence Act were not applicable.

22. On the failure by the prosecution to call one Sammy as a witness, the appellant relied on the case of **Bukenya & Another v Uganda**

(1972) EA 549, to assert that he ought to have been called to testify by the prosecution.

THE EVIDENCE ADDUCED BEFORE THE LOWER COURT.

23. The evidence adduced before the lower court by PW1, JN aka NA [name withheld] was that on 30th March, 2012 she found her sister's child at Bombolulu and he told her that the appellant had done bad things to him. PW2 stated that the child told her that the appellant removed his penis, applied saliva on it and put it in his anus. PW1 indicated that his sister (PW2's mother) was a retard

24. It was PW1's evidence that she took the child (PW2) to Makadara Hospital (Coast Province General Hospital) and reported the matter to Nyali Police Station. She indicated that she went to a village elder, one Abdallah, who assisted with the arrest of the appellant from his house. PW1 said that she was present during the arrest. She stated that the child she was referring to was RN [name withheld], who was 10 years old.

25. PW1 further stated that she had known the appellant for a long duration of time, but had no relationship with him. She further stated that PW2 told her that on 25th December, 2011 and 1st January, 2012 the appellant had done bad things to him and he would give him Kshs. 10/= as it became a habit.

26. The victim, RN [name withheld] adduced evidence as PW2 in the lower court. He was taken through *voir dire* examination and gave sworn evidence. He said that he was 10 years old and that PW1 was his Aunt. His evidence was that on the night of 24th December, 2011, their door had been locked with a padlock. He stated that he was playing with the appellant's jerry can with his friends, one of whom was Sammy. PW2's evidence was that when he went to their house, his brother refused to open the door for him. He further stated that the appellant took him and Sammu to his house. He also stated that the appellant removed his trousers, lay him on his stomach, he then removed his *"dudu"* and did bad manners to him. PW2 also recounted that the appellant applied saliva on his anus and inserted his *"dudu"* therein and did it until morning.

27. It was PW2's evidence that the appellant sent him for cigarettes and when he returned, he did it again and threatened to kill him if he told anyone. He indicated that he was given money to go and watch a video by the appellant, who told him to go home.

28. PW2 recounted that he informed his mother what had happened to him but she chased him away as she did not believe him. He stated that he was in a lot of pain and he went and told his big brother N [name withheld] what had happened. PW2 indicated that his Aunt (PW1) took him to the hospital and they later went to the police station. He indicated that Mama Pidi (PW1) was given a document, a P3 form. He stated that he knew the appellant as their neighbour and he did bad manners to him every day and gave him money afterwards.

29. PW3 was Dr. Ngone of Coast Province General Hospital (CPGH). He stated that PW2 was taken to CPGH on 14th April, 2012 (verified from the original hand written proceedings) for examination. PW3 said that PW2 had a thin anal region and the loosening of the said region showed that there was constant injury to the anal muscle which was caused by a blunt object. The degree of injury was assessed as harm. PW3 signed the P3 form on 23rd April, 2012. He explained that the delay in signing the said form was occasioned by the fact that the PW2 went for the P3 form later after being examined.

30. The Investigating Officer was No. 91654 PC Margaret Nyawira attached to Nyali Police Station. She testified as PW4. She stated that on 13th April, 2012 she was assigned this case to investigate and she summoned the victim to the police station, who was taken there by his Aunt (PW1). PW4 indicated that PW2 reported to her that the appellant called him to his house on 24th December, 2011 and defiled him. He also told her that the appellant was their neighbour.

31. PW4 stated that by then, PW2 had been taken to hospital for treatment. PW1 and PW2 took her to the scene at Kisimani and she was shown the house where the incident took place. She noted that PW2 and the appellant were neighbours. She indicated that by then the appellant had been arrested by members of the public and was in police cells. PW4 also indicated that on interrogating the appellant he told her that he could sort the matter out of court. She issued PW2 with a P3 form.

ANALYSIS AND DETERMINATION

32. The duty of the 1st appellate court is to analyze and re-evaluate the evidence adduced and come to its own independent decision. It must however bear in mind that it has neither seen nor heard the witnesses testify and make an allowance for the said fact. The said duty was espoused by the Court of Appeal in the case of ***Njoroge v Republic*** *[1987] KLR 19 at page 22 in the following words:-*

> ***"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya vs Republic [1957] EA 336, Ruwalla vs Republic [1957] EA 570."***

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

(i) If the age of PW2 was established;

(ii) If there were contradictions in the evidence adduced by prosecution witnesses;

(iii) Whether the failure by the prosecution to call some witnesses weakened the prosecution's case.

(iv) If the prosecution proved its case beyond reasonable doubt; and

(v) If the sentence that was imposed on the appellant can be regarded as being either harsh or excessive.

If the age of PW2 was established.

34. In his grounds of appeal, the appellant contended that PW2's age was not established. Although the above issue was raised in the grounds of appeal, the appellant did not expound on it in his written submissions. This court has deemed it necessary to address the said issue as the age of a victim in an offence of defilement determines the provisions of the law an accused person should be charged under and the sentence to be imposed on him, in the event that he is convicted.

35. PW1 who was the Aunt to the victim (PW2) gave the age of PW2 as 10 years. In his *voir dire* examination, PW2 said that he was 10 years old. He said the same thing in his examination-in-chief.

36. On 7th November, 2012 the Trial Court made an order for PW1 to be taken to CPGH for age assessment. The lower court proceedings indicate that the age assessment report was received in court on 24th January, 2013. It indicated that PW2's approximate age was 10 years. In the case of **Francis Omuroni v Uganda,** Court of Appeal Criminal Appeal No. 2 of 2000, the Court of Appeal in Uganda held that medical evidence is paramount in determining the age of a victim in an offence of defilement and that the Doctor is the only person who could professionally determine the age of the victim in the absence of other evidence.

37. It is this court's finding that PW2's age was established to be 10 years through the age assessment which was done on him. The ground of appeal on the said issue is therefore without merit.

If there were contradictions is the evidence adduced by prosecution witnesses.

38. Some of the issues raised by the appellant as contradictions are far from it. He claimed that PW2 contradicted the evidence of PW1 by stating that Mama Pidi was given his P3 form yet PW1 said that she was the one who took PW2 to hospital. If the appellant had read the evidence of PW2 more closely, he would have found out that Mama Pidi was the same person as PW1. In the evidence of PW2 it reads thus-

> *"JN [name withheld] took me to Coast General Hospital for examination after I told her. We later went to Nyali police station. I recorded my statement. They gave Mamake Pidi a document (PW1)."*

39. The above piece of evidence indicates that PW2 did not contradict the evidence of PW1 in regard to the person who was given his P3 form at the hospital. Failure by the prosecution to call the village elder by the name of Abdallah and one Sammy cannot be termed as a contradiction as indicated by the appellant in his written submissions. This court finds no contradiction whatsoever in the evidence of prosecution witnesses.

Whether the failure by the prosecution to call some witnesses weakened the prosecution's case.

40. The appellant in his submissions stated that one Sammy was not called as a witness. From the evidence of PW2, when the appellant found him and Sammy outside after PW2's brother refused to open the door to their house, he took them to his house. He took PW2 to his room and put Sammy in another room to sleep. It is therefore clear that Sammy did not sleep in the same room with PW2 and the appellant and would therefore not have known what transpired in the course of the night between the two.

41. In the case of **Julius Kalewa Mutunga v Republic** [20016] eKLR, the Court of Appeal held as follows on the issue of failure by the prosecution to call some witnesses –

> ***" ..... As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example that the prosecution was influenced by some oblique motive."***

42. The other witness who is said not to have been called was Abdallah, the village elder. This court notes that he was not an eyewitness to the commission of the offence. The only role he played was in arresting the appellant.

43. In the circumstances of this case, it cannot be said that the prosecution withheld the evidence of Sammy and Abdallah because it would have been adverse to its case. This court's finding on the said issue raised by the appellant is that it has no merit.

If the prosecution proved its case beyond reasonable doubt.

44. PW2's evidence was that the appellant defiled him on the night of 24th December, 2011 after his brother refused to open the door to their house for him. The appellant took both PW2 and his friend Sammy to his house. Sammy was given a different room whereas the appellant took PW2 to his room. The appellant undressed PW2, lay him on the bed with his body facing downwards. The appellant removed his *"dudu"* (penis) applied saliva on PW2's anus and inserted it therein. According to PW2, the appellant did it all night. He at one time sent PW2 for cigarettes and defiled him again.

45. PW2 indicated that he could not scream because he had been threatened that he would be killed by the appellant. He however told his mother but she chased him away as she did not believe him. He explained that his mother was mad. PW1 who was a sister to PW2's mother

explained that the latter was a retard. The foregoing fact was also stated by the Investigating Officer, (PW4).

46. The evidence of PW2 was corroborated by medical evidence adduced by PW3 who medically examined PW2 and found that he had loose anal sphincter muscles. He assessed the degree of injury as harm. It is clear to this court that PW2's anal sphincter muscles loosened as a result of being continually defiled by the appellant.

47. On the issue of identification of the appellant, he was well known to PW2 as his neighbour. The Investigating Officer visited the scene and ascertained that they were indeed neighbours. In this court's view the claim by the appellant that the case was not well investigated has no basis.

48. In his grounds of appeal, the appellant claimed that he was convicted in the absence of his Advocate who would properly have mitigated for him. He also stated that submissions filed were not considered. The lower court proceedings indicate that from 8th October, 2012 the appellant had an Advocate by the name Omare (sic) who was representing him.

49. After the appellant gave his defence on 7th December, 2012 his Advocate requested for a mention date. The prosecutor said he would not submit. Submissions had not been filed by 24th December, 2012. On that day Mr. Omare (sic) was not in court. The Trial Court gave the appellant up to 24th January, 2013 to comply but he informed the Trial Court that he had discharged his Advocate since he had given his defence. He prayed for a date for Judgment. This court notes that the law firm of D.N. Omari & Co. Advocates filed written submissions on 24th December, 2012. The appellant was correct in stating that the Trial Magistrate did not consider his submissions as she did not indicate that she had done so, in the Judgment she delivered against the appellant.

50. This court has gone through the said submissions and noted that the issues addressed by the appellant's Counsel in the lower court are almost similar to the ones which the appellant has raised in this appeal. His Advocate in the lower court had submitted that the age of the victim (PW2) was not established. The Trial Court ordered for PW2 to be taken to CPGH for age assessment on 7th November, 2012. The age assessment report dated 8th November, 2012 was presented to the court by the prosecutor on 24th January, 2013. It is therefore obvious that at the time the appellant's Advocate filed written submissions on 24th December, 2012 the said age assessment report was not in the court file, thus his submission to the effect that no age assessment was done for PW2.

51. Needless to say that a Trial Court is under obligation to go through submissions filed by Advocates or parties to a case as they play a pivotal role in the administration of justice. At times, submissions point out factors and/or issues which a Trial Court could otherwise have overlooked. This court holds that even if the Trial Court had taken into account the submissions made by Mr. Omari Advocate, the outcome of the case would not have changed as the said Court took into account the factors that a court needs to consider in a defilement case.

52. The issue of contravention of the appellant's rights under Article 49(1)(f) of the Constitution cannot be addressed by way of a Criminal Appeal as it is an issue to be raised by way of a constitutional petition.

53. In his sworn defence the appellant stated that on 30th March, 2012 he left work in the evening when he got arrested by community policing at his house, at 7:30p.m. He stated that he was taken to the police station where he saw PW1 who was his former neighbour and girlfriend, whom he could not marry because she had a child. He said that between 24th and 25th December, 2011 he was in his house with his brother David Mwachia and other people from upcountry. He admitted that PW2 went to his house but he did not see his friend. He refuted the evidence by PW2 and PW4 that PW2's mother is retarded. He said that she did not attend the lower court to testify. He further stated that when he parted ways with PW1, she said that she would teach him a lesson. He denied having committed the offence.

54. The appellant called his brother David Mwachia Dau (DW2) as his witness. He stated that he was at the applicant's house between 24th and 25th December, 2011 celebrating Christmas and that PW2 and his friend did not go to the appellant's house. He asserted that the charges were perpetrated by lies made by PW1 who had parted ways with the appellant after being in a relationship for a year. He stated that at the time the appellant was arrested on 30th March, 2012 (sic) he was no longer in a relationship with PW1. He indicated that PW2's mother was of sound mind and that she was their neighbour. In cross- examination, DW2 readily agreed that PW1 was better placed to give evidence about PW2's mother's state of mind.

55. The Trial Court considered the defence raised by the appellant and the evidence of DW2. She found no element of a grudge against the appellant by PW1. The Trial Court found PW2 to be a credible and truthful witness. She found his evidence to be consistent. This court has looked at the responses PW1 gave in cross-examination. At one point she said that she had a grudge against the appellant because he was paid. It is not clear what she meant. On being re-examined she said she had no grudge against him.

56. Having considered the evidence as a whole, this court's finding is that the prosecution proved its case beyond reasonable doubt. The appellant never cross-examined PW1 about their love relationship that had allegedly gone south. If at all there had been such a relationship, he would not have forgotten about it. This court finds that the appellant's defence was farfetched and an afterthought. It was property dismissed as such by the Trial Court. The appellant was convicted on overwhelming evidence which was leveled against him by the prosecution. I hereby uphold the conviction.

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

57. On the issue of the sentence imposed on the appellant, it cannot be understated that courts have a duty to uphold the welfare of children and ensure that persons who act as sexual predators targeting children are duly punished. Defilement of the boy child is frowned upon just as much as when the offence is perpetrated against the girl child. Sodomy as happened in this case can lead to a child having urinary and faecal incontinence. That can adversely affect the life of a child due to the medical problems that come about. The trauma associated with sodomy can lead to psychological problems. Such an offence can lead to stigmatization among the agemates of a boy who has been sodomised.

58. The appellant defiled a child whose mother was retarded. That was a fact which was well known to him as he was a neighbour to the victim (PW2). The appellant knew that PW2 was defenceless as his mother was not capable of protecting him due her mental incapacity. This court considers the foregoing as an aggravating factor when considering the sentence which was imposed on the appellant. The said circumstances call for a severe sentence.

59. This court also bears in mind the Court of Appeal decision in **Jared Koita Injiri v Republic [2019] eKLR,** which addressed the issue of mandatory sentences in sexual offences. I am therefore of the view that a determinate sentence will serve the ends of justice.

60. I hereby set aside the sentence of life imprisonment and substitute it with a sentence of 30 years imprisonment. The said sentence shall be effective from 27th April, 2012 since the appellant was in prison remand during the hearing of his case in the lower court. The provisions of Section 333(2) of the Criminal Procedure Code are as such applicable. 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 for the DPP

Mr. Oliver Musundi - Court Assistant.