REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL APPEAL NO 59 OF 2019

PETER MBUVI WAMBUA....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence by Hon C.K. Kisiangani (RM) - Chief Magistrate's Court at Machakos in Criminal Case Number (S O) 3 of 2018 delivered on 7.5. 2019)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

PETER MBUVI WAMBUA....ACCUSED

JUDGEMENT

1. The Appellant herein, **PETER MBUVI WAMBUA**, was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. He also faced an alternative charge for the offence of committing indecent act with a child contrary to Section 11(1) of the said Act.

2. He was convicted on the alternative charge and sentenced to serve ten (10) years' imprisonment.

3. Being dissatisfied with the said judgment, the Appellant filed his Petition of Appeal and the grounds are as follows:-

> **a. The learned magistrate erred in law and fact in convicting the appellant mainly on the evidence of the minor children which was untrue and could not be relied upon to support the conviction.**
>
> **b. The trial magistrate erred in law and fact by convicting on evidence that was full of contradictions, inconsistencies and fabrications hence should not have been relied upon as a basis of the appellant's conviction.**
>
> **c. The trial magistrate erred in law and fact in disregarding the fact that the prosecution did not prove the particulars of the alternative charge beyond reasonable doubt.**
>
> **d. The trial magistrate erred in law and in fact in failing to take into consideration the appellant's defence.**
>
> **e. The trial magistrate erred in making a finding on the alternative count against the weight of evidence.**

4. The appeal was canvassed by way of written submissions.

5. The appellant submitted on each of the grounds raised in the appeal. On the ground of belief of the minor's evidence, reliance was placed on section 124 of the Evidence Act and the case of **Dennis Okelo Mateba v R (2015) eKLR** in submitting that the minor was not candid in

saying that she did not know what was between the boy's legs yet she said the appellant touched her with it. It was further submitted that Pw2 and Pw4 were the only witnesses to the incident and their evidence was contradictory because Pw2 told the court that she and the appellant were seated on a chair eating when the appellant instructed her to get inside the house whereas Pw4 told the court that she found the two lying on a bed while covered in blankets; further that Pw2 told the court that the incident occurred on a non-school day whereas Pw4 testified that the incident occurred on a school-going day. It was therefore counsel's submission that the inconsistencies in the evidence cast doubt on the commission of the offence and the court was urged to find that Pw2 and Pw4 were not truthful.

6. On the issue of contradictions in the prosecution case, it was submitted that there was no evidence that there was contact between the genital organs of the appellant and those of the victim. It was submitted that the victim was examined three weeks after the incident and that the infection on the victim could not be linked with indecent assault said to have been committed by the appellant. It was further submitted that because the victim gave unsworn evidence, the same had no probative value.

7. On the issue of proof of the prosecution case, reliance was placed on the case of **Moi Dalu v R (2006) eKLR** and it was submitted that there was no evidence of the assault. On the issue of the appellant's defence, there is nothing of value in the submissions. Counsel prayed that the conviction be quashed and the sentence set aside and that the appellant be set at liberty.

8. In reply, counsel for the respondent opposed the appeal. It was submitted that the age of the victim was proven vide the birth certificate of the minor (Pexh 5); that the incident was proved vide the evidence of Pw4 who saw the appellant on top of the minor as well as the account of the minor herself. It was submitted that the sentence meted on the appellant was proper and thus the court was urged to uphold the sentence that was meted on the appellant.

9. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo v Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

> **"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

10. In support of the prosecution case, there were 6 witnesses lined up. **Pw1** was **MNM** who testified that the victim was her daughter who was living with her grandmother in 2017 when she was raped. She told the court that the appellant was employed to assist the grandmother but that she stopped him in October 2017 when she heard that he used children to do his work while he just slept yet he had been employed to do those tasks. It was her testimony that on 25.11.2017, Christopher Musyoka informed her that he had found the appellant lying on top of the victim while in their cousin's house. She stated that the victim was taken to Hospital and that she was informed afterwards that the child had no problem. She testified that she confronted the victim who informed her that the appellant had called her inside the house and instructed her to remove her clothes then made her to lie on the bed then they covered themselves with a blanket while the Appellant lay on top of her. She told the court that the victim informed her that the Appellant inserted his male organ between her legs. She testified that she reported the matter to Masii Police station on 29.12.2017 and had the child referred to Hospital. The treatment notes, PRC form, P3 form and birth certificate were tendered in court and marked for identification. When recalled, she testified that she could not tell why Christopher took long to tell her about the incident; that she did not know where the incident happened because she did not live with the victim. She testified on re-examination that she instructed the appellant to stop working because of lack of money to pay him.

11. Pw2 was **WN**; a voir dire examination was conducted on her and that the court was satisfied that she possessed sufficient intelligence but did not understand the nature of an oath and hence she was directed to give unsworn evidence. She told the court that she did not know her age but that she was in class one. She testified that she used to live with her grandmother and that the appellant used to live with them and wash utensils. It was her testimony that while she was eating, the appellant instructed her to get inside the house and he followed her there where he removed her clothes and then touched between her legs with his "*kithise*" (translated in Kikamba language as a tail). She told the court that Musyoka saw them through the window as he did not enter he house and who later informed her mother. She told the court that she informed her grandmother about it. It was her testimony that she goes to Sunday school and that those who tell the truth go to heaven; that those who do bad things would go to Satan. She reiterated that Musyoka saw them on the bed. On cross examination, she testified that the appellant promised to buy her two chapattis. She finally reiterated that while she was outside eating, the appellant directed her to go inside the house where he did bad manners to her.

12. Pw3 was **Dr John Mutunga** who testified of a medical examination that he had carried out on the complainant. He stated that he observed that her external genitalia was normal; that her hymen was intact; she had a foul smelling whitish discharge from her vagina and was on antibiotics. He told the court that he filled the P3 form on 4.1.2018. He testified that he had the treatment notes from Machakos Level 5 Hospital dated 29.12.2017 that alleged that the victim had been assaulted three months before; he also had the PRC form. He told the court that there was no penetration but had a bacterial infection; The PRC form, P3 form and treatment notes were tendered as exhibits. On cross examination, he testified that the infection that the victim had is passed mostly through sexual activity but may be passed through other ways; that he could not tell if the victim was infected sexually.

13. Pw4 was **CM**; a voir dire conducted on him satisfied the court that he was possessed with sufficient intelligence and understood the duty of telling the truth and who was directed to give sworn evidence. He told the court that the appellant also known as Kavosi used to cook for him and his siblings when they were staying with their grandmother. He told the court that in 2017, he returned from school to change his clothes and found the door to the house locked from inside and hence he peeped through the window and saw the appellant on top of Pw2. On cross examination, he told the court that he found the appellant and Pw2 in mum's house where he kept his clothes and that they had covered themselves with a blanket. He told the court that he heard the appellant informing Pw2 that he would buy her chapatti and that he later informed his mother the day she came home because the appellant had gone away and had threatened him not to speak lest he be arrested.

14. Pw5 was **Nicholas Mutinda Kandi** who testified that he received a report on 29.12.2017 from the village manager that a child had been defiled. He told the court that he was informed that the child was Pw2 and that her mother was Pw1 and that he referred the matter to the

police station. On cross examination, he told the court that he could not prove that the appellant was Kavosi.

15. Pw6 was **Pc Alfred Chebii** who testified that he was at the Masii Police Station in 2018 when Pw1 and Pw2 came and reported a defilement case. He told the court that the child was four years old and that Pw1 reported that on 24.12.2017 when she returned home, Pw4 reported that the appellant had been found locked in a house with the victim and who saw the appellant defiling her; that Pw4 was threatened not to speak and only got the opportunity to speak when the appellant left. He tendered the birth certificate of Pw2 as an exhibit. On cross examination, he testified that he did not record a statement from the appellant as he was processed by Kathiani Police station.

16. The trial court found that the appellant had a case to answer and who was subsequently put on his defence. After section 211 of the Penal Code had been read out to the appellant, he opted to give sworn evidence and call one witness. He testified that he was also called Kavosi and that he used to work for Pw1 but however he had left due to financial constraints. He testified that he was arrested after he left Pw1's grandmother's home. He told the court that the prosecution witnesses were lying. On cross examination, he told the court that he had a good relationship with the children he used to work for.

17. DW2 was **Kasyula Kioko** who testified that Pw1 was his neighbour and who had five children. He told the court that he used to see the appellant at Pw1's home working. On cross examination, he testified that he did not know what had happened at Pw2's home.

18. Having looked at the submissions, the grounds of appeal as well as the evidence on record, I find the following issue necessary for determination :-

a. Whether or not the prosecution had proved its case beyond reasonable doubt.

b. Whether there were procedural infractions that would vitiate the trial.

c. Whether there were contradictions in the evidence of the prosecution and whether the same could be cured by section 382 of the Criminal Procedure Code Act.

d. What orders may the court make?

19. On the issue of proof of the prosecution case, I shall combine the same with the aspect of contradictions. The appellant's counsel submitted that the prosecution case was riddled with contradictions that cast doubt in the case and ought to be resolved in favour of the appellant. A perusal of the list of exhibits produced during the trial showed a birth certificate as evidence of birth which placed the age of the complainant as 4 years and hence the appellant's claim that age was not proven lacks merit.

20. With regard to evidence of penetration, the trial court relied on the evidence of Pw2, as corroborated by Pw4 who was an eye witnesses and the medical evidence from Pw3. The said medical evidence was based on a P3 form. Pw3 testified that the complainant's hymen was intact. The court seemed convinced that there was contact between the genital organs of the appellant and Pw2 in placing reliance on section 2 of the Sexual Offences Act as well as the case of **Moi Dalu v R (2006) eKLR.** I am unable to see any contradiction in the evidence of the witnesses that would go to the root of the prosecution case since the testimonies corroborated each other. As was held in **Richard Munene v Republic [2018] eKLR** not every inconsistency or contradiction is material. As for the identity of the appellant; the evidence was more of recognition since the appellant used to live with the complainant and her siblings as he had been employed there by the complainant's mother. The appellant in his defence evidence admitted that he used to work at what was said to be the scene of the crime. When I look at the evidence in totality, I am satisfied that there was no penetration and the trial court rightly considered the alternative charge as there was no evidence on penetration according to the evidence of the doctor. The arrival of Pw4 was in the nick of time as the appellant could have accomplished the mission of defiling the complainant and thus the evidence supported the alternative charge.

21. The appellant's counsel has assailed the trial court for failing to consider the defence of the appellant. The record reveals that the trial court duly considered the appellant's evidence and found that the same did not cast doubt upon that of the prosecution. Hence the appellants ground of appeal thereon lacks merit.

22. In addressing the question as to whether or not the prosecution proved its case to the required standard, being proof beyond reasonable doubt, i find that the evidence on record is satisfactory to convince this court that the appellant is the perpetrator of the offence. The complainant fingered him out as the perpetrator as she had known him before. The appellant was well known to the victim and her siblings. The complainant's brother (Pw4) peeped through the window and found the two lying in bed having covered themselves with a blanket. The incident took place during the day. I am satisfied that the appellant was found red handed in flagrant delicto. The identification of the appellant was thus not in doubt as it was one of recognition. The appellant himself admitted that he had no problem with the victim and her siblings as well as their mother and hence there was no possibility of a frame up as alleged by the appellant. It was highly unlikely that the complainant's mother would use her own young and vulnerable daughter as a victim of sexual assault so as to get at the appellant for no apparent reason yet they had no differences before. The appellant's defence did not cast any doubt on the prosecution's case and thus it was rightly rejected by the learned trial magistrate.

23. On the issue of procedural infractions and their effect, the appellant's counsel pointed out and I note that there was reliance by the trial court on an unsworn statement of Pw2. Section 151 of the Criminal Procedure Code requires the taking of evidence in criminal cases on oath, it states as follows:

"**Every witness in a criminal cause or matter shall be examined upon oath, and the Court before which any witness shall appear shall have full power and authority to administer the usual oath**".

24. Even though the same was unsworn, I am guided by section 124 of the Evidence Act and by the case of **Dinkerrai Ramkrishan Pandya v R [1957] EA 336** where the East Africa Court of Appeal cited the case of ***Coughlan v Cumberland (3) (1898) 1 Ch. 704 where Lindly***

MR, Rigby and Collins L.JJ *observed* that "when the Question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; **and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on credibility of witnesses whom the court has not seen**.

25. It would mean that reliance on such unsworn evidence would be subject to whether the court is satisfied that the witness was truthful; I am satisfied that Pw2 was truthful because she seemed to understand the duty of speaking the truth due to her testimony that was to the effect that she goes to Sunday school and that those who tell the truth go to heaven while that those who do bad things would go to Satan. Her evidence was properly relied upon. The resultant conviction of the appellant by the learned trial magistrate was therefore quite safe and I see no reason to interfere with it.

26. Finally, the appellant was sentenced to serve ten years' imprisonment. Under section 11(1) of the Sexual Offences Act, a person found guilty is liable to serve a sentence of not less than ten years. It is noted that the appellant was sentenced to ten years' imprisonment. I find the said sentence to be the possible minimum in law. The victim was a young child hardly five years old and that the incident will psychologically affect her. I find that the sentence was neither harsh nor unlawful. I see no reason to interfere with the same.

27. In the result, it is my finding that the appeal lacks merit and is hereby dismissed. The conviction and sentence is upheld.

It is so ordered.

Dated and delivered at Machakos this 29th day of September, 2020.

D.K. Kemei

Judge