REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 87 OF 2017

JAMES MUKOBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence of Hon. V.J. Yator

delivered on 11th May, 2017 in Mombasa Chief Magistrate's Court

Criminal Case No. 2031 of 2014).

JUDGMENT

1. On 31st October, 2014 the appellant herein, James Mukobo was arraigned in the lower court and charged with the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 29th day of October, 2014 at [Particulars Withheld] in Changamwe within Mombasa County, intentionally and unlawfully caused his penis to penetrate the vagina of RN [name withheld] a girl aged 4 years.

2. He was also charged with the alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of the charge were that on the 29th day of October, 2014 at [Particulars Withheld] area in Changamwe within Mombasa County, intentionally and unlawfully caused his penis to rub the vagina of RN [name withheld] a girl aged 4 years.

3. The appellant was found guilty of the main charge and sentenced to serve 20 years imprisonment. Being dissatisfied with the conviction and the sentence he filed the following grounds of appeal on 24th May, 2017:-

(i) That the Trial Subordinate Court erred in law and fact by failing to find that the evidence adduced against the appellant did not satisfy the ingredients required to uphold a conviction under the charges that were preferred against him;

(ii) That in so doing the Learned Trial Magistrate erred in law by failing to note that the prosecution's case was not proved to the standard required by the law hence the appellant's conviction was very unsafe;

(iii) That the Learned Trial Magistrate failed to appreciate that the case against the appellant was a fabrication and in so doing also failed to take note that witnesses were not called to clear doubts raised in the prosecution's case;

(iv) That the Learned Trial Magistrate failed in law and in fact to appreciate, analyze and resolve the numerous contradictions manifest on record in favour of the appellant and which contradictions diminished any credibility the prosecution evidence had;

(v) That in view of paragraph 4 above, the Learned Trial Magistrate failed to properly analyze the evidence on record and thereby arrived at erroneous findings of fact and law;

(vi) That the Honourable Trial court erred in law by convicting the appellant on uncorroborated evidence of this manner;

(vii) That the Learned Trial Magistrate failed in law in not making a finding that the medical evidence as presented did not *per se* disclose the offence the appellant was charged with;

(viii) That the Honourable Trial Court erred in law and in fact in failing to find that the conduct of the appellant did not portray a

guilty mind;

(ix) That the Learned Trial Magistrate failed in law and in fact in not finding that the evidence of the first report materially contradicted the evidence on record; and

(x) That the Honourable Trial Court erred in law and fact by failing to objectively apply its mind to the defence of alibi raised by the appellant and his witnesses, which evidence was credible.

4. The appellant's Counsel filed his written submissions on 10th December, 2018. It was submitted that the evidence adduced did not satisfy the ingredients of a charge of defilement under the provisions of Section 8(1) as read with 8(3) of the Sexual Offences Act, thus the charge was incurably defective. With regard to the foregoing, the appellant's submission was that PW1, the victim, in her evidence stated that uncle Mwagumbi hurt her with a "chuma" (iron rod) which he put inside her. It was pointed out that PW1 did not talk about a penis and she did not point to the appellant's genitals to mean the iron rod. Counsel for the appellant emphasized that PW1's evidence did not show that the appellant used his genial organ to penetrate her genital organ. He stated that as such, the Hon. Magistrate erred by finding that the prosecution proved the main charge of defilement beyond reasonable doubt.

5. On the defect in the charge, it was submitted that PW1 was alleged to be 4 years old yet the penal provisions in the charge sheet were given as Section 8(3) of the Sexual Offences Act which provides the punishment for defilement of children between the age of twelve and fifteen years. It was therefore submitted that the said defect was fatal and the ensuing conviction was null and void. The case of **Albert Oyondi vs Republic**, High Court Appeal No. 404 of 2016 was cited to show that the Hon. Trial Magistrate should have scrutinized the charge sheet and rejected it. It was submitted that the appeal therein was allowed because of the defect in the charge.

6. The appellant's Counsel referred to failure by the prosecution to call one Alice Maundu who filled the P3 form as a serious lapse and that the prosecution's evidence contained a glaring discrepancy as PW5 said that the P3 form was filled by Dr. Ngone.

7. The conviction of the appellant was also challenged on the ground that the evidence against him was uncorroborated and speculative. More so, in that the Hon. Magistrate speculated that the appellant could have used a condom to defile PW1 and she also took judicial notice that there are HIV discordant people. The case of **Okethi Okale and Others vs Republic** [1965] EA 55 was cited to support the assertion that the Hon. Magistrate should not have put forward a theory not supported by evidence.

8. It was submitted for the appellant that one Aunty Diana to whom PW1 allegedly reported the defilement and a teacher by the name Regina were not called to shed light on what they knew about the case. The decision in **Bukenya and Others vs Uganda** [1972] EA 549 was cited to demonstrate the importance of the prosecution availing all the evidence necessary to establish the truth even if the evidence may be inconsistent with their case. Counsel prayed for the appeal to be allowed.

9. Ms Ogweno, Principal Prosecution Counsel filed written submissions on behalf of the respondent to oppose the appeal. She stated that the complainant who was 4 years old recounted how the appellant called her from where she was playing with her younger brother, took her to his house, lay her on the bed and put his rod in her vagina. She described the appellant as uncle Mwagumbi who lived in the same plot as her family.

10. PW3 checked PW1's genital organ after receiving a report, and saw it was not normal. An examination of PW1 at Coast Province General Hospital (CPGH) revealed that her hymen was broken and her labia minora was lacerated.

11. In Ms Ogweno's view, the manner in which the charge was framed did not make it defective since Section 8(1) of the Sexual Offences Act defines the act of defilement whereas Section 8(2) or 8(3) of the said Act merely guides the court on sentencing.

12. It was submitted that there were no inconsistencies in the medical evidence relied on by the prosecution as the Doctor who filled the P3 form relied on the report in the Post Rape Care Form (PRC form). It was further submitted that the appellant's Counsel cross-examined the Doctor at length in a bid to challenge the medical evidence adduced.

13. On failure to call the Class Teacher referred to as Regina, Ms Ogweno submitted that the prosecution does not have to call a flurry of witnesses to give the same narration as it was evident that PW1 was injured on her private parts.

14. The Prosecution Counsel urged this court to set aside the conviction for the offence of defilement and substitute it with the offence of sexual assault contrary to Section 5(1) of the Sexual Offences Act. She submitted that her argument was informed by the failure by PW1 due to her tender age, to accurately name the appellant's private part by its correct name because she had referred to it as an iron rod. Ms Ogweno cited the case of **John Irungu vs Republic** [2016]eKLR, where the Court of Appeal held that the offence of sexual assault was a cognate offence to the offence of defilement as per the provisions of Section 179 of the Criminal Procedure Code.

ANALYSIS AND DETERMINATION

15. The duty of the first appellate court is to analyze and re-evaluate the evidence adduced before the lower court and come to its own independent decision. The court must however bear in mind that it has neither seen nor heard the witnesses testify and make an allowance for that. In **Kiilu and Another vs Republic** [2005] 1 KLR 174, the Court of Appeal stated thus:-

"1. An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.

2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; Only then can it decide whether the Magistrate's findings 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."

16. The evidence adduced before the lower court was that the complainant's father, PW2, NJN [name withheld] was a Truck Driver who left his children under the care of a House Help by the name of Fatuma. He had parted ways with their mother. On 30th October, 2014 when he was in Nairobi, he was called at 8:00 a.m., by a Teacher by the name Rose who told him that his child "R" [name withheld] had been defiled but the House Help was not aware of the same. The said Teacher told him that the child was not walking properly and she had reported to the Head Teacher who had checked the child and found that she had been defiled. PW2 called the child's mother so that the child could be taken to Hospital.

17. PW2 testified that he went to his house and his child (PW1) told him that it was uncle Wanyumba (appellant) who had defiled her. PW2 stated that the appellant was the Caretaker of the plot he was living in, at Miritini, where he moved in January, 2014. He further stated that his children knew the appellant well and he had no differences with him. He knew him as James Mukobo.

18. PW2 indicated that PW1 was born on 24th April, 2001. She was thus 4 years old. He produced the Child Health Card as P. exhibit 1.

19. PW1, RN [name withheld] was a child of tender age. She was taken through voire dire examination and the Hon. Magistrate found that she understood the importance of telling the truth. She testified that uncle (the appellant) hurt her in her vagina in his house. She referred to him as uncle Mwangumbi. She stated that the appellant hurt her with a "chuma" (iron rod) when she went to watch TV in his house. She identified the appellant in court. She further stated that her mother took her to Hospital.

20. PW3, KM [name withheld] a Manager at an Academy in Miritini testified that on 30th October, 2014 while at her office, a teacher by the name Regina went to her and told her that "R" [name withheld], a pupil, had a problem. She went to the class and carried "R" to a private room and removed her clothes as she could not walk. She asked her what she was suffering from and she pointed to her private parts. PW3 saw PW1's private parts were not normal. It was PW3's evidence that PW1 told her that uncle had put his iron rod inside her vagina.

21. PW3 took PW1 home to find out from the House Help what had happened. She told PW3 that "R" had gone to play and she had been injured by the time she returned home. The House Help called PW2 and informed him. She also told a neighbour who gave them transport to Hospital. When "R" was asked who had injured her, she said it was uncle Nyumba and pointed to the appellant. The appellant asked her about it, and she told him that he is the one who defiled her. The appellant was arrested. PW3 and others took PW1 to Changamwe Police Station where they reported and then took her to CPGH where a Doctor confirmed that she had been defiled.

22. PW4, No. 96053 PC Jackline Oyogi was on duty at Changamwe Police Station on 30th October, 2014 when she received a report from PW3 that she suspected that PW1 had been defiled. She told PW3 to let PW1 walk but she said that she could not walk. She also reported that the appellant had been booked in the cells as people wanted to kill him. PW4 further testified that PW1 was taken to Hospital and the PRC form showed she had fresh lacerations on her vagina. A P3 form was filled by Dr. Ngone.

23. Dr. Anthony Njuguna from CPGH testified as PW5. He stated that he had worked for 4 years with Dr. Ngone whose handwriting and signature he was familiar with. It was PW5's evidence that Dr. Ngone used the PRC form as reference to fill the P3 form and that there was evidence of defilement. PW5 produced the P3 form as P. exhibit 2 and the PRC form as P. exhibit 3. PW5 stated that on examination, PW1 was found to have had fresh lacerations on the labia minora and the hymen was broken. He further stated that the PRC form was filled by Alice Maundu, whose handwriting he was familiar with.

24. In his defence, the appellant denied having committed the offence he was charged with and stated that on 29th October, 2014 after doing cleanliness in the place where he was working as a Caretaker he went to the Water Offices to follow up on a water meter which had been disconnected. He indicated that he went back to his place at 9:00 p.m. He said that the following day after doing cleanliness he went to follow up on the water issue when he was called by PW2 and asked what had happened to PW1. That he went back to the plot where he found PW1's mother who told him that PW1 was knocked by a door.

25. He also said that PW3 went with some strangers and strated telling people to kill him but did not tell him the reason as to why he was to be killed. The appellant said he was saved by a good Samaritan who took him to a Police Station where he was told he had defiled PW1. He stated that he was tested for HIV on 27th January, 2016 and found to be negative. The appellant stated that PW3 had a grudge against him as she was responsible for the water meter that had been disconnected. He also said that when the houses he was taking care of were being constructed, cement was falling on PW3's house and he had to hoard, after she complained. After that she complained that the people who were constructing the house were making noise.

26. DW2, Dr. Ahmed Hassan produced a medical examination report for the appellant which showed that he was examined on 27th January, 2016 by Dr. Hadija Omar and was found to be HIV negative.

27. The issues for determination are:-

(i) If the appellant was positively identified by the complainant;

(ii) If there was penetration of PW1's genital organ in the complainant's genital organ; and

(iii) If the charge was defective; and

(iv) If failure to call 2 witnesses was fatal to the prosecution's case.

If the appellant was positively identified.

28. The victim of the offence, PW1, was a 4 year old girl. The Hon. Trial Magistrate after conducting a voire dire examination found that she understood the importance of telling the truth. She told PW3 that it was the appellant who defiled her. The proceedings indicate that she said in court that it was Uncle Mwangumbi who put his rod in her private part, after she went to his house to watch TV. She also told her Father and the Police that it was the appellant who defiled her. It was the evidence of PW3 that when she took PW1 to their house to find out from the House Help what had happened to PW1, when the appellant appeared, she pointed him out as the one who had defiled her.

29. PW1 also told her father, PW2, that it was uncle "Wa Nyumba", meaning the appellant who was the Caretaker of the houses they were living in who had defiled her. PW2 said he moved to Miritini in January, 2014. The appellant stated that PW1's family had stayed in the house they were living in, for 4 months. PW2 had also testified that his children knew the appellant well and that his house was adjacent to the appellant's. He said that he had told the appellant to be checking on his children and they had a good relationship with him.

30. The evidence adduced by the prosecution unerring points to the appellant as the perpetrator of the offence. I therefore hold that he was positively identified by PW1 and that his identification was by way of recognition.

If penetration was proved.

31. It was the evidence of PW1 that when she went to watch TV in the appellant's house, he placed her on the bed and hurt her with a "chuma" (iron rod). On cross-examination, she said that the appellant put his rod inside her. She cried but no one went to assist her. She pointed to her vagina to show the place where the appellant put his rod. He threatened her by telling her that if she told her mother, father or Aunty Diana, he would put the iron rod again in her vagina. She said that on going home she told Aunty Diana that uncle had put his rod in her vagina but she never beat her up.

32. PW2 recalled that his House Help called him and told him that his child had an ache on her leg. He told her to apply rob on the said leg. When he was called by PW1's Teacher, after being told that PW1 had been defiled, he went to his house. He recounted that PW1 told him that it was uncle "Wa Nyumba" who defiled her. It was his evidence that Fatuma, the House Help was still young and did not understand much.

33. The evidence of PW3 supported PW1's evidence that she had been defiled. PW3 assisted to take PW1 to Hospital after her Class Teacher, Josephine, reported to her that PW1 had difficulties in walking. She examined PW1 in a room in the School she was working in and saw that her private parts were not normal. They reported to Changamwe Police Station. A P3 form and PRC form confirmed that PW1 had been raped. PW5 testified that the P3 form was filled by Dr. Ngone and the PRC form by Alice Maundu. The findings were that PW1's hymen was broken and she had fresh lacerations consistent with defilement. Although the appellant's Counsel submitted that there were inconsistencies in the medical evidence, I see none from the two medical reports and the evidence of PW5. There is no indication on record that the P3 form was filled by one Alice Maundu. It is crystal clear that she filled the PRC form and Dr. Ngone filled the P3 form.

Whether the charge against the appellant was defective.

34. As per the Child Health Card produced by PW2, the age of PW1 was 4 years. As such, the appellant should have been charged under the provisions of Section 8(1) as read with 8(2) of the Sexual Offences Act. He was however charged under the provisions of Section 8(1) as read with 8(3) of the Sexual Offences Act. It was therefore submitted that the charge was fatally defective and that the error should be resolved in favour of the appellant who should be acquitted at this stage.

35. Ms Ogweno, Principal Prosecution Counsel sought to resolve the defect by urging this court to find the appellant guilty of the lesser charge of sexual assault contrary to Section 5(1) of the Sexual Offences Act. This in her view, would resolve the issue of whether the appellant inserted his genial organ into the genital organ of PW1 as the latter did not state in her evidence that the appellant inserted his penis into her vagina. It must not be forgotten that PW1 was only 4 years old at the time she was defiled. This court takes judicial notice that at such a tender age, PW1 might not have known the name of the male anatomy that the appellant inserted in her vagina. She referred to it as "chuma" (iron rod) and she explained that it was **"his iron rod"** which he removed from his bed. In her very young brain PW1 may not have known that the iron rod was part and parcel of the appellant's body.

36. The Hon. Trial Magistrate resolved the issue of whether the object that was inserted in PW1's vagina was an iron rod *per se* or the appellant's penis, by stating as follows:-

> *"The complainant repeatedly used the word "chuma" (iron rod) to describe the object the accused used to penetrate her. However, she described clearly that **his iron rod**. The possessive pronoun here suggests that the object used was a member of the accused's body and not a foreign object. Furthermore, the depiction of an erect penis as an iron rod cannot be seen as unusual given the fact that the complainant was a child of tender years. Therefore, given the complainant's age and her limited vocabulary, the court finds that she was describing the accused's penis and not any other object when she said "chuma yake".* (emphasis added).

37. The Hon. Magistrate had the advantage of watching and hearing PW1 first hand as she testified and I have no reason to depart from her reasoning and finding. The appellant's defence did not at all weaken the prosecution's case, if anything, it fortified it as it established that the appellant was indeed a Caretaker in the plot where PW1 was living with her father. It fortified the fact that the appellant was known to PW1 and on the day the offence occurred, he was in the said plot although he said that at one time he went out of the plot to sort out the problem of a water meter that had been disconnected.

38. The appellant in his defence tried to cast aspersions on PW3 as having had a grudge against him. He however never cross-examined PW3 on the issues he alleged against her in his defence. They therefore remain as untested allegations.

39. The prosecution's failure to call one Diana and Regina to testify was challenged. A careful reading of PW3's evidence-in-chief and cross-examination shows that the Class Teacher who reported that PW1 had a problem was one Josephine. The name written as Regina for the Class Teacher seems to have been written in error as R was PW1. Whereas PW1 referred to her Aunty as Diana, according to PW3, his House Help's name was Fatuma. PW2 said that the said Fatuma was still young and did not know much. It is thus clear that she would not have made any value addition even if she had been called as a witness for the prosecution. Failure to call PW1's Class Teacher, in my considered view did not prejudice the appellant in any way. In any event, PW3 is the one who played a crucial role in checking PW1's private parts, by reporting the incident to the Police Station and in assisting to take her to the Hospital.

40. In **Keter vs Republic** [2007] eKLR, the court held as follows with regard to failure by the prosecution to call some witnesses:-

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

41. Although the Hon. Magistrate put forward a supposition that the appellant could have used a condom when defiling PW1, it was not in the evidence. She also took judicial notice of the fact that there are people who are discordant, because the appellant stated that he was HIV negative and PW1's HIV results would at times come out positive and at times negative. The Hon. Magistrate erred by putting forward a theory that the appellant could have used a condom when defiling PW1. However, despite the foregoing, it did not prejudice the appellant. Furthermore, there was overwhelming evidence that the appellant committed the offence he was charged with.

42. Going back to the charge, I find that the evidence proved that the appellant defiled a 4 year old child. I do not see the prejudice that has been occasioned against the appellant for having been charged under the provisions of Section 8(1) as read with Section (3) of the Sexual Offences Act instead of being charged under the provisions of Section 8(1) as read with Section 8(2) of the said Act. I hereby invoke the provisions of Section 382 of the Criminal Procedure Code to cure the defect. It is my finding that the evidence adduced proved a charge under the provisions of Section 8(1) as read with Section 8(2) of the Sexual Offences Act. Section 382 of the Criminal Procedure Code provides as follows:-

> ***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."*** *(emphasis added).*

43. The Court of Appeal in the case of **Samuel Kilonzo Musau vs Republic [2014] eKLR,** held that:

> ***"That provision insulates a finding or sentence of the trial court from challenge on account of any error, omission or irregularity in the charge unless it has occasioned a miscarriage of justice".***

44. The sentence provided under Section 8(2) of the Sexual Offences Act is life imprisonment. The appellant in this case was sentenced to 20 years imprisonment. Bearing in mind that he had been charged under the wrong provisions of the law, I uphold the sentence of 20 years imprisonment imposed against the appellant for the reason that it is the less severe sentence of the two. The said sentence shall be effective from 11th May, 2017.

45. The appeal is hereby dismissed. The appellant has 14 days right of appeal.

DELIVERED, DATED and SIGNED at MOMBASA on this 26th day of April, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Odundo holding brief for Mr. Chepkwony for the appellant

Ms Ogweno - Prosecution Counsel for the respondent

Mr. Oliver Musundi - Court Assistant