REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL CASE NO. 39 OF 2018

MWANGA KASANGA alias **BENJAMIN KASANGA MWANGA.....APPELLANT**

VERSUS

REPUBLIC .....RESPONDENT

(An appeal from the Judgment of the Hon. L. N. Juma (Mrs) R. M delivered on 4th June 2018 in Kilifi Criminal Case No. 93 of 2015 the parties being Republic v Mwanga Kasanga alias Benjamin Kasanga Mwanga)

Coram: Hon. Justice R. Nyakundi

Kanyi J. Advocates for the appellant

Ms. Sombo for the respondent

Appellant

JUDGMENT

This is a first appeal in which the appellant **Mwanga Kasanga** approached the Court after being dissatisfied and aggrieved with the Judgment of the trial Court in Criminal Case No. 93 of 2015 presided over by **Hon. L. N. Juma (SRM).**

According to the record, appellant was indicted initially with the charge of defilement contrary to Section 8 (1) as read with Sub-section (3) of the Sexual Offences Act. The appellant was thereafter tried, found guilty, convicted and sentenced to a term imprisonment of twenty-five years for the offence of sexual assault contrary to Section 5 (1) of the Act. Aggrieved with both conviction and sentence the appellant preferred an appeal as embodied in the memorandum of appeal as hereunder:

(a). That the trial Magistrate erred in Law and infact by failing to consider the submissions made by the appellant thus arriving at a wrong determination.

(b). That the Learned Magistrate erred in Law and in fact in failing to consider and instead dismiss the evidence of the appellant as untruthful as compared to that of the prosecution.

(c). That the Learned Magistrate erred in Law and in fact in misapprehending the testimony and documentary evidence of the doctor.

(d). That the Learned Magistrate erred in Law and in fact in convicting the appellant for a lesser offence.

(e). That the Learned Magistrate erred in Law and in fact in sentencing the appellant to 25 years' imprisonment.

Procedural History and factual matrix to the appeal

In brief on 18.2.2015 appellant was apprehended and charged of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act. The particulars of the charge being that on 18.2.2015 at Kilifi Township within Kilifi County, intentionally and unlawfully appellant caused his penis to penetrate into the vagina of **PKL** a child aged 6 years.

During the trial in terms of Section 107 (1) and 108 of the Evidence Act, it was incumbent upon the prosecution to summon witnesses to discharge the burden of proof of beyond reasonable doubt against the appellant. In this regard the trial proceeded against the appellant and four witnesses gave evidence in support of the indictment. According to the testimony of **PW1 – Boniface Mwanga** the appellant had been hired to carry the victim from home to school during the period under review. It happened that on the material day of the offence appellant drove by at high speed in company of the victim. When he returned home **(PW1)** testified that he found the victim in a distressed condition and was crying. That is when he asked the housegirl to carry out a quick physical examination which showed a discharge on her private parts and presence of sand residues. He decided to take her to the hospital who confirmed the child had been defiled.

On being cross-examined by the defence counsel **Mr. Waswa**, the witness confirmed that the appellant had been picking and dropping the victim for three months without any problem, save for this one unusual incident.

The next witness to testify was the victim **(PW2).** In her testimony she described the events of the day when the appellant took her to a forest and picked a thorn from a tree called *Mkurudadi* which he used to pierce her vagina. She further told the Court that appellant put her down in a sleeping position as he used the thorn to pierce the vagina severally. Thereafter, he warned her not to tell anyone of what had transpired in the forest. On arrival at home **(PW2)** stated that she informed her father **(PW1)** accusing the appellant of the sexual assault.

It was also a summary of the evidence from **(PW3) PC. Philip Nzombo** of Kilifi Police Station who happened to investigate the complaint against the appellant. After filing the report, the victim **(PW2)** having been examined by the medical officer **(PW4) Dr. Ahmed** to ascertain the nature of the offence complained of before the victim. In the totality of his testimony **(PW3)** produced a birth certificate as exhibit 3 indicative of the age of **(PW2)** to be six years old at the time the offence was committed.

Last but not least was the evidence of **Dr. Ahmed (PW4)** who proceeded to give evidence on behalf of **Dr. Kadivani**, the medical officer involved in examining **(PW2)** immediately after the sexual assault incident. According to **PW4 Dr. Kadivani**, who undertook the investigations or examination of the victim prepared the P3 and PRC which he produced as exhibits. With regard to the positive findings **Dr. Ahmed** told the Court that the victim had different multiple bruises on inner genitalia involving both the thigh and vulva.

Defence case

In his sworn defence the appellant stated that he used to carry many children to school including the victim. In his errands on the day in question he went for her as usual at [Particulars Withheld] School in Kilifi. That is when her class-teacher told him that since morning (PW2) has been experiencing some pain. It was therefore agreed that he takes the child home. Further, appellant told the Court that in the presence of their teacher he carried his daughter and the victim on the same motorcycle to drop them at their respective homes. He therefore dropped his daughter first and thereafter the victim (PW2) whom he handed over to the househelp with information of what the teacher noticed about her. Was surprised to learn of the alleged defilement or sexual assault.

In addition to the appellant testimony its also on record that **DW2 – CK** in the instant case weighed in to present his side of the story as a teacher to the victim. According to **(DW2)** he confirmed to the Court that the appellant used to pick and drop some of their students at the school. One such student happened to be **(PW2) (PK).** In **(DW2)** evidence on 18.2.2015 the appellant arrived at around 4.30 – 4.45 p.m. to pick **(PW2) (PK)** from school. He however recalled that during the early hours of the day he noticed that **(PW2)** had a problem in sitting and did her class work while standing. A few days later the father **(PW1)** informed them that the child (PW2) had been defiled.

Submissions by the Appellant

Addressing the Court on appeal, appellant filed written submissions where he argued by saying that he was a victim of a frame-up. He referred to the evidence and pointed out that in her evidence **PK,** the victim never testified that she was defiled.

The appellant further submitted that the discretion exercised by the Learned trial Magistrate not to cause an amendment of the charge in terms of Section 214 of the Criminal Procedure Code did prejudice him and occasioned an injustice. That by the Learned trial Magistrate convicting him of a lesser offence, it was clear that the initial charge sheet was defective and in contravention with the Law. The appellant urged the Court to be persuaded by the dictum in the cited cases of **Albert Oyondi v R CR Appeal No. 404 of 2018, John Cardon Wagner v R {2010} eKLR and Yongo v R CR Appeal No. 1 of 1993.**

It was also submitted that the evidence of (PW1) and (PW2) is lacking in truth on the circumstances of the alleged offence and yet the Learned trial Magistrate went ahead to find their evidence credible and worthy of believe. That by the Learned trial Magistrate dwelling on the uncorroborated evidence of the victim and inconsistencies adduced by (PW1) rendered the trial unjust. He relied on the case of **Kennedy Mwakio v R CR Appeal No. 61 of 2015.**

As regards the failure by the prosecution to call for the evidence of the house help appellant submitted that the charge was not proved and that conviction for sexual assault should not stand. Thus the appellant referred to what he called the legal effect of uncalled witnesses by the prosecution. He placed reliance on the legal proposition in the case of **Bukenya v Uganda {1972} EA**. The appellant attacked the Learned trial Magistrate decision for not resolving a benefit of doubt in his favour as against the prosecution. The appellant further argued and submitted that the Learned trial Magistrate misapprehended the findings and expert evidence of the doctor on the victim injuries in her part of the genitalia (vagina). He took issue with the statement of the doctor which failed to point out the probable weapon to be the thorns as allegedly stated by the victim. He asked the Court to disregard the probative value of the medical evidence heavily relied upon by the Learned trial Magistrate.

The appellant also submitted to what he thought was a misdirection and significant error on the part of the Learned trial Magistrate in convicting him for a lesser offence. In a nutshell the appellant asked the Court to quash the conviction set aside the sentence and set him free.

Learned prosecution counsel supported the conviction and sentence arguing the victim had been sexually assaulted contrary to Section 5 (1)

of the Sexual Offences Act. According to the prosecution counsel there was not any misdirection in regard with the credibility of witnesses nor the documentary evidence of the Doctor **(PW4).** As regards the lesser charge of sexual assault, Learned Prosecution Counsel submitted that the Law is very clear under Section 179 (1) of the Criminal Procedure Code when such discretion is exercisable in the interest of justice of the matter.

In summary, Learned Prosecution Counsel contended that the evidence of the doctor corroborates **(PW2's)** evidence that she was sexually assaulted by the appellant at the scene. In the result Learned Prosecution Counsel argued and submitted that none of the grounds of appeal avail the appellant, the benefit of doubt contemplated against the appeal on conviction and sentence. It followed therefore the Learned Prosecution sought leave of the Court to have the appeal dismissed.

The Law and Determination

As a first appellate Court the guiding principles are well set out in **Pandya v R {1957} 336, Ruwala v R {1957} EA 570**.

> ***"It is the duty of the Court to rehear the case and evaluate the whole evidence before the trial Magistrate with such other materials as it may have decided to consider and admit at the trial. The Law stipulates that the appellate Court must then make up its own mind and conclusions but carefully and meticulously not to disregard the impugned Judgment but weigh the various points raised and the final determination. Further, under this jurisdiction when the question arises which witnesses are to be believed or their demeanor rather than the other, the appellate Court must be guided by the impression made on the Magistrate who saw and heard the witnesses……"***

The appellant was convicted of the offence of sexual assault contrary to Section 5 of the Sexual Offences Act. The Section stipulates that:

> ***"Any person who unlawfully***
>
> ***(a). Penetrates the genital organs of another person with***
>
> ***(i). Any part of the body of another or that person or***
>
> ***(ii). An object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes.***
>
> ***(b). Manipulates any part of his body or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body is guilty of an offence termed as sexual assault.***

The basic elements for the offence are that the accused must by an intentional and unlawful caused penetration of the genital organs of another person or by an object manipulated for that purpose carried out penetration into the sexual organs, of the victim.

It is not in dispute that the appellant was initially charged with the offence of defilement contrary to Section 8 (1) and (2) of the Sexual Offences Act. However, on consideration of the matter and the evidence presented by the prosecution, it was found fit by the Learned trial Magistrate to invoke Section 179 (1) of the Criminal Procedure Code, for purposes of a verdict of guilty and a conviction for a lesser charge under Section 5 (1) as read with Sub-section (2) of the Act.

The main grievance submitted by the appellant touched on the misdirection held by the Learned trial Magistrate not to dismiss the charge for being fatally defective. He contended that the conviction was unsafe as the Learned trial Magistrate ought to have followed the laid down principles in **Albert Oyondi, John Gordon, Wagner Mwanga Kasanga & Yongo (supra)** decisions.

In the instant case though Section 179 (2) of the Criminal Procedure Code was invoked by the Learned trial Magistrate that jurisdiction to exercise both discretion is textualised under Section 186 of the Code, which states as follows:

> ***"When a person is charged with the defilement of a girl under the age of fourteen years and the Court is of the opinion that he is not guilty of that offence but is guilty of another offence under the Sexual Offences Act, he may be convicted of that offence although he was not charged with it."***

In the present case, the appellant faced a serious charge, that of defilement of a female under the age of eighteen years. It is apparent that at the conclusion of the trial for reasons given by the Learned trial Magistrate she had reasonable cause to make a finding for a lesser offence in terms of the statutory provisions which governs conviction and sentence for lesser offence, though the offender may not be initially charged of it. There are two ways in which an accused person can be held criminally liable for a lesser offence.

First, where the evidence in fact proves that he or she did not completely perform a special part of the serious offence and there is a relational inchoate liability.

Secondly, where a persons aids, abets, commits or procures the commission, or commits an indictable offence and the evidence shows that he is not guilty of the substantive charge but a special part of the offence, that satisfies the formulation under the rubric of offences provided for in the Sexual Offences Act. Therefore, in terms of Section 186 of the Criminal Procedure Code it must be an act immediately connected with the commission of an offence and indictment against the accused which could reasonably be considered not just a proximate act but actually on unequivocal last act.

The last act test is the final thing an accused person has to be proved to have done in order for the full offence to happen. Thus it must be understood that the conception which underpins the mensrea element of the initial charge is not different of inconsistent with that of a lesser offence. This rule applies in a straight forward manner to most offences as contemplated in Section 179 (1) (2) of the Criminal Procedure Code. However, the code provides a special Section 186 to deal with lesser offences under Sexual Offences Act on the facts that the appellant was found to have committed a lesser offence, the Learned Magistrate power to depart from the main charge seems to be backed by Section 186 of the Criminal Procedure Code and not the commonly cited Section 179 of the Code.

What is suggested here is that the prosecution should have applied for amendment of the charge pursuant to Section 214 of the Criminal Procedure Code. It follows from this understanding that the appellant took the view of such action by the Learned trial Magistrate to be an error or misdirection for proceeding with a trial on a defective charge. Despite these views held by the appellant the position of the Law is now embedded in our various jurisprudential decisions i.e. **Josphat Karanja Maina v R {2009} eKLR, David Irungu Murage & Antony Karuri v R CR Appeal No. 18 of 2004, BND v R {2017} eKLR, Peter Ngure Mwangi v R {2014} eKLR**

Applying the above principles the charge in question gave the appellant notice both of the alleged facts and of the prosecution's basic legal theory. A deficiency on the probable weapon used to penetrate the victim genitalia did not deprive the appellant of the opportunity to prepare his defence. In any event the charge sheet and information gave the appellant a curium legal framework to guide him in the presumption of the evidence at the trial.

The question then is whether or not the Learned trial Magistrate indictment and conviction of the appellant with a lesser offence is inconsistent with Section 214 of the Criminal Procedure Code. In my view, I do not think so such a motion pursued by the Learned trial Magistrate is appropriately covered under Section 186 of the Criminal Procedure Code. Failure to set forth Section 186 as a specific form of indictment mandate by statute to establish the charge did not prejudice nor occasion an injustice to the appellant. As long as the statutory language is otherwise satisfied, any errors or omissions in the present appeal are curable under Section 382 of the Criminal Procedure Code. This ground of appeal therefore fails.

Ground 2

On this ground the appellant submissions manifest that the trial Magistrate did not consider that the burden of proof was not discharged and the evidence by the witnesses remained inconsistent and contradictory without any proper explanation. In appellants contention the victim testimony (PW2) and that of his father (PW1) examined closely showed a pattern of inconsistency to proof the elements of the offence.

The relevant Law in Kenya is succinctly set out in **Twehangane Alfred v Uganda CR Appeal No. 139 of 2001, Joseph Maina v R CA No. 73 of 1992, John Canceo Desa v N Amin CA No. 27 of 1933 {1934} 1EACA 13.**

In the present case I remind myself of the principles laid down in **Ruwala and Pandya case (supra)** there may be a case in which the contradictions in the evidence adduced at the trial is in question. However, the extent of scrutiny by an appellate Court must rest entirely on the degree and safety net in accordance with the principles in **Twehange and Joseph Maina Mwangi**. The evidence on these witnesses complained of by the appellant discloses no material discrepancy which impairs their probative value and the resultant burden of proof of beyond reasonable doubt. It suffices to say that the evidence fairly demonstrated that the appellant committed a criminal act of sexual assault as described by the victim **(PW2).** There is no inherent contradictions and or inconsistencies with regard to the evidence by the prosecution witnesses PW1 – PW4 to warrant interference by this Court. This ground of appeal also fails.

Ground 3 – uncalled witnesses

The main contention on the part of the appellant was the failure by the prosecution to summon to Court the evidence of house help on this in line with Section 143 of the Evidence Act and the principles in **Mwangi v R {1984} KLR – 595**, the legal and evidential burden to call witnesses to proof the charge against the appellant beyond reasonable doubt rests with the prosecution.

As the Court of Appeal held in **Mwangi (supra)** case:

> ***"Whether a witness should be called by the prosecution is a mater within the discretion of the prosecution and the Court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive."***

As regards the uncalled evidence of the house help, I accept the principles expressed in **Keter v Republic {2007} EA 135** where it was held interalia:

> ***"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."***

For me the Court has not been shown her materiality and cogency evidence which could changed the landscape and final findings made by the Learned trial Magistrate to this appeal even the dictum in **Bukenya case** on the point of uncalled witnesses, looking at the matter all around was of less significance to the appellant's appeal. I also therefore disallow this ground of appeal.

Ground 4

Finally, with regard to this complaint that due weight had not been given to the defence put up an alibi evidence by the Learned trial Magistrate. The same has been carefully analyzed and weighted against the prosecution case.

In my view, the evidence relied on by the prosecution as given on oath by (PW2) satisfied in all the circumstances of the case to proof the elements of the offence and substantively recognize the appellant as the perpetrator of the crime. The statement by the victim showed the intention and unlawful acts of omission on how he dragged her into the forest, picked a thorn, laid her on the ground followed with piercing of the vagina. The appellant was later to drop the victim at her home when indeed (PW1) discovered that she was in unusual pain.

This piece of evidence was corroborated in material particulars by the other evidence given by the medical doctor (PW4) substantially confirming the injuries sustained as claimed in respect of the piercing of her vagina. There can be no doubt that evidence of recognition is receivable and admissible in the instant case with no possibility of error to create any suspicion on him that he was not on that scene described by the victim. **(See Turnbull v R {1984} 3 ALL ER).**

It was as a result of the foregoing that the trial Magistrate found the appellant guilty of the lesser charge of sexual assault contrary to Section 5 of the Sexual Offences Act.

I am therefore not convinced that there are any alleged untruths or alibi defence that would be properly cause this Court to interfere with the Judgment on conviction of the appellant.

There is no merit in the appeal which I order dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF MARCH 2019

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R. NYAKUNDI

JUDGE