REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 74 OF 2018

MATANO SHABANA MUNYOKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate Court at Mombasa Criminal Case No. 649 of 2011 by Hon. A. Ruguru (Ag SRM) dated 11th October 2013)

Coram: Hon. R Nyakundi

Mr. Muthomi for Respondent

Appellant in Person

Court Assistant

JUDGMENT

The Appellant was charged with defilement contrary to section 8 (1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 21st February 2011 at [particulars withheld] Estate, Changamwe Location in Mombasa District within Coast Province, unlawfully and intentionally caused his penis to penetrate the anus of WK a boy aged 13 years.

He was charged with an alternative count of committing an indecent act with a child contrary to section 11(1) if the Sexual Offences Act no. 3 of 2006. The particulars of the offence were that on 21st February 2011 at [particulars withheld] Estate, Changamwe Location in Mombasa District within Coast Province, unlawfully and intentionally caused his penis to rub the anus of WK a boy aged 13 years.

At the end of the trial, the Appellant was convicted and sentenced to 20 years imprisonment. Aggrieved by the sentence and the conviction of the trial court, the Appellant lodged an appeal on the following amended grounds:

1. That the learned trial Magistrate erred in both law and fact by failing to establish that the evidence that the court relied to convict me was from members of the same family and thus was a frame up.

2. That the learned trial Magistrate erred in both law and fact by failing to establish that the key witnesses who were adversely mentioned in the proceeding were never called to tell the court what they needed to say.

3. That the learned trial Magistrate erred in both law and fact by failing to establish that the medical evidence was not conclusive to sustain a conviction.

4. That the learned trial Magistrate erred in both law and fact by failing to establish that the prosecution case was marred by massive contradictions and discrepancies.

5. That the learned trial Magistrate erred in both law and fact by failing to establish that my mitigation was not put into consideration.

6. That the learned trial Magistrate erred in law and fact by failing to establish that my constitutional rights were greatly violated during the trial of the present case.

Background

PW1 WK, the victim, after voire dire examination was found not to know the meaning of an oath but he understood the importance of telling the truth and therefore his evidence was received as unsworn. He told the court that on the 21st February 2011 he was at home asleep when at about 1:00am he heard someone knocking on his window. He inquired who it was and the Appellant identified himself and asked for water so he could go to the toilet, which the victim gave him. That the Appellant came back and asked the victim to allow him to sleep in his bed. Since the victim knew the Appellant and had slept in the same bed before, the victim allowed it and went back to sleep.

PW1 stated that later night he felt did not have clothes on and that the Appellant on his back. That the Appellant held the victim's neck and mouth, so that he could not scream, put his penis into his anus, and ejaculated. The Appellant then ran away. The victim immediately woke his aunt **(PW3)** and told him what had happened. **PW3** then informed the victim's father **(PW4)** who took the victim to Changamwe Police Station and made a report.

The victim was referred to hospital where he was examined and given medicine. He returned to the hospital after two days and re-examined. It was the victim's testimony that he knew the Appellant well as a neighbour and that the Appellant would occasionally sleep in the house. He further stated that on the night of the incident, the house was illuminated by security lights and he could see the Appellant well.

PW2 L. Ngone, was the medical officer from Coast General Hospital who testified on the medical evidence. He produced the P3 form for the victim and stated that the victim had tenderness in his anus and concluded that the victim had been defiled. He classified the injury as harm.

PW3 GWK was the victim's aunt. She stated that the complaint lived with her and he was 13 years old. She testified on the night on 20th to 21st February 2011 the victim knocked at her door while crying and said that the Appellant had sodomized him. That she examined him and saw some fluids and white spots. She then called **PW4** and explained what happened. According to **PW3**, **PW4** went looking for the Appellant and found him at a stationary matatu, arrested him and escorted him to Changamwe police Station. **PW3** told the court that they took the victim to hospital where he was treated. She testified that she knew the Appellant well as he was their neighbour and he had stayed in their house for a period of time until he started misbehaving and smoking bhang forcing them to chase him away.

PW4 EK, was the victim's father. He stated that the victim was a class 6 pupil and was 13years old but he did not have a birth certificate. He testified that on 21st February 2011 at around 2:40am, he received a call from PW3 who informed him what had happened to the victim. He went and interrogated the victim who explained to him what had happened. Thereafter PW4 went looking for the Appellant and his parents' house but he did not find him, however he was tipped off by a community policing officer that the Appellant was hiding in a stationary car.

PW4 went and found the Appellant in a stationary matatu and proceeded to interrogate him in the presence of his mother, grandfather and members of the public. He then arrested the Appellant, hired a taxi and together with the victim, his mother and **PW3**, took the Appellant to the police station where he was rearrested. Thereafter they took the victim to hospital. It was PW4's testimony that the Appellant was a neighbour and a family friend but that he had no grudge with him.

PW5 CPL Josca Kluthsi No. 41158, was the Investigating officer attached to Changamwe Police Station. He reiterated the evidence of the witness and told the court that in the course of his investigation he received the Post Rape Care (PRC) form, which he produced as P. Ex3. He also took the victim for age assessment where the victim was assessed and found to be 13 years old. He produced the age assessment report (P. Ex2).

At the close of the prosecution case, the Appellant was placed on his defence. He chose to give an unsworn statement and told the court that on the 22nd February 2012 he was at Bahati at the roadside with his friends when PW4 started interrogating them. That they started quarrelling and trading insults and finally they started fighting. That members of the public came shouting thief and beat him up and taken to the police station where he was informed that he had defiled the victim. He denied doing so and started that he only had an argument with **PW4.**

Submissions

<u>Appellant's written submissions</u>

On appeal, the Appellant relied on his written submissions filed on the 22nd May 2020. The Appellant submitted that the prosecution never proved its case as required by law and faulted the prosecution for failing to adduce the victim's short which **PW1** and **PW4** had stated was smeared with spermatozoa. He further submitted that his blood and urine samples were collected yet they were never adduced as evidence.

It was the Appellant's submission that the prosecution failed to call witnesses who witnessed him being arrested by **PW4**. He placed reliance on the case of **Ndungu Kimani vs rep KLR 288 (1979).** The Appellant submitted that the trial Magistrate failed to take into consideration the fact that **PW4**, the complainant's father, told the court that he had a grudge with the Appellant and that the case against him was a fabrication.

The Appellant further submitted that his rights under Article 35(1)(a) were breached as he was never supplied with witnesses statements when the complainant testified. He relied on the case of **Jospeh Momo vs Rep.** Lastly, it was the Appellant's submission that the trial Magistrate failed to consider his mitigation that he was a first offender and he depended on the case of **Daniel Magotho vs Rep Cr. App 361 of 2009.**

Respondent's submissions

The Respondent relied on its written submissions dated 4th June 2020 and filed on the 9th June 2020. In its submissions, the Respondent stated that it all the ingredients of defilement had been proved beyond reasonable doubt. It was submitted that the age of the victim had been proved by the testimony of **PW2**, **PW3** and **PW4** who testified that the victim was 13years old, which was corroborated by the age assessment report produced by **PW5**.

On penetration, the Respondent submitted that the evidence of the victim clearly proved penetration. The Respondent further submitted that DNA testing was not mandatory to prove defilement and relied on the case of **Charo Changawa Karisa vs Republic [2018] eKLR.**

On identification of the Appellant, the Respondent submitted that the complainant was able to identify the Appellant as the house was well illuminated and further that the Appellant was well known to him minimizing the possibility of mistaken identity.

On sentence, it was the Respondent's submission that the trial Magistrate considered the Appellant's mitigation against the offence and character of the accused and that sentence of 20 years was lawful taking into consideration the gravity and prevalence of the offence.

Appellant's replying submissions

The Appellant filed further submissions on the 13th July 2020 in response to the Respondent's submission. It was his submission that the age of the victim was not proved as the age assessment was produced by PW5 the investigating officer instead of the maker in contravention of section 77 as read together with section 33 of the Evidence Act. On sentence, it was the Appellant's further submission that following the Judgment of the Supreme Court in **Francis Karioko Muruatetu & another v Republic [2017] eKLR** that the Court of Appeal in **Evans Wanyonyi vs republic [2019] eKLR** held that the sentence in the Sexual Offences Act were discretionary.

Analysis and determination

This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusions. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanour of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. See **Okeno v R (1972) EA 32, Eric Onyango Odeng' v R [2014] eKLR.**

I have considered the grounds of appeal, the respective submissions, and the record and the only issues for determination are whether the Appellant's rights were infringed, whether the prosecution proved its case against the Appellant and whether the sentence was excessive.

On the first issue, the Appellant contends that he was not issued with the witness statements. The Appellant wrongly cited Article 35(1)(a), however the correct provision is Article 50 (2)(j) of the Constitution provides that: -

> "to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;"

In **Thomas Patrick Gilbert Cholmondeley Vs. Republic {2008} eKLR,** the Court of Appeal pronounced itself as thus: -

> **"We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under……. our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial; all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items."**

The importance of furnishing an accused person with witness statements was aptly highlighted in **Joseph Ndungu Kagiri v Republic [2016] eKLR** Mativo J, held that: -

> **"Article 50(2)(j) correctly interpreted means that an accused person should be furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence in advance. The sole purpose of doing so is so is to avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence at the opportune time both in cross-examination and in his defence… This means the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his or her defence..."**

Based on the foregoing, it is clear that the prosecution is vested with the responsibility of furnishing an accused person with witness statements before the trial begins and continuously throughout trial. In the present case, it is clear from the record that when the matter came up for mention on the 16th March 2011 the trial Magistrate directed the Appellant be furnished with the witness statements. On the 17th May 2011, when the matter was coming up for hearing the Appellant informed the court that he had not being supplied with the witness statements and the trial Magistrate ordered that the prosecution furnish him with the same. Similarly, on the 28th June 2011, the trial Magistrate once again ordered the prosecution to furnish the Appellant with witness statements. On the 17th August 2011 when the matter came up for hearing, Mr. Magollo, advocate for the Appellant proceeded with the hearing, and at no point did he inform the trial Magistrate that he did not have the witness statements. Throughout the trial, the Appellant never brought up the issue again even when a new Magistrate took over the hearing of the case.

From the record, it is clear that the court played its part when it directed the Respondent to furnish Appellant with the witness statements. At no time during the whole trial did the Appellant inform the court that he had not been supplied with the statements but he proceeded with the

hearing. It is trite that in certain circumstances an accused person has a duty to inform the trial court when his rights to a fair trial have been breached.

The Court of Appeal in **Hadson Ali Mwachongo v Republic [2016] eKLR** held thus: -

> **"We are equally satisfied that the appellant's constitutional right to a fair trial was not violated. The record does not indicate the appellant raising any issue pertaining to access to witness statements. On the contrary, he is recorded informing the court that he was ready for the hearing of the case...In short, the appellant's complaint regarding denial of access to witness statements is simply not borne out by the record. As this Court stated in Francis Macharia Gichangi & 3 Others v. Republic, Cr. App. No. 11 of 2004 it is to be reasonably expected that an accused person who claims that his or her trial rights have been violated will at the very least raise the issue with the trial court."**

Guided by the above decision, if the Appellant had not being issued with the witness statement, it was incumbent on him to inform the trial court that he had not been supplied with witness statements during the hearing. There was no way the trial court could have known that he did not have the witness statements. From the record, the trial court was also ready to ensure that the Appellant's right to a fair hearing was protected and on its own motion it directed the Respondent to supply the Appellant with the witness statements and even adjourned the hearing so that he could be supplied with the same. I find that this ground fails.

On whether the prosecution proved it case beyond reasonable doubt, it cannot be gainsaid that the prosecution must prove all the three elements of defilement being the age of the victim, proof of penetration and the positive identification of the perpetrator. **See Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013.**

PW4, the father of the complainant, stated that the victim was 13 years. This was corroborated by PW2, who filled the P3 form and estimated the complainant's age to be 13years old. In the premise I find that the age of the victim was proved.

On the element of penetration, it is trite that courts mainly rely on the evidence of the victim which is corroborated by medical evidence as was held in Dominic Kibet Mwareng vs. Republic [2013] eKLR where the court stated that: -

> "**…**In cases of defilement, the Court will rely mainly on the evidence of the Victim which must be corroborated by medical evidence..."

In this case, the victim **(PW1)** gave evidence how the Appellant came to the window of his room and sought for water to go to the toilet. He returned later and requested to sleep in the victim's room. Since the victim was familiar with the Appellant, he granted him permission and he proceeded to sleep.

It was the victim's testimony that the Appellant in the middle of the night got on his back, held him down by the neck and covered his mouth, proceeded to insert his penis in the victim anus and ejaculated. The victim's evidence was corroborated by **PW2** who produced the medical evidence and stated that the anal region was tender and concluded that he had been sodomized. I find that penetration had been proved.

On the issue of identification, recognition has been held by courts to be more reliable than identification of a stranger as long as the court is convinced that the circumstances of identification were favourable. See **Francis Muchiri Joseph – V- Republic [2014] eKLR** and **Wamunga –vs- R, [1989] KLR.**

In the present case, the complainant told the court that he knew the Appellant as a friend and that the Appellant had slept in his room in previous occasions before the incident which was not disputed by the Appellant. His evidence was corroborated by that of **PW3** and **PW4** who stated that the Appellant was a family friend as well as a neighbour and that he had slept in the same house as the complainant in the past. Additionally, the complainant testified that when the Appellant came to the house at the night of the incident, he was able to identify the Appellant as the house was well illuminated with the security lights outside the house. In consideration of the evidence before the court, I find that the Appellant was positively identified.

The Appellant raised issue that other witnesses who were present when the Appellant was arrested by **PW4** were not called to testify in the case. it is trite that there is no requirement that the prosecution should call any particular number of witnesses to prove its case. This is buttressed by Section 143 of the Evidence Act which provides that:

No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

In the case of **Keter V Republic [2007] 1 EA 135** the court held inter alia that:

> "The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

I have reviewed the evidence before court, the purported witnesses who were present when the Appellant was being arrested were not crucial witnesses as they could not give evidence as to the incident.

The Appellant also submitted that the trial Magistrate failed to consider that **PW4** had stated in his evidence that he had a grudge with the Appellant. I have compared the typed proceedings and the handwritten proceeding of the trial court and I note that the hand written proceedings stated that **PW4** did not have a grudge with the Appellant. The typed proceedings were subject to a typing error and this ground fails.

On sentence, the mandatory nature of sentences under the SOA has come under scrutiny following the decision of the Supreme Court in **Francis Karioko Muruatetu & another v Republic [2017] eKLR,** where the apex court pronounced itself as thus:

> **"Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right."**

7) Many decisions from the Court of Appeal have adopted the decision of the Supreme court in holding that the mandatory sentences of the SOA takes away judicial discretion in sentencing. In **Rophas Furaha Ngombo v Republic [2019] eKLR** the Court of Appeal quoted with approval its decision in **Dismas Wafula Kilwake vs. Republic, Criminal Appeal No. 129 of 2014**, where is stated thus: -

> **"In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court, which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the sexual offences act, which do exactly the same thing."**

When sentencing the Appellant, I note that the trial Magistrate was bound by the mandatory minimum sentence as provided in section 8(3) of SOA. While the sentence is lawfully, I find that the trial Magistrate failed to consider the fact that the Appellant was a first offender. I reduce his sentence to 10 years.

In the premises, I uphold the Judgment of the trial court and confirm the Appellant's conviction. The Appellant shall however serve 10 years imprisonment with effect from the date of arrest pursuant to Section 333(2) of the Criminal Procedure Code.

Orders accordingly.

Right to appeal 14 days.

Judgment delivered, dated and signed at Malindi this 18th day of December, 2020.

.....

R. NYAKUNDI

JUDGE

In the presence of:

The Appellant in person

Mr. Onyango for the State