REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL CASE NO. 231 OF 2017

RASHID OMAR PARAPA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence of the Chief Magistrate's Court at Mombasa in Criminal Case No. 630 of 2015 by Hon. E. K. Makori (C.M) on 14th December, 2017)

JUDGEMENT.

1. The Appellant, RASHID OMAR PARAPA, was charged with the offence of defilement contrary to Section 8(1) as read with Section (2) of the Sexual Offences Act No. 3 of 2006. The facts were that:

> **"On 1st day of March, 2015 in Likoni sub county within Mombasa county the appellant unlawfully and intentionally caused his penis to penetrate the anus of VA a girl aged 9 years."**

2. The appellant was also charged with an alternative charge of an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The facts were that:

> **"On the 1st day of March, 2015 in Likoni sub-county within Mombasa county, the appellant unlawfully and intentionally caused his penis to touch the anus of VM. a girl aged 9 years."**

3. The Appellant was tried, convicted and sentenced to serve ten (10) years imprisonment by Hon. Makori (CM) he was aggrieved by the conviction and sentence, hence filed this appeal which carriers four (4) grounds as follows (verbatim):

> **(a) That the learned trial magistrate erred in law and fact in convicting and sentencing him to 10 years imprisonment without considering that he was not give chance to take plea on new charge.**
>
> **(b) That the Honourable learned magistrate erred in law and fact in convicting and sentencing him to 10 years imprisonment on a charge found after the close of the prosecution case (on judgment day).**
>
> **(c) That the learned trial magistrate erred in law and fact by convicting and sentencing him 10 years imprisonment without considering that (50(2)(c) was not adhered to.**
>
> **(d) That the learned trail magistrate erred in law and fact by not putting into consideration his sworn defence statement.**

His prayer is that the appeal be allowed, conviction quashed and sentence set aside.

4. The appeal proceeded for hearing on 5th June, 2017 and both counsels for the parties submitted that they were relying on their written submissions filed on 19th April 2018 and 5th June, 2018 respectively, in every word. In his written submissions, the appellant argued grounds 1 and 2 together and grounds 3 and 4 together.

5. He submitted that despite convicting him for the offence of committing an indecent assault act in the alternative, the learned trial magistrate registered his displeasure and frustrations in the manner in which the investigations were conducted and made reference to paragraphs 7 and 8 of his judgment at page 3. That it was therefore ironical for him to arrive at a finding that the prosecution proved its case

beyond reasonable doubt.

6. He also submitted that the prosecution failed to call witnesses such as one FADHILI MOHAMED who filled and signed the PRC report and father to the complainant who were very critical to their case, which only led to the inference that the evidence of those witnesses would have been adverse or contradicting to the prosecution's evidence on record.

7. Further, the appellant submitted that there were gaps and missing links in the evidence of the prosecutions witnesses which were written due to the shoddy investigations of the case.

8. On the issue of the complainant's age, the appellant submitted that allegedly it is well known that proof of age of the victim is paramount in a sexual offence, the particulars of the charge and in evidence of the prosecution's witnesses indicate that the complainant was 9 years not at the time but no evidence in terms of birth certificate or age assessment report was tendered to confirm this. In fact the voire dire examination that was conducted, the appellant submits was insufficient to determine and confirm that the complainant was intelligent.

9. In response, M/s OCHOLLA, counsel for the state submitted that on the issue of the charge being incurably defective, the appellant was found guilty and convicted for the alternative count whereby the victim's age indicated the particulars and corroborated by the evidence of PW1.

10. On the issue of victims age, not having been proved M/s Ocholla submitted that the appellant was convicted for the offence of indecent act in the alternative which only required PW1 that the victim was of tender age as for the definition in the Children's' Act. And while conceding to the fact that the prosecution did not produce any evidence of victims age, M/s Ocholla submitted that this was established by the trial magistrate when he conducted a voire dire examination of the victim.

11. She also submitted that the evidence by the prosecution was water tight and corroborated contrary to the contetion that it was contradictory. She further submitted that Section 36 of the Sexual Offences Act is not couched mandatory terms and it was not necessary in this case. She stated that the magistrate was right in dismissing the appellant's defence as the same was an afterthought notice not having been issued in good time to enable the prosecution investigate the allegations.

12. This is a first appeal whereby this court has a duty to re-evaluate and re-consider the evidence that was adduced before the trial court and arrive at its own independent conclusions, while bearing in mind that it did not have the advantage the trial court had of hearing, seeing and observing the demeanor of the witnesses as they testified (See OKENO VERSUS REPUBLIC (1972) E.A 32; PANDYA VERSUS REPUBLIC (1957) E.A 336 & KARIUKI KARANJA VERSUS REPUBLIC (1986) KLR 190.)

13. A summary of the prosecution's evidence was that VM, a minor aged about 9 years old was taken through a voire dire examination and found to understand the nature and purpose of an oath. She stated that the appellant had done "bad manners" to her. She said that the first time the appellant went to the bathroom where she was having a bath and asked that they do "bad manners" but she refused. That he showed her a lot of money and left.

14. The complainant went on to state that on one Saturday, she was going to bathe when the appellant got in. The complainant was in a lesso and the appellant held her by force and did "bad manners" to her by pushing his "mdudu" in her buttocks. PW1 said that she told the appellant's wife and her father about it despite the aplenty asking her not to tell anyone about it or he would do something bad to her. She then said that papers were filled at the hospital.

15. When cross examined, the complainant told court that she was passing through short cuts when a certain woman who thought she was lost found her and she slept in her house for one night then took her to the police station where she found her mother. She also told court that she made noise and bled when the appellant did "bad manners" to her.

16. PW2, MMM testified to court that on 7th March, 2015, she had come from work and the appellant's wife was crying. And when she inquired what was wrong, her daughter, the complainant asked if she could beat her if she told her something. She said that she assured her that she would not beat her and the complainant went on to tell her that on 1st March 2015, she was having a bathe in the bathroom when the appellant come there and defiled her and asked her not to tell her.

17. Her mother, PW2, cried out of pain. She went to Likoni police station on the morning of 8th March 2015 and reported the matter. She took her child (PW1) to hospital. PW2 said that her child told her that the appellant had done that to her twice. When cross examined, PW2 admitted that the appellant was the caretaker of the plot where they lived but denied that her husband had problems paying rent or that this had brought hatred between them. She also said that the complainant disappeared but was taken to the police station by another woman, who she said she did not know.

18. PW3, DR RAILA SEIF of Coast General Hospital gave evidence that he knew DR IBRAHIM who he had worked with at the same hospital for two years and was familiar with his handwriting. He proceeded to produce a post rape care form for VK aged 9 years filed on 9th March 2015 following an allegation that she had been defiled by a neighbor. That the report indicated that the defilement was both vaginal and anal and indicated no physical injuries. Further indication were lacerations and healing abrasions on the vagina but the hymen was intact. It also revealed lacerations on the anus. The report further showed that investigations indicated the appellant's HIV and hepatitis were negative and there were no sperm cells.

19. The injury was classified as harm as the conclusion made indicated that there had been vaginal defilement. PW3 produced the PRC form, PRC, treatment notes and P3 form as exhibits P2, 3, 4 & 1 respectively on behalf of the doctor who filed them. In cross examination, PW3 told court that the date of the offence was 1st March 2015 and matter was reported on 8th March 2015.

20. It also came out that the victim was examined on hospital on 9th March 2015, a week after the incident. It also came out that the doctor who filled the P3 form did not indicate the approximate age of the victim and that the P3 form was filled after it had been stamped, that is signed on 23rd and stamped on 20th. Also the findings in the P3 form indicate that both labia were intact and so was the hymen.

21. PW4, EVA NDUTA MATU, testified that she reported on duty on 8th March 2015 and on perusing the OB, found a case of defilement and she recorded witnesses' statement and escorted the complainant and her mother to hospital. PW4 went on to tell court that after some time the child had disappeared on 18th March 2015 and on 19th March 2015 a Good Samaritan by the name Veronica found her and placed her in police custody. The victim was taken to hospital on 20th March 2015 where a P3 form was filed and age assessment conducted and PRC form conducted. They arrested the appellant who was identified by the complainant. The complainant was then taken to Kenya Joy Childrens' home after she received threats from the appellant.

PW4 also said that the victim's mother acted only after seeing the difficulty the victim was going through in walking. She also told court that the appellant was arrested by a mob and taken to the police station.

22. The prosecution closed their case on 3rd August, 2016 and both counsels submitted in support of their case on 16th August, 2016. The appellant was placed on defence on 28th October, 2016 after the court found that a prima facie facie had been set out to warrant him being placed on such.

23. The appellant, RASHID OMAR PARAPA, in his sworn defence told court that he is a matatu driver and he denied having defiled the complainant on 1st March 2015 as he was engaged in his matatu business. He said that he was arrested after a month or so by the police without being told why. He also said that the reason for his arrest was because he had a problem with the complainant's mother since they had failed to pay rent.

24. DW1, MAGDALENE MARY, said she was the appellant's wife and confirmed that he was a driver and also a caretaker. She said that on the 1st March 2015 when the complainant alleged that she had been defiled by the appellant, he had gone to work as a driver from 5:00am and returned home at 5:30pm as usual.

25. In his judgment, the trial magistrate found the appellant guilty of the offence of indecent assault/act minor contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

26. In determining the appeal, I have considered the grounds thereof by analyzing the evidence that was adduced before the trial court, reading through the submissions, the cited authorities and the law. I find that the following issues emerge for determination:

(a) Whether the prosecution proved its case beyond any reasonable doubt.

(b) Whether the trial magistrate was justified in relying on the evidence of the complaint alone.

(c) Whether the trial magistrate was justified to dismiss the appellant's defence.

27. On the first issue, I have read through the proceedings and the judgment of the trial magistrate. The appellant was charged with the offence of defilement contrary to Section (2) of the Sexual Offences Act and in the alternative, a charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. In his judgment the trial magistrate acquitted the appellant for the offence of defilement in the main count and proceeded to convict him on the alternative charge of indecent act.

28. In reading through the judgment, I find the trial magistrate had this to say when determining whether or not the prosecution had proved its case beyond reasonable doubt on whether the main charge of defilement in the alternative charge of committing an indecent act to a child:

> **"From the evidence on record the incident allegedly happened on 1st of March 2015. The child was first seen at the hospital or for the purpose of filling the PRC report on 9th March 2015 and subsequently the P3 filled on 23rd March 2015. There was lapse of time. In matters or defilement of sexual assault, its imperative that these reports are made earlier. For instance, if there could be traces of semen from the man involved on any evidence which can link the accused with the offence a time lapse like in this matter will usually not bring good result from the prosecution. …… the PRC and P3 indicate some form of tear to be minor anus and lacerations at the vestibule of the vagina. Whether these injuries were occasioned on 1st March 2015 is not very clear for an offence of defilement to be reckoned."**

29. From these findings it is clear that the trial magistrate found the prosecution's evidence wanting, especially with regard to whether the appellant could be linked to the offence(s) and or when the alleged offence(s) could have been occasioned in view of the lapse of time if between the date the offence is alleged to have lapsed and when it was reported and complainant (PW1) subjected to medical examination.

30. Having found so, it is clear that doubts had been created in the trial magistrate's record whose benefit should have been awarded to the appellant and the prosecution found not to have proved their case to the required standard in either count as the evidence in terms of who committed them. Also in going through the evidence that was adduced before the trial court, I find that indeed the ingredients required to prove the offence of defilement were not satisfied. Neither an age assessment report, birth certificate or birth notification or any other evidence was tendered to prove the exact age of the complainant.

31. And on the issue of penetration, it was the complainant's evidence that :

> "He held me by force and did manners to me. That is raping. He put his mdudu in my buttocks."

Words such as "mdudu" and "bad manners" do connote penetration due to their genesis nature. Penetration has been defined as:

> **"Penetration"** means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

Furthermore, the PRC and P3 form which were produced as evidence by consent indicated that the complainant's hymen was intact.

32. The other issue is with regard to whether the uncorroborated evidence of the complainant (PW1) who was said to be a minor sufficient to warrant the conviction and subsequent sentencing of the appellant on the offence of committing an indecent act. In relying on the provisions of section 124 of the Evidence Act, the trial magistrate mentioned;

> **"a finding that the prosecution has proved its case as beyond reasonable doubt basis in respect of the alternative charge of indecent assault/act on a manner contrary to Section 11(1) of the Sexual Offences Act…**

This was because according to the trial magistrate, the complainant, who was found to be a minor, was taken through a voire dire examination and found intelligent enough to understand the importance of an oath and telling the truth and she identified the appellant as the person who did what she alleged was done to her, hence the action that was taken.

33. It will be noted that the complainant told court that when the appellant did "bad manners" to her, she reported to her father and the appellant's wife. Her father was never called to record a statement with the police or give evidence in court. And on the appellant's wife, who even PW1's mother said was present and crying when the complainant narrated to her what the appellant had done to her, did not testify to confirm this. Instead, she testified as her husband, the appellant's witness reporting what the complainant had stated.

34. It will also be noted that the evidence of PW1 was contradicted by the medical evidence that was adduced by consent. According to the PRC (Exhibit 1) there were:

> **"lacerations at the vestibule. Hymen which with lacerations in anal region."**

And the degree of injury, according to the P3 form was indicated as "MAIM". The question becomes, how could this be?

35. From the above findings, while the law under Section 124 of the Evidence Act allows for conviction on evidence of a single witness in sexual offences, there is a requirement that extreme care be taken in analyzing every evidence that will have been adduced before court.

36. It will be noted that, apart from the contradiction and gaps which have been pointed out in the evidence of the prosecutions witness, the trial magistrate, in acquitting the appellant for the offence of defilement, exposed dissatisfaction over the evidence and the manner in which it was collected with regard to linking the appellant to the offence and when the said offences were alleged to have been committed. I find that it was unsafe for the trial magistrate having found so, to have proceeded to convict the appellant with the offence of committing an indecent act on the same evidence.

37. Lastly, there is the issue of the trial magistrate having found the appellant's defence. Apart from raising the defence of alibi, I find that the main defence issued by the appellant was that there was an issue that arose between him and the complainant's mother over the rent arrears since he was the caretaker of the plot where they lived. This cannot be taken to be an afterthought as the issue was raised during cross examination of PW2.

38. Having found the prosecution's evidence against the appellant is riddled with doubts, I have no reason to believe in his defence. I hence find this appeal meritable, and uphold the same.

I proceed to quash the conviction and set aside the sentence against the appellant accordingly.

The Appellant is therefore set free, unless lawfully held.

Ruling DELIVERED, DATED & SIGNED this 22nd day of January, 2019.

D. CHEPKWONY

JUDGE.