REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 221 OF 2017

ROBERT MWALIMU KAINGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in Shanzu Senior Resident Magistrate Court Criminal case No. 1076 of 2014)

JUDGMENT

The appellant was convicted for the charge of sexual assault contrary to Section 5(1)(b) as read with Section 5(2) of the Sexual Offences Act No. 3 of 2006. He was sentenced to life imprisonment.

2. The particulars of the charge were that on the 10th day of November, 2014 at [particulars withheld] in Kisauni Sub-County in Mombasa County intentionally caused his finger to penetrate the vagina of MMM [name withheld] a child aged 3 years.

3. The appellant being dissatisfied with the conviction and sentence filed a petition of appeal raising the following grounds of appeal:-

i. That the honourable trial court erred in law and fact by failing to objectively analyze the evidence tendered on record and failing to resolve the obvious inconsistencies manifest in the evidence to the appellant's favour;

ii. That the honourable trial court in failing to properly analyze the facts and evidence on record, arrived at erroneous findings of fact and law as the evidence on record does not disclose the offence of sexual assault;

iii. That the honourable trial court erred in law by convicting the appellant on the uncorroborated evidence of a minor which was not tendered under oath and was also most unbelievable;

iv. That the honourable trial court erred in law by failing to objectively apply its mind to the defence tendered by the appellant and corroborated by the appellant's witness and which testimonies were made under oath and were not controverted or at all;

v. That the honourable court erred in law in failing to appreciate that the medical evidence on record did not support the facts of the case nor the charges against the appellant;

vi. That the honourable trial court erred in law by failing to reach a finding that the prosecution failed to call the most crucial witness who would have assisted the court arrive at a fair outcome;

vii. That the honourable trial court erred in failing to reach a finding that the offence had been proved beyond a shadow of doubt;

viii. That the trial Magistrate erred in law in failing to note that the conduct of the appellant at the time of the allegation, arrest and trial did not portray a guilty mind at all;

ix. That the trial court erred in law in relying on the evidence of a minor that was missing from the face of the record and thereby eliciting serious questions as from whence the learned trial magistrate based her findings; and

x. That the trial Magistrate failed to note the suspect acts of the complainant and her witnesses which raised doubt as to the occurrence of the said offence if at all.

4. The appellant's submissions were filed on 28th January, 2019. Mr. Muganda, Learned Counsel who appeared for the appellant relied fully on the written submissions filed by the law firm of Nabwana Nabwana & Co Advocates and requested the court to peruse the same and write a judgment. In the said submissions, variances were pointed out in the prosecution's case such as the P3 form indicating that the offence occurred on 12th November, 2014 while the charge sheet and PW1's evidence indicated that the offence occurred on 10th November, 2014.

5. He also pointed out that the P3 form indicates that the injury sustained by the victim reveals the offence of defilement but the charge sheet shows that the offence of sexual assault was committed. He took the position that medical evidence revealed that the hymen was intact, thus there was no penetration.

6. Counsel for the appellant took issue with the failure by the prosecution to call one Fatuma (Mami) as a witness and the non-consideration of the evidence tendered by defence witnesses.

7. Ms Ogweno, Learned Principal Prosecution Counsel filed her written submissions on 6th February, 2019, in which she opposed the appeal. She stated that the offence occurred on 12th November, 2014 when the complainant who was 3 years old was left in the custody of a neighbor by the name of Fatuma (Mami). PW1's testimony was that the report she received was that the appellant called the complainant (PW2) and inserted his finger in her vagina. He then gave her money to buy fish. Ms Ogweno stated that the complainant knew the appellant as "mtu wa makaa". PW2 reported the incident to her mother, father and uncle on the same day.

8. It was submitted that PW1 and PW2 knew the appellant as "mtu wa makaa" and he was arrested on 14th November, 2014 when the complainant and her mother pointed him out to members of the community policing.

9. With regard to the defect in the charge as to the date the offence occurred, Ms Ogweno relied on Section 134 of the Criminal Procedure Code. She submitted that defect in the charge did not render the conviction invalid as the appellant fully participated in the lower court proceedings and that in his defence he spoke of the events of 12th November, 2014. She was of the view that the defect was curable under the provisions of Section 382 of the Criminal Procedure Code.

10. The Prosecution Counsel submitted that an offence under the provisions of Section 5(1)(b) of the Sexual Offences Act does not require proof of the complainant's age. She relied on the case of **John Irungu vs Republic** [2016] eKLR to support her assertion.

ANALYSIS AND DETERMINATION

11. The duty of the first appellate court is to analyze the evidence tendered before the court below and come to its own independent conclusion, bearing in mind that it has neither seen nor heard the witnesses testify. In **Soki vs Republic** [2004] eKLR the Court of Appeal cited the case of **Gabriel Kamau Njoroge vs Republic** (1982 – 1988) 1 KAR 134 that held as follows:-

> **"It is the duty of a first appellate court to remember that parties are entitled to demand of it a decision on both questions of fact and of law, and the court is required to weigh conflicting evidence and draw its own inference and conclusions bearing in mind that it has neither seen nor heard the witnesses and make due allowance for this."**

12. PW1, the complainant's mother testified that on 10th November, 2014 she left her home and proceeded to Kisauni. She left her child under the care of Fatuma also known as Mami. While there, Mami called her and one Naomi took to her the child, PW2. Mami asked PW2 to tell PW1 what she had told her. It was PW1's evidence that PW2 told her that the appellant had called her and inserted his finger in her vagina. She felt pain and started crying. The appellant asked her to lie down and he would give her money to buy fish but she refused, ran home and told Mami, who went to the appellant and confronted him. He denied having done anything.

13. PW1's evidence was that she went to the charcoal stall and confronted the appellant who said nothing. PW1 stated that PW2 described the appellant as "yule na macho makubwa" and at times she referred to him as "mwenye wa makaa".

14. PW2 a minor by the name MM [name withheld] was the complainant herein. She testified that the appellant called her when she was playing a game with another child. She referred the appellant as "huyo mtu wa makaa". She stated that he called her and gave her money to buy fish. He then inserted his finger in her vagina. She thereafter told her father, mother and uncle.

15. PW3, No. 97745 PC Edna Kamene on 13th November, 2014 received a complaint from PW1 who was accompanied by PW2, to the effect that the latter had been defiled. She referred them to the Gender and Violence Department at Coast Province General Hospital (CPGH) where PW2 was examined and treated. PW3 received the PRC form the following day which showed that PW2 had abrasions on her private parts. She later took PW2 to CPGH to have the P3 filled. On 20th February, 2015 she took PW2 for age assessment. PW3 produced the age assessment form as p. exhibit 1. PW3 further testified that the appellant was later arrested after members of the community policing were led to him by PW1.

16. Dr. Omar Tsuma Nazon is in the lower court proceedings reflected as having been testified as P3 instead of PW4. He produced the P3 form on behalf of Doctor Ibrahim who was on study leave. Dr. Nazon was conversant with the handwriting and signature of Dr. Ibrahim. The Doctor established the nature of the offence as defilement. It was his evidence that PW2's genitalia was erythematous and lacerations were visible. The P3 form was produced as p. exhibit 2. He also produced the PRC form as p. exhibit 3.

17. In his defence statement, the appellant indicated that PW1 framed him up for the offence herein which he did not commit. He further stated that it was PW1 who pointed him out and not PW2 as she said nothing when she was asked by PW1 who had defiled her. For an undisclosed reason, the appellant produced copies of witness statements of PW1, PW2 and of one Mami Abulrahman.

18. DW2, Rehema Ali Mohamed's evidence was that it was PW1 who pointed out the appellant after she asked PW2 who had inserted a finger in her vagina and she kept quiet. DW2 stated that the appellant is a person of good character and could not have committed the offence. She further indicated that Mami had not gone to the stall earlier to enquire about the issue.

19. DW3, Mwalimu Ndokolan also defended the appellant by saying that he was with him from 10:00 a.m. to 7:30 p.m., on 13th November, 2014 and he did not see the complainant on that day. He stated that at around 7:30 p.m., PW1 went to the stall and found the appellant, DW3 and another person sitting on a bench. She stated that PW1 used torch light from her phone to point at them and then asked PW2 "ni huyu?". DW3 further stated that Mami did not go to the stall.

20. The issues for determination are:-

i. If the appellant was positively identified;

ii. If the offence of sexual assault was proved beyond reasonable doubt;

iii. If the charge was defective; and

iv. If the prosecution failed to call a material witness.

Identification

21. The offence the appellant was charged with was committed at day time. This is discernible from the evidence of PW1, the victim's mother. She testified that on 10th November, 2014 she left her home for Kisauni at around 1:00 p.m. When she reached there, the lady she had left her child (PW2) with called her. One Naomi took PW2 to PW1 and on being asked to recount what she had told Mami, PW2 informed her that "mwenye na mkuu" (on reference being made to the original handwritten proceedings it is recorded as "mwenye na makaa") called her and inserted his finger in her vagina. She felt pain and started crying.

22. PW1 further testified that she went with PW2 to the charcoal stall and confronted the appellant but he did not say anything. She asked PW2 to show her the person who inserted a finger in her vagina and she pointed at the appellant who started laughing and yelling to other men. He told PW1 that he would not do such a thing to a child. She reported the matter to Nyali Police Station.

23. In her evidence, PW1 stated that in her statement she recorded that PW2 said "yule na macho makubwa" assaulted her. PW1 also said that she referred to him as "mwenye wa makaa" and that in their neighbourhood, he was referred to as "mtu wa makaa" and that children also refer to him as "mwenye macho makubwa".

24. PW2 gave unsworn evidence as she was a child of 3 ½ years of age who did not understand the meaning of an oath. She testified that she was playing with her sister E [name withheld] and other children when "huyu mtu wa makaa" who was at his stall called her. She stated that she did not know the name of the "mtu wa makaa". She identified the "mtu wa makaa" as the appellant.

25. On cross-examination, PW2 was consistent that the person who inserted his finger in her vagina was the appellant whom she pointed out in court.

26. In his defence statement, the appellant admitted that he sells charcoal and he was at work on 12th November, 2014 together with DW2 and DW3. In cross-examination he stated PW1 used to go to his stall to buy charcoal and at times she would be accompanied by PW2 who knew him well as he had sold charcoal at the stall for 10 years. He admitted that people in the neighbourhood, including children, knew him as a charcoal seller. He admitted that the children use to call him "mwenye makaa". In making reference to the statement of PW2 which described him as "mtu wa kuuza makaa macho makubwa", he stated that if the children used to call him "macho makubwa", he did not know of the same.

27. In the case of **Wamunga vs Republic** [1989] KLR, the Court of Appeal held as follows:-

> **"It is trite law that where the only evidence against a defendant is evidence of identification by recognition, a trial court is enjoined to examine such evidence carefully and be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of conviction."**

28. In this instance, the only witness who gave evidence as to what transpired was PW2. As per PW1's evidence, the offence was perpetrated during the day time and that was not contested. This court therefore holds that the circumstances were favorabale for positive identification. Further, in this case, identification was by way of recognition.

29. The appellant admitted that he had worked in that area for 10 years and that he was known to both PW1 and PW2. He stated that at times PW1 used to go to his charcoal stall with PW2. He also admitted that he is commonly known in the neighbourhod as "mtu wa makaa". This court notes that PW2 used the said term when describing the person who had sexually assaulted her. The statement of PW2 which the appellant produced in court as D. exhibit 2, indeed buttresses the fact that PW2 reported to PW1 that it was the appellant who had inserted his finger in her vagina. The issue of mistaken identity does therefore not arise. The Hon. Magistrate found that the appellant was positively identified and I do not fault her finding.

If sexual assault was proved.

30. PW2 was categorical in her evidence that when the appellant called her to his charcoal stall, he gave her money to buy fish and inserted his finger in her vagina. The same is borne by the contents of her witness statement that was produced in the lower court as D. exhibit 2.

31. On being taken to hospital, she was examined and a PRC form was filled. Her outer genitalia was found to be normal. She had erythematous vaginal abrasions. Her hymen was intact. The comments on the PRC indicate that the fresh erythematous vaginal abrasions could be due to forced penetration.

32. The appellant's Counsel Mr. Nabwana, contrasted the said findings with the contents of the P3 form where Dr. Ibrahim indicated the nature of the offence to be defilement. The Hon. Magistrate addressed the said issue by stating that a Doctor is not a legal expert and as such he would not know the definition of an offence of sexual assault which the appellant was charged with and defilement as indicated in the P3 form. On my part, I do concur with the trial Magistrate Hon. A. Ndun'gu on the above and add that it is the Police who determine the offence that a suspect is to be charged with. The role of the Doctor is to establish if in a case such as this, any injuries are visible on the victim of a sexual offence.

33. It is my finding that the evidence of PW2 that the appellant inserted his finger in her vagina was supported by medical evidence. Further, the proviso to Section 124 of the Evidence Act applies. The trial court was satisfied that PW2 was truthful in her evidence. She further found that PW2 was a credible witness and that her evidence was clear, consistent and unshaken.

If the charge was defective

34. The evidence of PW1 with regard to when the offence was committed was at variance with the date reflected on the charge sheet. PW1 testified that the offence occurred on 12th November, 2014 whereas the charge sheet indicated that the offence occurred on 10th November, 2014.

35. In cross-examination, PW1 stated that the incident happened on 12th November, 2014. PW3 in cross-examination stated that the incident was reported to Nyali Police Station on 12th November, 2014 through OB No. 65/12/2014 and not on 10th November, 2014. DW1 and DW2 spoke of the events of 12th November, 2014. DW3 in cross-examination also referred to the 12th November, 2014. The P3 form on page 1 indicates that the offence happened on 12th November, 2014. The PRC gives the date of the offence as 12th November, 2014.

36. Section 214(2) the Criminal Procedure Code provides as follows:-

> **" Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof."**

37. In the case of **Obedi Kilonzo Kevevo vs Republic** [2015] eKLR the Court of Appeal when faced with an appeal wherein the dates in the charge sheet were at variance with the date stated in the facts read out to the accused person cited the case of **Rama vs Republic** [2009] KLR 671 where it was held as thus:-

> **"It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the appellant is not discernible."**

38. The Court in **Obedi Kilonzo Kevevo vs Republic** (supra) where the appellant had pleaded guilty to the charge read out to him in the trial court, continued to state as follows:-

> **"Applying this principle to the rival arguments of the parties, we are satisfied in the instant case that this was an omission and discrepancy which did not prejudice the appellant and that no miscarriage of justice has been occasioned as a result of the difference in dates. The errors on the dates cannot make the charge sheet defective or the conviction a nullity. This defect is therefore curable under section 382 of the Criminal Procedure Code. We are therefore of the considered view that the discrepancy on the dates as contained in the charge sheet and as contained in the facts read out to the appellant did not occasion a miscarriage of justice."**

39. In the present appeal, although the charge sheet indicates that the offence was committed on 10th November, 2014, the evidence of PW1 indicated it happened on 12th November, 2014 and so did PW1. The appellant, DW2 and DW3 spoke of the events of 12th November, 2014. In the said circumstances, there is no doubt that the offence occurred on 12th November, 2014. In this court's view, the error made by giving the wrong date on the charge sheet is curable under the provisions of Section 382 of the Criminal Procedure Code. I also hold that the appellant was not prejudiced by the manner the charge was framed as he was able to cross-examine witnesses at length and to fully participate in the lower court proceedings.

Failure to call a material witnesses.

40. The defence Counsel took issue with failure by the prosecution to call one Fatuma, also known as Mami to testfy. In the lower court proceedings of 24th April, 2017, the prosecution explained its failure to procure the attendance of the said witness as she had relocated to an unknown place and her mobile phone was off. In the said circumstances, this court cannot therefore make the presumption that the prosecution had failed to call the said witness because she was likely to give evidence that would have adversely affected the prosecution's case. In any event, the said witness was not present when the appellant inserted his finger in PW2's private parts. The appellant produced Mami's statement as D. exhibit 3 and the same therefore forms part of the lower court record.

41. In **Keter vs Republic** [2007] eKLR the court held as follows with regard to the role of the prosecution in calling witnesses in court:-

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

42. In this case, failure to call Mami as a witness did not prejudice the appellant in any manner as there was ample evidence upon which the trial court based a conviction.

43. The Hon. Magistrate considered the evidence adduced before her in minute detail before she convicted the appellant. It is my finding that nothing turns on this appeal. The case against the appellant was proved beyond reasonable doubt. The defence raised by the appellant does not cast any doubt on the prosecution's case. I therefore dismiss the appeal against conviction.

44. With regard to the sentence, the appellant was sentenced to life imprisonment. Section 5(1) of the Sexual Offences Act provides for the offence of sexual assault which the appellant was charged with. Section 5(2) of the said Act stipulates that a person guilty of an offence under Section 5(1) is liable upon conviction to imprisonment for a term of not less than ten years which may be enhanced to imprisonment for life.

45. When called upon to mitigate, the appellant did not say anything. He was sentenced to life imprisonment. It is a principle of sentencing that the sentence meted out against an accused person should be commensurate with the offence committed. In this court's view, the sentence of life imprisonment was harsh in the circumstances of this case. The interests of justice would have been served by imposing a less severe sentence against the appellant.

46. I therefore set aside the sentence of life imprisonment and substitute it thereof with a sentence of 10 years imprisonment. The said sentence will be effective from the 29th of September, 2017 being the date the Judgment was delivered in the lower court. The appellant has 14 days right of appeal.

DELIVERED, **DATED** and **SIGNED** at **MOMBASA** on this **29th** day of **March, 2019.**

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Muganda for the appellant

Ms Marindah for the DPP

Appellant present

Mr. Oliver Musundi - Court Assistant