THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HIGH COURT CRIMINAL APPEAL NO. 132 OF 2017

ALEXANDER KIMWELE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of Hon. P.K. Mutai, Resident Magistrate, delivered on

21st July, 2017 in Kwale Principal Magistrate's Court Criminal Case No. 1105 of 2015)

JUDGMENT

1. On 13th October, 2015, the appellant herein, Alexander Kimweli Kinyili was charged with the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 23rd day of September, 2015 at [particulars withheld] village Mivumoni location, Msambweni District in Kwale County within Coast region, unlawfully and intentionally committed an act which caused his penis to penetrate into the vagina of PNW [name withheld] a girl aged 7 years.

2. The appellant also faced an alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 23rd day of September, 2015 in Msambweni District of Kwale County within Coast region, indecently committed an act to PNW [name withheld] a girl aged 7 years by touching her genital organ (vagina).

3. After a full trial, the appellant was found guilty of the main charge and convicted of the same. He was sentenced to serve 30 years imprisonment. The appellant being dissatisfied with the said conviction and sentence filed a petition of appeal and grounds of appeal on 3rd August, 2017. On 3rd December, 2018, his amended grounds of appeal were deemed as being properly on record. These are:-

(i) That the trial court erred in law and fact by failing to re-evaluate the trial record and find that there were some irregularities in the trial proceedings which can only be solved in his favour;

(ii) That the trial court erred in law and fact by failing to find that the prosecution case was full of contradictions and doubts; and

(iii) That the trial court erred in law and fact by failing to find that his defence was not shaken by the prosecution.

4. This court gave directions as to the hearing of the appeal. The appellant filed his written submissions on 22nd November, 2018. The respondent filed its written submissions on 10th December, 2018. The appeal was set down for hearing on 17th December, 2018. Come the said date, the Counsel for the respondent filed and served the appellant with a notice of enhancement of sentence under the provisions of Section 354(3)(a)(ii) of the Criminal Procedure Code. On the said date, the appellant filed submissions in response to the respondent's submissions. The appeal was then scheduled for hearing on 22nd January, 2019. On the said date, the appellant filed and served on Counsel for the respondent a response to the notice of enhancement of sentence.

5. With regard to the alleged irregularities on the court record, the appellant urged this court to re-evaluate the record of the lower court and declare the trial in the said court a nullity, discharge him or order for a retrial. The reason advanced for so stating was that the language used by all the prosecution witnesses to testify was not given. Another irregularity raised by the appellant is that the Judgment of the lower court was not signed and that the same offended the provisions of Section 169 of the Criminal Procedure Code.

6. The appellant relied on the case of **Kiyato vs Republic (1982-880 KAR**, where an appeal was allowed after being declared a nullity but a retrial was not ordered due to unexplained violation of the constitutional rights of the appellant therein. He also cited the case of **Joseph Anyole vs Republic** [2008] eKLR where a retrial was not ordered due to insufficiency of evidence or to enable the prosecution to fill gaps in

its evidence in the lower court. The appellant left the issue of whether this court should order for a retrial or not to this court to exercise its discretion.

7. The appellant took issue with the evidence of the Doctor, PW5, who testified that he did not ask the victim what had transpired and that his role was limited to treating her, yet the P3 form contained relevant details of the offence. The appellant submitted that for the foregoing reason, the charge facing him was a frame up.

8. The appellant challenged the failure by the prosecution to adduce evidence to prove that the victim was taken to Kikoneni Health Centre first for treatment as was alleged by PW3 and that the Doctor was unable to treat her and an ambulance was called to take her to Msambweni District Hospital. Further, he argued that no information was given about the person who called the ambulance, its registration number or the name of the ambulance attendant or to which institution it belonged.

9. The appellant raised the issue of the prosecution's failure to produce the blood stained underwear that PW2 talked about in court. He also wondered why it took the victim 2 months to tell PW2 the person who had defiled her if he was actually known to her. It was also submitted that PW7 testified that the victim did not tell them anything about what had transpired.

10. The appellant contended that the *voire dire* examination was not properly conducted because the Hon. Magistrate failed to write down the questions put to the witnesses who were minors, followed by the answers they gave. He cited the case of **John Muiruri vs Republic** [1982] eKLR where the court declared a trial a nullity for failure by the Trial Court to conduct *voire dire* examination properly.

11. The appellant urged this court to consider his defence statement and mitigation, which according to him were not considered by the Hon. Magistrate. He also prayed for the sentence of 30 years imprisonment to be reduced as it was excessive.

12. In her written submissions, Ms Marindah opposed the appeal. She submitted that the appellant fully participated in the proceedings, which is evident from his extensive cross-examination of witnesses. He also gave a defence statement and never raised the issue that he did not understand the proceedings before the lower court. She pointed out that the plea was taken in Kiswahili language, which the appellant understood.

13. On the allegation that the Judgment was unsigned, the Prosecution Counsel asserted that it was signed. It was submitted that the offence of defilement was proved and the age of the minor was established to be 7 years at the time the offence was committed. A birth certificate was produced to support the said fact.

14. Ms Marindah also submitted that penetration was proved by medical evidence which showed that the victim's hymen was broken, there were lacerations on her virginal walls and bleeding from the vagina.

15. On the identity of the perpetrator of the offence, the Prosecution Counsel indicated that some witnesses testified that it was Baba L who defiled the victim.

ANALYSIS AND DETERMINATION

16. The duty of the first appellate court is to analyze and re-evaluate the evidence adduced before the court below and make a determination on the same bearing in mind that it has neither seen nor heard the witnesses testify.

In **Okeno vs. Republic** [1972] EA 32 it was held that:-

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."***

The Evidence tendered before the Trial Court

17. The victim who was referred to as PNW in the charge sheet is hereinafter referred to PN or PW, P or N [names withheld] depending on the evidence of the witnesses. She has been mistakenly referred to as PW4 in the lower court proceedings as there was another witness who had testified as PW4. She was taken through *voire dire* examination on 20th June, 2016 as she was a minor. The Hon. Magistrate ruled that she did not understand the nature and importance of giving evidence under oath and that she should give unsworn evidence. On that day, PN did not give evidence due to what the Prosecution Counsel referred to as shyness on her part.

18. On 21st February, 2017, she was back in court. On that day she testified that she knew Baba L who did "tabia mbaya" to her. She recounted that he got hold of her hand on her way from school. She was in the company of her friends M and MN [names withheld]. It was PN's evidence that the appellant called her to the bush. PN did not testify further on the said date. She was recalled on 28th March, 2017. She continued with her evidence by stating that the appellant took her inside the bush and did "tabia mbaya" to her. She did not speak more. The Prosecution Counsel prayed for her to be declared a vulnerable witness and for her mother's evidence (PW1) to be taken as her testimony and for the court to consider the evidence of the other witnesses.

19. PW6, MM [name withheld] who is also referred to as M or W [names withheld], who was a minor was taken through *voire dire* examination. The Hon. Magistrate ruled that she should give unsworn evidence as she did not understand the importance of giving evidence

on oath. She testified that on a Thursday when she was coming from school with PN and M [name withheld], they decided to harvest fruits from Madam Stella's place, where they found Baba L. It was her evidence that he called P and held her hand. She and M ran away and stood at a distance next to KR. She stated that she had seen Baba L about 5 times before that day. They waited for P for some time and went back. They found Baba L and P under a tree. Baba L was doing "tabia mbaya" to P. PW6 and M shouted for help and Baba L left for his home. They took P to her home and left her there.

20. PW6 stated that Ps skirt was blood stained. There was blood on her leg and she was complaining of pain. She told them that Baba L did bad things to her and that she was defiled. She identified Baba L as the appellant herein.

21. MN [name withheld] also referred to as M or N [names withheld] who was is also a minor was taken through *voire dire* examination. The Hon. Magistrate ruled that she should give unsworn evidence as she did not understand the importance of giving evidence on oath. She testified as PW7, she stated that she had known Baba L for a long time and also knew his home. She recounted that when they were picking fruits with N (PN) and PW6, the appellant called PN by name and took her to the forest while holding her hand. They proceeded to Madam S's home and later saw PN walking with difficulty. She had blood on her skirt.

22. It was PW7's evidence that they did not proceed to where PN and the appellant were in the bush. She indicated that the two stayed there for some time. She testified that PN did not tell them what transpired and she proceeded to her home. Later Mama G (PW1) called them on a different day to find out what had happened and they explained to her. She identified Baba L as the appellant herein.

23. PN's mother, AW [name withheld] testified as PW1. She stated that PN was 8 years old as at the time she was testifying in court as she was born on 30th August, 2008. She indicated that her daughter was in Primary School. She recounted that on 13th September, 2015 she went home at 6:00 p.m., after attending a merry go round meeting. She found PN seated while crying. She asked her what had happened but she remained silent. On asking her friends W and N [names withheld] what had happened, they told her that while coming from school they came across Alex Kirume Kimeli, who is also known as Baba L, who summoned PN, got hold of her hand and took her to a structure. PN's friends also told her that they could hear her crying.

24. It was the evidence of PW1 that she found PN bleeding. They took her to Kikoneni Health Centre where she was referred to Msambweni Hospital for further medical attention. They reported the incident to Msambweni Police Station. She identified the P3 form as MFI-2.

25. PW2, GM [name withheld] who is PW1's mother and PN's grandmother testified that on 23rd September, 2015 in the evening, she was at home with PW1 and her children. She stated that PW1 shouted and called her. On going to where she was, she found underwear which was blood stained, PW2 looked at PN and found her private parts torn.

26. PN was taken to Kikoneni Hospital but the Doctor was unable to treat her. An ambulance was called and she was rushed to Msambweni Hospital. PW2 stated that at the time of treatment, PN was in bad shape and was not in a position to talk. PW2 indicated that she reported the matter to Msambweni Police Station and a P3 from was filled.

27. It was the evidence of PW2 that she interrogated PN later who told her that on the way from school, they passed through a forest and started picking fruits. She was then called by Baba L. PW2 stated that she knew where he stays as he was a neighbour. She identified Baba L in court as the appellant.

28. PW4, No. 675565 Sergeant Shukri Ali Aden who was attached to Msambweni Police Station was the Investigating Officer in this case. He testified that on 25th September, 2015 at 1345 hours he received a complaint from the victim herein who was accompanied by her grandmother. She reported that on 23rd September, 2015 at 5:00p.m., when coming from school, the appellant called her to a temporary structure and defiled her. She knew the appellant as Baba L.

29. PW4 further testified that the report they received said that the victim's mother when bathing her noted blood stains on her dress. She checked the victim's private parts and found blood coming therefrom. The child was rushed to Kikoneni Health Centre but they were referred to Msambweni Hospital for corrective surgery. PW4 indicated that the appellant escaped and he was arrested on 11th November, 2015 by members of the public. PW4 further testified that the P3 form established that there was penetration. He produced the birth certificate of the PN as p. exhibit 1.

30. PW5, Dr. Mukoga Ahmed from Msambwweni Hospital examined the victim on 25th September, 2015. He observed that her skirt was stained with dry blood, she had blood on her legs, her hymen was broken, there were lacerations on the vagina and she was bleeding. PW5 stated that the victim was admitted to hospital for 2 days. His finding was that there was a sexual penetrative act. He gave the age of the injury as 10 hours.

31. In his defence, the appellant stated that on 10th October, 2015, he was collecting his money in the village for maize sales when he came across 3 people. They stopped him and asked him to accompany them. They called for a motor vehicle which they boarded. He was taken to the Police Station and charged with a false charge.

32. The Hon. Magistrate found the appellant guilty of the charge of defilement and sentenced him to 30 years imprisonment. The Director of Public Prosecutions filed a notice of enhancement of sentence on 17th December, 2018. The impact of the said notice was explained to the appellant on 18th December, 2018. He opted to carry on with this appeal.

33. The issues for determination are:-

(i) If the language of the court was understood by the appellant;

(ii) If *voire dire* was conducted properly;

(iii) If the identity of the perpetrator of the offence was proved;

(iv) If penetration was proved;

(v) Whether the age of the victim was established;

(vi) If there were inconsistencies and contradictions in the evidence of prosecution witnesses;

(vii) If the defence case was considered; and

(viii) If the Judgment was signed by the Hon. Magistrate.

34. The appellant in his submissions indicated that the language of the court was not given in the proceedings thus he did not understand and follow his trial. From the outset, when the appellant was first arraigned in court on 13th October, 2015, the charge was read out to him and he responded to the same in Kiswahili language. A plea of not guilty was entered. On several occasions thereafter, the matter was mentioned and the language of the court is indicated in the lower court proceedings to have been translated from English to Kiswahili. On 17th March, 2016 when the case was scheduled for hearing, the appellant addressed the court and said that he was ready to proceed. He also said that he was suffering in custody.

35. Although the language of the court was not indicated on 26th June, 2016 when the hearing of the case begun, the appellant cross-examined prosecution witnesses up to the last witness at a later date. The appellant also gave a defence statement.

36. With the above facts, it is clear beyond peradventure that the language of the court was Kiswahili as it was the language the appellant used to take a plea. It is my finding that the said ground of appeal is without basis. What matters most is that the appellant fully participated in the lower court case, which he did. The authorities he relied on to show that he was entitled to an acquittal or that the court should order a retrial for failure of the Trial Court to indicate the language in which the proceedings were conducted, are therefore not applicable.

37. The appellant challenged the manner in which *voire dire* examination was carried out, in that the Trial Magistrate did not record the question she put to the witness and the answers given. The Court of Appeal held that a Trial Court can follow the procedure suggested by the appellant but it can also record the answers given by the witnesses in response to the questions put to them. In the case of **Patrick Kathurima vs Republic**, Nyeri Criminal Appeal No. 137 of 2014, the Court of Appeal stated as follows with regard to *voire dire* examination:-

> ***"It is best though not mandatory in our context that the questions put and the answers given by the child during voire dire examination be recorded verbatim as opined in the English Court of Appeal in Regina versus Compell (Times) December 20 1982 and Republic versus Lalkhan [1981] 73 CA 190 for the benefit of the appellate court which must satisfy itself on whether that important procedure was properly followed."***

38. On whether the appellant was properly identified, the offence was committed in broad daylight. The appellant was known to PW6 and PW7 as Baba L. They also knew his son L who was a pupil in standard 5 in the School they used to attend. The issue of mistaken identity does not arise.

39. On the issue of whether the offence of defilement was proved, it is instrumental to note that the victim, PN was coming from school in the company of two other minors, PW6 and PW7 when she was called by the appellant who held her hand and walked with her to some bushes. They stayed therein for some time and when she emerged therefrom there was blood on her skirt and leg. She was complaining of pain and she told PW6 that Baba L did bad things to her. When PW6 and PW7 were asked what had happened to PN, they stated that it was the appellant who called her by name, held her hand, walked away with her and defiled her.

40. PW6 said that she and PW7 went to check on PN and they found the appellant under a tree doing "tabia mbaya" to PN. PW7 another minor corroborated the evidence of PW6 in all material particulars save for whether the offence occurred in the bush or in a structure or whether they found Baba L defiling PN or if she told them anything when she rejoined them after being called by him.

41. PW1, the mother to PN found her crying at home on the evening of 13th September, 2015. She asked PN what had happened but she remained silent. On asking PN's friends PW6 and PW7 what had transpired, they told her that while coming from school they came across the appellant who got hold of PN's hand and took her to a structure. PN's friends also told her that they could hear her crying.

42. PN's grandmother who testified as PW2 stated that on 23rd September, 2015 she saw that PN's underwear was blood stained and on checking her private parts, she saw they were torn. They took her to Kikoweni hospital where they were referred to Msambweni Hospital.

43. The fact that PN was defiled found corroboration through the evidence of PW5, Doctor Mukoga. It was his evidence that PN's hymen was broken, there were lacerations on her vagina and she was bleeding from her vagina. The P3 form also shows that there was blood on her legs. The Doctor indicated on the P3 that there was forced sexual penetrative act. PN was admitted to hospital for 2 days as a result of the injuries. Medical findings prove there was penetration of PN's vagina.

44. The age of PN was proved through the production of her birth certificate by PW4, the Investigating officer. The said birth certificate shows that she was born on 30th August, 2008. The offence herein was committed on 23rd September, 2015, PN was therefore 7 years of

age.

45. The appellant also submitted that there were contradictions in the prosecution evidence. Having perused the file, I find inconsistencies in the evidence of PW6 and PW7 as to whether the defilement took place in a structure or under a tree and if PN told them anything when she returned from where she was taken by the appellant. I see no material inconsistencies in the evidence of PW6 and PW7 that can be resolved in favour of the appellant.

46. The issue that was of concern to this court was that PW1 in her examination in chief stated that the offence occurred on 13th September, 2015. On being cross-examined, she indicated that her daughter came across the appellant on 23rd September, 2015. On the issue of inconsistencies and discrepancies, the Court of Appeal in the case of **Philip Nzaku Watu vs Republic** [2017] eKLR, had the following to say:-

> "***However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signify fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."***

47. The appellant contended that the Judgment was not signed. The lower court hand written proceedings reflect that the Judgment was read on 21st July, 2017 by the Hon. Magistrate and the same is duly signed. In the said Judgment he considered the appellant's defence statement. He noted that the appellant only described how he was arrested, the case had taken long and that he complained that the PN never testified.

48. There was very little evidence that was adduced by the victim, PN. She was declared a vulnerable witness by the prosecution. Her evidence was not taken into account after the Hon. Magistrate ruled that her mother's evidence would be regarded as the victim's evidence.

49. The appellant in his submissions raised the issue that PN did not tell PW2 about the person who defiled her until after 2 months. Her failure to tell PW2 who was her grandmother about the defilement and the perpetrator of the same cannot be taken against her. When she was asked by her mother, PW1, who had defiled her, she remained silent and the information came from PW6 and PW7. Her shyness was evident before the lower court. On three occasions she appeared in court but said very little. She was declared a vulnerable witness. Failure to produce PN's blood stained underwear or to call the Medical Officer from Kikoneni Health Centre who referred PN to Msambweni Hospital for treatment or to call the Ambulance Assistant to court or to give the registration Number of the ambulance that took PN to the said Hospital did not weaken the prosecution case. The evidence adduced before the lower court was overwhelming against the appellant. It is my finding that the prosecution proved its case beyond reasonable doubt. The conviction was therefore sound and it is hereby upheld.

50. Section 8(2) of the Sexual Offences Act provides that a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. The appellant was duly informed by the court about the consequences of the notice of enhancement of sentence that was filed by the Prosecution. He however opted to go ahead with the appeal.

51. Having found that the evidence against the appellant was overwhelming and that the offence of defilement was proved beyond reasonable doubts, I hereby set aside the sentence of 30 years imprisonment and substitute thereof the sentence of life imprisonment. The appellant has 14 days right of appeal.

DELIVERED, DATED and SIGNED at MOMBASA on this 22nd day of February, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Ms Ogweno - Prosecution Counsel, for the respondent

Mr. Oliver Musundi - Court Assistant