REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 171 OF 2017

MUTHUI KIOKO ..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence by Hon. D. Mochache, Senior Principal Magistrate, in Shanzu Senior Principal Magistrate's Court Criminal Case No. 119 of 2015).

JUDGMENT

1. The appellant was convicted for the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of the charge were that on the 10th day of January, 2015 at [Particulars Withheld] area of Kisauni Sub-County within Mombasa County unlawfully touched the vagina of AM [name withheld] a girl aged 10 years with his penis. He was sentenced to life imprisonment.

2. The appellant being aggrieved by the said conviction and sentence filed a petition and grounds of appeal on 26th September, 2017. He later amended his grounds of appeal, with leave of the court. He raised the following grounds of appeal-

(1) That the learned Hon. Trial Magistrate erred in law and fact in her final analysis concerning his case as to-

a) Whether the complainant was defiled.

b) Whether the appellant was the person who defiled the complainant.

c) Whether the child in question was a minor when given that-

(i) No scientific tests were done as required by law to prove the same.

(ii) There was no evidence on record to show why it took 2 years and 2 months to escort PW1 to hospital.

d) The PRC form exhibited was unjustifiably admitted as evidence for it neither bore the seal of the hospital of origin nor did its author testify.

(2) That the Learned Hon. Trial Magistrate erred in law and fact in basing her findings and assertions on the prosecution case as there was no evidence tendered to ascertain the age of the complainant.

(3) That the Hon. Trial Magistrate erred in law and fact in shifting the burden of proof upon the appellant yet it was the duty of the prosecution to prove its case to the required standard when given that-

a) The persons who arrested him were unreasonably left out of the prosecution's case.

b) One Dennis who told PW2 of the matter in question was not called to testify.

c) The information which was used by the prosecution as the basis of its case was obtained by force through beatings and the victim could have implicated anybody to save her skin.

(4) That the Learned Trial Magistrate erred in law and fact by rejecting the appellant's sworn defence which remained unshaken by the prosecution's case.

3. The appellant filed his submissions which were to the effect that the case against him was fabricated by the victim, her mother and Aunt. He stated that no other person from the said locality came to testify although PW1 said that the offence occurred at a Kiswahili type house. In the appellant's view, there must have been other tenants in the said house but the prosecution was silent on that fact.

4. The appellant decried the long duration of time it had taken before the hearing of his case commenced as he was arrested on 31st January, 2015 and arraigned in court on 2nd February, 2015. He stated that his case did not commence hearing until 26th April, 2017. The appellant made reference to the lower court proceedings of 21st June, 2016 and said that PW1 had refused to testify but she was forced to go to court and testify. The appellant interpreted PW1's reluctance to testify to mean that she had not been offended by anyone.

5. He claimed that the Investigating Officer who testified on 26th April, 2016 stated that PW3 had not recorded a statement up to that time. The appellant submitted that the foregoing meant that the claim against him was fabricated. The appellant stated that PW1 testified on 26th April, 2017 which was 6 days after the filling of the PRC form but the P3 form was filled 2 years later. He wondered why he was charged before the P3 form was filled.

6. The appellant submitted that PW3 testified before the Trial Court that she led PW1 to hospital but she and PW2 did not give such an account in their evidence.

7. The appellant claimed that the P3 form was not produced although it had been marked for identification. He further claimed that the name of the police officer who took PW1 to hospital on 20th April, 2017 was not disclosed on the said document. The appellant contended that since the PRC form did not have a stamp from the police station, it should have been rejected. He further stated that one RK who escorted PW1 to hospital was not called to testify as well as one SM who filled the PRC form.

8. He further stated that no proper foundation was laid under Section 77 of the Evidence Act for production of the PRC form by PW4 as the court was not informed of the reason why S, who filled the said form, was not called to testify.

9. The appellant claimed that PW3 lied to the court when she testified that the PRC form was filled which confirmed defilement on 30th January, 2015 yet PW4 testified that on the day of filling of the PRC form, the injury was one year and 2 months old.

10. Another bone of contention raised by the appellant was that the P3 form gave the age of the victim as 10 years as at 30th January, 2015 but the PRC form gave her age as 28 years. The appellant therefore argued that the charge of defilement could not be supported by the documents which were presented to the court.

11. He claimed that PW5 and PW2 did not place him at the scene of crime as the former said that she did not enter the house in which she heard PW1 crying. The appellant submitted that one Dennis was said to have informed PW2 of what had happened to PW1 but he was not called to testify. The appellant further stated that the persons who arrested him were also not called to testify. He cited the case of **John Kenga v Republic**, Nairobi High Court Criminal Appeal No. 1226 of 1984, where the appellant was acquitted for failure by the prosecution to call some witnesses.

12. The appellant contended that his arrest had nothing to do with the offence, which he claimed was a fabrication. He submitted that his defence was unreasonably rejected and that the Trial Court shifted the burden of proof to him. He prayed for the appeal to be allowed.

13. On 22nd July, 2020 Ms Mwangeka, Prosecution Counsel filed her written submissions on behalf of the Director of Public Prosecutions (DPP). While elaborating on what amounts to an indecent act, she made reference to Section 2(1) of the Sexual Offences Act No. 3 of 2006. She stated that indecent act is defined as an unlawful intentional act which causes any contact between any part of the body of a person with the genital organ, breast or buttock of another but does not include an act that causes penetration.

14. It was submitted that PW1 testified and maintained in cross-examination that the appellant defiled her. Further, that the Doctor (PW5) in cross-examination equally testified to the fact that PW1's hymen was broken which was evidence of defilement. It was pointed out that in determining whether an indecent act had occurred, the Trial Court relied on the medical evidence from the Doctor who informed the court that PW1 had lacerations on her vestibule thus proving that the appellant had unlawfully touched her vagina.

15. Ms Mwangeka stated that even if the P3 form which was filled 2 years and 2 months after the offence was committed was to be disregarded, the evidence on record would still be sufficient to form the basis of a conviction. She indicated that the PRC form was filled on 30th January, 2015 and it provided corroborative evidence to the complaint by the victim.

16. It was submitted by the Prosecution Counsel that the contention by the appellant that the PRC form was not produced by the maker at this point in time was escapist and an afterthought. In addition, she pointed out that the appellant never objected to production of the same by PW4, before the lower court.

17. It was submitted that the appellant was the one who committed the offence of indecent act as PW1 stated that he was the one who defiled her. It was also submitted that her evidence was strengthened by that of PW5 who heard some noise at the appellant's house only to realize that it was PW1 who was saying *"niache niache"*. It was stated that PW5 ordered PW1 to open the door and she emerged therefrom while buttoning her skirt. It was indicated that PW5 adduced evidence to the effect that she had seen the appellant in his house on the material day.

18. On the issue of identification of the perpetrator of the offence, Ms Mwangeka submitted that the appellant was well known to PW1 as

they were neighbours and there was no issue of mistaken identity.

19. In regard to the issue of PW1's mother having had a grudge against the appellant, it was indicated by the Investigating Officer that the appellant made no report to the police station about alleged threats, intimidation and/or harassment by her. It was pointed out that PW1's mother who testified as PW2 adduced evidence that she never had a problem with the appellant and had no intention of framing him up and that she maintained the same stand even in cross-examination. It was also stated that PW2 denied having threatened to have the appellant jailed because he had a lot of money.

20. Ms Mwangeka stated that failure by the prosecution to call one Dennis should not lead to a negative inference being made against the prosecution. She relied on the provisions of Section 143 of the Evidence Act which states that no particular number of witnesses need to be called to prove a certain fact. She also stated that even without the testimony of Dennis, the evidence adduced against the appellant totally proved the elements of the offence he was charged with, to the required legal standards.

21. On the sentence of life imprisonment which was imposed on the appellant, Ms Mwangeka submitted that Section 11(1) of the Sexual Offences Act provides for imprisonment for a term of not less than 10 years and that when sentencing him, the court noted that he was not remorseful and it would be difficult to rehabilitate such a person. She relied on the case of **Charles Ndirangu Kibue v Republic** [2016] eKLR, to augment her submissions and to assert that the sentence imposed on the appellant was commensurate with the gravity of the offence. She urged this court not to disturb the sentence. She prayed for the conviction and sentence against him to be upheld.

22. In his response to the DPP's submissions, the appellant stated that the Trial Court erred by convicting him under the provisions of Section 215 of the Criminal Procedure Code (CPC). He cited the case of **Stephen Wakaba Muturi v Republic** HCCR Appeal No. 599/2003 (Nairobi) where the court held that an accused person cannot be convicted under the provisions of Section 215 of the CPC. The appellant argued that since he was convicted under the said provisions, his appeal should be allowed.

23. In making reference to the case of **Paul Ngure v Republic** HCCR Appeal No. 1081 of 2003 (Nairobi), where the court was of the view that life sentence should be left for a serial child molester, the appellant indicated that he was a 1st offender and that the sentence of life imprisonment did not give him room to reform and for rehabilitation.

24. The appellant contended that he was not reminded of the charge he was facing as required under Section 211 of the CPC before he was required to make his defence. He therefore stated that his rights were violated.

THE EVIDENCE ADDUCED BEFORE THE LOWER COURT

25. The victim AM [name withheld] testified as PW1 after being taken through *voir dire* examination. She stated that she was 13 years old and she knew the appellant as *Mutua*. She further stated that he was their neighbour at a Swahili type house, where they lived with many people. She indicated that when the appellant came to court, he had changed his name.

26. She recounted of how on 10th January, 2015 her Aunt J [name withheld] sent her to take an axe from home and that the appellant called her but she refused to go. It was her evidence that he grabbed her, cupped her mouth (this court has counterchecked with the original handwritten lower court proceedings for accuracy) and dragged her to his house where he locked the door and took her to his bed. She stated that he undressed her and he removed his clothes. He then lay on her and defiled her. Afterwards, he gave her Kshs. 30/= and told her not to tell anyone or he would kill her. She indicated that she did not shout for help because he had covered her mouth.

27. It was PW1's evidence that she took the money and left but told her Aunt J. who told her mother about the incident a few days later. PW1 further stated that her mother then reported to Nyali Police Station and she was taken to hospital and examined. She was issued with PRC and P3 forms as well as her lab results.

28. PW1's mother WKM [name withheld] testified as PW2 in the lower court. It was her evidence that on 29th January, 2015 at 9:00a.m., a boy by the name Dennis went to her and asked if she had been told anything. She replied in the negative and he told her that when she reached home, she should ask PW1 if she had been defiled by *Mutua*. PW2 stated that *Mutua* (appellant) was their neighbour. It was PW2's evidence that when she reached home she asked PW1 and J if such an incident had happened but they denied. PW1 said that J was her cousin who was 16 years old. She further said that she beat her and PW1 and that was when J told her that she had sent PW1 to get an axe from their house. That when PW1 delayed in going back to the stall, she sent Dennis to find out why she had delayed. PW2 stated that J told her that when Dennis went there, he found PW1's room locked but heard noise in another room. That Dennis went and called J and they both went to the appellant's house and called out PW1 and told her to get out of the house.

29. PW2 further stated that on asking PW1 what had happened, she recounted to her that the appellant had undressed her and himself. That he defiled her, then gave her 30/= and warned her not to tell anyone.

30. PW2 indicated in her evidence that the following day she reported to Nyali Police Station and they were referred to hospital. She indicated that she had no problem with the appellant and she was present when he was arrested. She stated that she had no intention of framing him up.

31. The Investigating Officer was No. 95610 PC Rose Nanjala Webi who testified as PW3. She was attached to Nyali Police Station gender desk. Her evidence was that on 30th January, 2015 she received a report from PW2 that PW1 had been defiled by their neighbour. After booking the report in the Occurrence Book (OB) she escorted PW1 to Coast Province General Hospital (CPGH), where upon examination, a PRC form was filled which confirmed that she had been defiled.

32. PW3 stated that the appellant was arrested on 31st January, 2015 but he never told her that PW2 had used her daughter (PW1) to frame him up. PW3 further stated that the appellant never reported that PW1's mother had threatened him.

33. PW4, Dr. Time Nasir of CPGH produced the P3 form for PW1 which was filled on 20th April, 2017. She indicated that PW1's estimated age was 12 years. Her hymen was found to be broken. In making reference to the PRC form, PW4 stated that when she examined PW1, she had healing lacerations of the vestibule. The degree of injury was assessed as maim and the probable type of weapon used was a blunt object. PW4 indicated that the PRC form was filled 30th January, 2015.

34. PW5 was JB [name withheld]. She was 19 years old at the time she testified on 28th April, 2017. She stated that PW1 was her cousin's daughter. She further stated that the appellant was their neighbour at [Particulars Withheld] but he moved houses after he was charged.

35. Her evidence was that on 10th January, 2015 she sent PW1 to their house to collect an axe. PW5 then went to look for her but when she got to their house, PW1 was not there. PW5 stated that she heard some noise from the neighbour's house where PW1 was saying *"niache niache"*. That she banged the door and commanded PW1 to get out. When she opened the door, PW5 noted that PW1 was buttoning her skirt. PW5 stated that she did not get into the house and did not see who was inside there. She indicated that she had seen the appellant in his house on the day of the incident.

36. When put on his defence, the appellant stated that he lived in [Particulars Withheld] with his uncle. He denied having defiled PW1. He stated that on the material day he was on duty at 11:00a.m., and a friend of his told him the police were looking for him for having allegedly defiled a minor. The appellant indicated that the victim's mother asked Sungu (community policing) to arrest him. That he was arrested at home and taken to the village elder. He was then taken to Nyali Police Station. In his view, PW1's mother bribed the police and that was the reason why he was arrested.

ANALYSIS AND DETERMINATION

37. The duty of the 1st appellate court is to analyze and re-evaluate the evidence which was adduced and come to its own independent decision while bearing in mind that it has neither seen nor heard the witnesses testify and make an allowance for the said fact.

38. The issues for determination are:-

(i) Whether failure to call some witnesses weakened the case for the prosecution;

(ii) If the appellant was convicted under the wrong provisions of the law;

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

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

Whether failure to call some witnesses weakened the case for the prosecution.

39. PW2's evidence was that on 29th January, 2015 a boy called Dennis went to her stall coughing and asked if she had been told anything. She said that she had not. He told her that on going home, she should ask PW1 if she had been defiled by the appellant. PW2 also said that after she had beaten PW1 and PW5, the latter told her that she had sent PW1 to go and collect an axe from their house but she delayed to return to the stall. It was then that she sent Dennis to go and find out why PW1 had delayed to go back. PW5 told her that Dennis found their room locked but heard noise in another room. He then went and called PW5 and they both went to the appellant's house and called PW1 to get out of the house.

40. Under Section 143 of the Evidence Act, there is no set number of witnesses required to prove a criminal charge against an accused person except where it is specifically provided by law.

41. In **Donald Majiwa Achilwa and 2 Others v Republic** [2009] eKLR, the Court of Appeal stated thus on failure by the prosecution to call some witnesses:-

> ***"The law as it presently stands, is that the prosecution is obliged to call all the witnesses who are necessary to establish the truth in a case even though some of the witnesses evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witness to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case."***

42. In this case, the evidence adduced by PW5 who was in the company of Dennis when they went to the appellant's house was adequate. In this court's view, there was no need for the prosecution to call Dennis to repeat what PW5 said.

If the appellant was convicted on the wrong provisions of the law.

43. In his submissions in response to the DPP's submissions, the appellant raised a new issue to the effect that he was convicted under the provisions of Section 215 of the Criminal Procedure Code. This court's view on the said issue is that he should have raised the said arguments in his initial submissions so that the prosecution could have had the opportunity to respond to the same. Needless to say that when appellants are invited to respond to submissions filed by the office of the Director of Public Prosecutions, they must restrict their responses to issues that have been addressed by the said office and not introduce new issues which cannot be responded to.

44. On the new issue raised by the appellant. the Trial Court was very clear in its Judgment that it found the appellant guilty of the offence of

indecent act and applied the provisions of Section 11(1) of the Sexual Offences Act. In making reference to the provisions of Section 215 of the Criminal Procedure Code, the Trial Court did not indicate that it had found the appellant guilty of the offence of indecent act contrary to Section 215 of the Criminal Procedure Code. It is clear that the appellant is clutching onto straws by making such a submission, in an effort to extricate himself from the offence of indecent act. His submission is devoid of any merit and falls by the wayside.

If the prosecution proved its case beyond reasonable doubt.

45. The appellant's submission that the case against him was fabricated by PW2 was counteracted by the evidence of PW1 who stated that PW2 had no grudge against him. PW2 also confirmed the said fact. PW3 who was the Investigating Officer stated that before the incident in this case happened, the appellant had not made a report of any dispute between him and PW2. The allegation by the appellant was therefore dismissed appropriately by the Trial Court. Further, if PW2 had a grudge against the appellant she would not have gone to the lengths she did of beating up PW1 and PW5 so that she could find out what had happened to PW1. If the case was fabricated against the appellant as alleged, PW1 would not have been found with healing lacerations of the vestibule when she was examined at CPGH on 30th January, 2015.

46. The appellant contended that no independent witness was called from among the tenants who resided in the Swahili type house he used to live in. There was no evidence which was adduced to the effect that the tenants of the said house where the appellant, PW1, PW2 and PW5 used to live in, were in their rooms when the offence occurred. It cannot therefore be concluded that the case against the appellant was fabricated.

47. It was PW1's evidence that the appellant threatened to kill her if she talked about the incident. It is thus clear that PW1 feared for her life after the incident and the inference that can be drawn is that was the reason why she did not disclose to her mother the fact that she had been defiled. After the appellant was charged in court and released on bond, on 21st June, 2016 the prosecutor informed the court that PW1 had refused to go to court as the appellant had threatened to kill her.

48. The submissions by the appellant that charges were leveled against him long before PW1 had been medically examined are not correct. PW1 was examined at CPGH on 30th January, 2015. According to Dr. Time who testified as PW4, she filled the P3 form 1 year and 2 months after the offence in issue was committed. The charge sheet discloses that the appellant was arrested on 31st January, 2015 and arraigned in court on 2nd February, 2015. His allegation that he was charged before PW1 was medically examined is false and unfounded. The PRC form disclosed that there were injuries on PW1's genitalia. The said document could be used as a basis of charging the appellant pending the filling of the P3 form.

49. Although the appellant at the appellate stage challenged the issue of the PRC form having been produced by a person who was not the maker of the said document, he did not object to the said document being produced by PW4 before the Trial Court. Under Section 77(2) of the Evidence Act the court may presume that the signature to any such document is genuine and that the authors hold or held the office and qualifications mentioned on the said document. The appellant should have objected to the production of the PRC by PW4 before the Trial Court but he did not. It is now too late for him to raise an objection at the appellate stage. This court's finding is that the appellant was not disadvantaged by the production of the PRC form by PW4 as he failed to demonstrate that he suffered any prejudice.

50. The contention by the appellant that PW1 implicated him after she was beaten by her mother (PW2) is not correct. PW5 sent PW1 to get an axe from their house and when she took long to go back to the stall where she was supposed to take it, the former went to look for the latter. On reaching their house, PW5 heard PW1's voice in the appellant's house saying *"niache niache"*. PW5 knocked at the door and ordered PW1 to get out of the said house. As she was getting out, PW5 saw that PW1 was buttoning her skirt. It is apparent to this court that PW2 beat up PW1 and PW5 so that they could tell her the truth on whether PW1 had been defiled by the appellant or not. That happened after one Dennis told PW2 to ask PW1 if she had been defiled by *Mutua*. It is therefore clear from the evidence adduced by PW2 that she did not beat PW1 so that she could implicate the appellant in the commission of the offence but her aim was to find out the truth.

51. In this case the appellant's amended grounds of appeal and submissions address the issue of defilement. It is however worth noting that he was convicted and sentenced for the offence of indecent act. His submissions that the age of PW1 was not established is irrelevant since failure by the prosecution to establish PW1's age was the factor which made the Magistrate to convict him for the offence of indecent act instead of defilement. In this case, the Trial Court could have relied on the approximate age of the victim given on the P3 form to convict the appellant for the offence of defilement. Authorities abound of instances where courts have done so.

52. Indecent act is defined under the provisions of Section 2(1) of the Sexual Offences Act to mean an unlawful intentional act which causes –

> ***"(a) any contact between any part of the body of a person with the genital organs, breasts 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."***

53. In this case, PW1 did not expressly state which private part of her body was touched by the appellant, be it her genital organ, breasts or buttocks. She said that the appellant undressed her and himself and lay on her and defiled her. The evidence which implicates the appellant as to the private part of PW1 which came into contact with his genital organ can be deduced from the medical evidence which was adduced by PW4. On being medically examined, PW1 was found to have lacerations at the vestibule which meant that the appellant's body part came into contact with PW1's genital organ, namely vagina. The P3 form indicates that the probable type of weapon which was used was a penis. The history of the incident as given by PW1 is reflected on part A of the PRC form. It reads that the appellant penetrated PW1's vagina with his penis. The foregoing information has been referred to, in order to buttress this court's finding that the appellant's body part namely penis, came into contact with PW1's vagina.

54. The appellant's claim that PW1's age was indicated as 28 years on the PRC form is misleading. The PRC form shows that it was the perpetrator of the offence who was said to be 28 years old and not PW1. In any event, the age of PW1 in this case was not relevant as the appellant was convicted for the offence of indecent act.

55. The appellant submitted that he was not positively identified as the perpetrator of the offence. I concur with Ms Mwangeka's submissions that the appellant was well known to PW1 as they were neighbours who lived in a Swahili type house. She knew the appellant by the name *Mutua.* He grabbed her hand and pulled her into his house. He covered her mouth and locked the door. It was in the evening and not at night. PW1 could not have been mistaken about the identity of her neighbour, whom she said had changed his names in court.

56. This court's finding is that the appellant Muthui Kioko, was also commonly known as *Mutua* to PW1, PW2 and PW5 who were his neighbours. Apart from the foregoing, PW5 heard PW1's voice coming from the appellant's house on 10th January, 2015 saying *"niache, niache"!.* In addition to the above, PW5 had seen the appellant in his house on the material day.

57. The appellant said in his defence that he was on duty at 11:00a.m. That in itself did not exonerate him from the commission of the offence as the incident happened in the evening of the material day and not in the morning. PW5 saw PW1 buttoning her skirt as she emerged from the appellant's house which proves her assertion that the appellant undressed her after he pulled her into his house. PW1's evidence was therefore corroborated by PW5 and in so doing, the appellant's defence was dislodged. This court's finding is that the evidence adduced against the appellant was overwhelming and he was properly convicted for the offence of sexual assault. I uphold the said conviction.

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

58. The appellant was sentenced to life imprisonment. Section 11(1) of the Sexual Offences Act provides a minimum sentence of 10 years imprisonment. The appellant was lucky enough to get off the offence of defilement on a technicality because the age of PW1 was not established. Having noted so, the lower court proceedings reveal that when the appellant was called upon to mitigate he just smiled. That in itself was scornful to the court and is evidence of lack of remorse on his part.

59. The prosecution stated that the appellant was a first offender. The act of the appellant threatening to kill PW1 when this case was ongoing in the lower court is an aggravating factor which calls for a severe sentence being imposed on him. This court however considers the sentence of life imprisonment imposed on the appellant as being excessive in the circumstances of this case.

60. I hereby set aside the sentence of life imprisonment imposed on the appellant and substitute it with a sentence of 30 years imprisonment. This court notes that the appellant was out on bail during the hearing of his case before the lower court. The sentence of 30 years imprisonment shall therefore be effective from the date when he was sentenced on 19th September, 2017. The appeal succeeds only to the above extent. The appellant has 14 days right of appeal.

DELIVERED, **DATED** and **SIGNED** at **MOMBASA** on this **25th** 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. Musundi - Court Assistant.