THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 35 OF 2018

JAMES MARTIN MAINA.....APPELLLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the Chief Magistrate Court

at Malindi before Hon. Oseko Chief Magistrate

dated 7th May 2018)

JUDGMENT

1. James Martin Maina, the appellant herein has appealed against conviction and sentence arising out the of the lower court in Criminal Case No. 50 of 2015. The appellant was indicted of the offence of defilement contrary to **section 8(1) (2)** of the Sexual Offences Act. The brief facts of the case were that on the 12th August, 2014 at around 16.00 hours at [Particulars Withheld] Village, in Malindi District, Kilifi County appellant herein intentionally and unlawfully caused his male genital organs namely penis to penetrate into the male genital organs (anus) of BKK a child aged 9 years. In his first appearance in court the appellant pleaded not guilty. The matter going through a full trial the appellant was convicted and sentenced to life imprisonment.

2. The prosecution case was based on the testimonies of seven witnesses. The first witness to adduce evidence was PWI BKK, the complainant at the time aged 9 years and a pupil at [Particulars Withheld] Primary School. He lived in the same homestead with his brother AK (PW2) and a sister MA (PW4). According to (PW1) BK testimony at around 1600 hours on 12th August 2014 he was at home playing in company of PW2 AK and a friend PW3(BKK) at Madrassa. Their evidence was to the effect that in the course of time the appellant emerged and called the complainant (PW1) BK but he declined to go as requested. It is alleged by PW1, PW2 and PW3 that the appellant started chasing them but managed to catch up with the complainant (PW1) as the rest took flight that for unknown reason the appellant carried away the complainant (PW1) to his house as witnessed from a distance by PW2 (AK) and PW3 (BK).

3. Meanwhile (PW1) testified that on arrival at the house of the appellant he was undressed, petroleum Jelly applied to his buttocks. The appellant also removed his trouser and did insert the penis into anal area of PW1. When the appellant was done he left the scene leaving the complainant (PW1) outside the house. PW1 further testified that with the help of his brother PW2 their sister PW4 (MA) was informed of the ordeal leading her to go for a rescue mission of (PW1). She rushed, only to find PW1 in pain and unable to walk properly. PW4 stated in court that she reported the incident to their father KK that PW1 had been defiled by the appellant. PW4 and PW5 gave evidence that together they made a report to Malindi Police Station, who in turn referred them to Malindi General Hospital. PW5 testified that he was given a P3 form which was duly completed by the Clinical Officer (Ibrahim Abdulahi (PW6) based at the same Malindi Sub County Hospital. It was also the testimony of PW5 that at the time of the incident as per the birth certificate (exhibit 1(a) PW1 was aged 9 years old. The clinical officer PW6 told the court that PW1 was taken to the hospital with the history of sexual .assault. On examination PW6 stated that from the initial treatment notes there were no physical injuries but he opined that sodomy was highly possible.

4. The appellant having been identified by PW1, PW2 and PW3 was arrested and charged with the offence. This was the evidence given by PW7 PC Robert Kinuthia who took over investigations of the matter.

5. The Appellant was placed on his defence at the close of the prosecution case. He denied the charge of participating in committing the crime alleged by the prosecution witnesses. He further told the court that on the material day and time he was not within the vicinity of the crime described by the complainant (PW1). The appellant in support of his defence also solicited the evidence of DW2- Moses Marika and the mother Lydia Chege (DW3). Both defence witnesses testified and exonerated the appellant from any culpability. According to DW2 on the material day he saw the complainant with other children playing. In a little while the sister PW4 came by and called (PW1) to stop playing and go to where she was, but that did not happen. Immediately DW2 further testified that it did not take long before he saw the

accused with a group of men alleging that he had defiled (PW1) BK. He (DW2) was categorically that the appellant was not at home as stated by the prosecution witnesses.

6. DW3 Lydia Chege in support of DW1 defence testified that she only came to learn of the incident in the late hours of the day. On 12th August 2014. This was when the father to PW5 to the complainant visited her home with a complaint that (DW1) had defiled his son (PW1). That PW5 wanted the matter settled out of court but she ruled out the possibility of such an arrangement. The learned trial Magistrate upon evauluating the evidence in totality established as a fact that (PW1) was defiled and the perpetrator was the appellant. The learned trial Magistrate dismissed the appellants alibi defence as an afterthought.

7. The appellant was subsequently found guilty, convicted and sentenced according to the enabling provisions of **section 8(1) (2)** of the Sexual Offences Act on appeal, the appellant filed a memorandum of appeal against the judgment of the lower court on the following grounds;

> ***(1) That the learned trial Magistrate erred in law and fact by failing to consider sharp considerations from the prosecution witnesses.***
>
> ***(2) That the learned trial Magistrate erred in law and fact by following to consider that the prosecution witnesses failed to prove that case beyond reasonable doubt.***
>
> ***(3) That the learned trial Magistrate erred in law and fact by relying on the evidence of a single witness which was insufficient to warrant a safe conviction.***
>
> ***(4) That the learned trial Magistrate erred in law and fails by failing to consider his defence.***

8. The appellants counsel Mr. Nyongesa, learned counsel submissions on appeal were that the glaring inconsistences and contradictions were never addressed by the trial court. Further, learned council contended that the evidence of a single identifying witness was fragile and learned trial Magistrate failed to own herself before relying on such evidence to convict the appellant.

9. It was further learned counsel submissions that the appellant's alibi defence was never taken into account in the final analysis of the decision. To buttress his submissions learned counsel relied on the cases of **John Mutua Munyoki v R 2017 EKLR , J.G.K. vs R 2015 EKLR** and **Victor Mwendwa Mulinge vs R 2014 EKLR.**

10. On the part of the state **Ms Sombo** prosecution counsel submitted that the prosecution case before the lower court was water tight in so far as proving the elements of defilement beyond reasonable doubt. That besides the single witness of PW1 conviction was also grounded on the evidence of PW2, PW3, PW4, PW5, PW6 and PW7. That PW1, PW2 and PW3 and PW4 placed the appellant at the scene of the crime.

11. As stated in the case of **Njoroge v R 1987 KLR and Okeno v R 1972 EA 32.** This is a first appeal I am under a duty to re-evaluate. The evidence and be able to draw my own conclusion bearing in mind that I have no advantage of the trial court in making references to the velocity and demeanor of witnesses. I have considered the entire record and the grounds advanced by the appellant challenging his conviction and sentence.

12. The thrust of the appeal turns out into two key fundamental issues

> ***(1) Whether the trial court established that the prosecution proved its beyond reasonable doubt.***
>
> ***(2) Whether the learned trial Magistrate erred in law and fact in taking into account the alibi defence offered by the appellant.***

13. The case against the appellant is premised or on both director and circumstantial evidence.

14. As regards the offence of defilement in terms of **section 8(1)** as read **8(2)** of the sexual offences. The prosecution must proof the following elements.

> ***(a) The intentional and unlawful act of penetration***
>
> ***(b) That the victim of the sexual assault was a minor.***
>
> ***(c) That the accused person was positively identified as the perpetrator of the offence***

15. Reverting to the facts and the evidence before the trial court it will be prudent to look at the provisions of the law and the pertinent legal principles.

Section 2 of the Sexual Offences depones penetration as the partial or complete of the male genitals to the genital of the female or any other child. The contention of the ingredient was to the effect the testimony by PW1, PW2, PW3 and PW5 was inconsistent and contradictory which was part of the prosecution case. The complainant sister PW4 and his father PW5 testimony could not be relied on because it amounts to hearsay. He argued that the evidence of PW2 and PW3 does not prove that the complainant was defiled. According to the appellant counsel submissions in view of the alibi defence there was no evidence that the appellant had an opportunity to commit the offence. He also

pointed out the conflicting evidence by the prosecution witnesses raising serious doubts to the occurrence of the defilement offence as allegedly by the complainant.

16. At the trial the key star witness as the actual incident was the complainant DW1. From the record the complainant gave a description of the events from the time he was playing with PW1 and PW3 and when the appellant carried him to his house. PW1, PW2, PW3 makes reference to the appearance of the appellant at the scene where they were playing. The appellant then called out the complainant and a sense insecurity the three of them took away flight with the appellant in pursuit. However he was able to get hold of PW1 whom he carried away to his house. This seems to have caused concern to PW2 and PW3 as supported from their testimony. By the time PW4 was informed by PW2 of the incident apparently the appellant had existed the house leaving PW1 in distressed outside the premises. That's where PW4 picked him and what followed was police action.

17. The clinical Officer PW6 who had examined the complainant to fill the P3 admitted as exhibit 3 after 8 days of the alleged act opined high possibility of sodomy has taken place. The trial Magistrate besides the clinical evidence of the P3 considered the primary treatment notes when the complainant was first seen on 12th April, 2014 at Malindi Sub-County Hospital. The initial diagnosis revealed the presence of laceration to the anal orifice consistent with the evidence of the complainant on penetration.

18. Both PW2 and PW3 did not witness the actual defilement but their testimony attest to the appellant chasing the complainant and carrying him away to his house. Thereafter they saw the complainant in a distressed condition with difficult in walking. It is the same distressed condition that the PW4 found the complainant when she went to rescue him from the outside the house of the appellant. The complainants evidence and the appellant must have forced his penis into his anal orifice is collaborated by physical examination captured in the treatment notes of 12th August, 2014.

19. The appellants defence was a denial of the charge under reliance of alibi defence. However from the testimony of PW1, PW2, and PW3 on12th August, 2014 they were playing together. That the contact with the appellant occurred at 1600 hours. Prior to this fateful day and hour the appellant was well known to them as a neighbor. I take cognizance of the principles in the case of **Leonard Aniseth v the Republic 1963 EA 206, SSENTALE v Uganda 1968 EA at 365**. Where the court held;

> ***"That an accused person who pleads alibi defence assumes no burden to proof it."***

20. I also reiterate that from the record the prosecution placed reliance on the evidence of PW1, PW2 and PW3 to positively recognize the appellant as the one who committed the crime against the complainant. The trial court examined such evidence carefully and was satisfied that the circumstances on recognition were favorably and free from the possibility of error or mistake. It safely made a positive finding on the strength of the evidence which identified the appellant (see the case of **Cleophas Otieno Wamunga v the Republic Criminal Appeal No. 20 of 1989, Abdalla Bin Wendo v the Republic 20 EACA 166).**

21. I also endorse the trial Magistrate view that the complainant was a child of tender years. In terms of **section 19** of the oaths and statutory declaration Act it was required of the court to conduct this *avoire dire* to receive the evidence on oath or if in the opinion of the court the child does not possess sufficient evidence to tell the truth, he or she could be permitted to give unsworn testimony.

22. In the instant appeal the complainant took the witness stand upon an inquiry under **section 19** being carried out by the learned trial Magistrate.

At the end it all it was said that the complainant level of intelligence on the knowledge to understand the duty of speaking the truth could have his evidence received on oath. This evidence under cross examination was not impeached by the appellant defence to render it unworthy of credit or re-liability. The circumstantial evidence given by PW2 and PW3 was admissible on opportunity and causation. The accusation by the complainant was made contemporaneously with the occurrence of the offence of which the appellant was arrested charged convicted and sentenced accordingly.

23. A closer look at the evidence on record reveals nothing could qualify the threshold issue under the principles of inconsistent or contradictory evidence which go to the core to shake the prosecution case on penetration of the complainant. It is not in dispute that the complainant was sexually assaulted the evidence clearly demonstrates corroborate on this first element from the treatment notes and P3 form. The opinion by the clinical officer on high possibility is not materially at variance with the primary examination in the treatment notes.

24. Regarding the element on age of the complainant there is evidence of PW1 and that of PW5 who produced the birth certificate as an exhibit. As at the day of defilement the complainant was aged 9 years old. It is a principle of law in the case of **Francis Omuroni v Uganda Criminal Appeal No.2 of 2000** where the court held;

> **"In defilement cases the age of the victim can be determined by way of medical evidence, birth certificate, the parents or guardian and by observation or common sense."**

25. I have evaluated the evidence on record and I am satisfied that the trial court arrived at a positive finding on the element of penetration and age of the minor also agree on evidence of PW1 as supported by PW2 and PW3 that they had a good opportunity to possible recognized the appellant and place him at the scene of the crime. I find nothing in the prosecution case that manifest itself that the appellant was falsely implicated with the offence in question. The direct and circumstantial evidence dislodged the alibi defence by the appellant that he was elsewhere besides the scene of crime.

26. All in all the circumstances of this appeal is that I find the prosecution discharged the burden of proof beyond reasonable doubt before the trial court. For the foregoing reasons the appellant conviction was safe and satisfactory. There is no procedural or substantive irregularity to disturb the verdict on conviction of the lower court judgment dated 7th May 2018.

SENTENCE

27. The appellant upon conviction was sentenced to mandatory Life Imprisonment pursuant to **section 8(2)** of the Sexual Offences Act.

In principle now following the Supreme Court Decision in the case of **Francis Kariuko Muriatetu v R 2017 EKLR** courts are permitted to depart from legislated mandatory sentences where exceptional circumstances exist exercising judicial discretion. This movement towards a more flexible discretionary power to determine appropriate sentence has seen the Court of Appeal in the case of **Jared Injir vs R EKLR 2019** precisely address the mandatory nature of Life Imprisonment in terms of **section 8(2)** of the Sexual Offences.

28. The court reiterating the holding in **Francis Kariuko Muriatetu** (*supra*) interfered with the sentence of the trial and first appellant court by substituting it with a term Imprisonment of 30 years. The future of a new dawn now is where mandatory sentences of death or Life Imprisonment permits exercise of judicial discretion based on particular circumstances of the case where mandatory sentences have enjoyed some measure of popularity their widespread use has been found unconstitutional, and undesirable.

29. Following these decisions that effectively and significantly clarified the approach to apply on mandatory minimum sentences the sentence of Life Imprisonment in respect of the appellant has to be interfered with under this sentencing scheme. I invite the appellant to offer mitigation.

14 days Right of Appeal explained.

Dated, signed and delivered at Malindi this 19th day of June, 2019.

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REUBEN NYAKUNDI

JUDGE

Representation:

Mr. Nyongesa present

Ms. Sombo Prosecutor.