REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINALAPPEAL NO. 31 OF 2018

JOHN MBUGUA WANJIKU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an Appeal from the ruling and order of HON. OGOMBE SRM dated 7th September 2018

in Criminal case No. 130 of 2016, Republic v John Mbugua Wanjiku

at the Senior Resident Magistrate's Court at Ngong)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. Particulars of the offence were that on 2nd day of October 2016 in Kajiado County, intentionally caused his male genital organ to penetrate the female genital organ of JW a child aged 15 years.

2. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) as read with section 11(4) of the Sexual Offences Act No. 3 of 2006. Particulars being that on the 2nd day of October 2016 in Kajiado County, intentionally and unlawful touched the female genital organ of JW a child aged 15 years with his male genital organ.

3. The prosecution called 5witnesses and after close of its case, the trial court in a ruling dated 7th September 2018, found that the appellant had a case to answer and put him on his defence. The appellant was aggrieved and filed a petition of appeal dated 19th September 2018 raising the following grounds, namely, that:

> ***1. The learned magistrate erred in fact and law in finding that the appellant had a case to answer in the face of the fact that the complainant initially on oath in examination in chief expressly and unequivocally stated that it was not the accused who defiled or had intercourse with her in the material date and time;***
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> ***2. The learned magistrate erred in fact and law in finding the appellant had a case to answer in the face of the fact that the complainant initially on oath in examination in chief expressly and unequivocally stated that it was a fellow student at her school and not the accused who had carnal knowledge with***
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> ***3. The learned magistrate erred in fact and law in finding the appellant had a case to answer in spite of the absence of identification of the accused by the complainant as the perpetrator of the subject offence (s), in her initial examination in chief and or her failure to place him at the scene of the alleged offence.***
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> ***4. The learned magistrate erred in fact and law in prejudicially stepping down the complainant after she unequivocally stated that the accused was not the assailant and requesting to withdraw the case but rather required her to come back on another date to redo her testimony.***
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> ***5. The learned magistrate erred in law and fact in compelling the complainant under duress through summons and warrants to attend court after numerous failed attendances on a subsequent date specifically for purposes of prejudicially identify the accused as the assailant on which date the appellant did not have adequate opportunity to prepare for cross-examination of the complainant.***

6. The learned magistrate erred in fact and law in finding the appellant had a case to answer yet the appellant was denied the opportunity of effectively testing the complainant's testimony by way of cross-examination by the prosecution failing and or declining to give him adequate opportunity to prepare for her cross-examination.

7. The learned magistrate erred in fact and law in finding the appellant had a case to answer on the strength of uncorroborated, inconsistent and inconclusive testimony; without any plausible probative, corroborate evidence establishing and proving the requisite elements of the subject criminal charges and move specifically without the benefit of any DNA or other samples linking the appellant to the alleged sexual assault on the complainant.

8. The learned magistrate erred in fact and law in ignoring and failing to consider cross-examination of the other prosecution witnesses by the accused clearly raised reasonable doubt and indeed obliterates the prosecutor's case against him and or indeed exonerates him.

9. The learned magistrate further erred in arriving at a decision that was wholly against the weight of evidence

10. The learned magistrate erred in failing to accord the appellant an opportunity to secure legal counsel to carry out their defence and or ensure that legal counsel provided for by the state was at law/engaged to defend the appellant especially in light of the gravity of the criminal charges leveled against him.

4. Mr. Kamau,learned counsel for the appellant, submitted that the trial magistrate failed to consider the prosecution evidence to ascertain whether there was sufficient evidence to call upon the appellant to defend himself. Counsel contended that on 3rd November 2016, the complainant informed the court of her wished to withdraw the case against the appellant but the prosecution objected and the trial court upheld the objection. Counsel further contended that the complainant told the court that the person who defiled her was not in court and that she was forced by her mother (PW2) to frame the appellant.

5. Mr. Njeru learned Assistant Deputy prosecution counsel opposed this appeal. He submitted that this court should not allow to be used to micromanage the trial court and that under section 40 of the SOA, only the DPP can sanction withdrawal of a charge. According to Mr. Njeru, the complainant had told the court that she knew the person who had defiled her. He therefore urged the court to dismiss the appeal.

6. I have considered this appeal; submissions made on behalf of the parties and perused the record. This being a first appeal, it is by way of a retrial and this court, as a first appellate court, has a duty to reconsider the evidence a fresh re-analyze and reassess it in order to come to its own conclusion. It should at the same time bear in mind that it never saw the witnesses testifying and therefore give due allowance for that.

7. In ***Kiilu& Another vs. Republic*** [2005]1 KLR 174, the Court of Appeal 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 to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. 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."

8. The prosecution called 5 witnesses to prove its case. PW1 was the minor who was said to have been defiled. The trial magistrate conducted a *voire dire* examination on her on 3rd November 2016. She told the court that she was 15 years and the court was satisfied that she possessed sufficient intelligence and understood the nature of an oath. The court allowed her to be sworn.

9. The minor told the court that on Sunday 2nd October 2016, she went to church where she met a lady called Cynthia they planned go to Mopel picnic site. However a woman asked them what they were doing outside the church and when they told her that they were waiting for someone, she ordered them to go inside the church which they did. Inside the church, they found a boy called John.

10. She told the court that after service, they went out and she told John she wanted to go to Ngong. Cynthia left them and went home. The witness told the court that she went with John since was afraid going to go home late. She stayed at John's home until Monday and that they had sex in the process.

11. She testified that she went to her aunt because she feared her mother and thereafter she went to Nairobi where she met a man and because it was late, the man took her to Parliament Police station. At the station, police officers contacted her mother who went and picked her.

12. According to the witness, her mother took her to hospital the following day after she told her what had happened. Tests were conducted and confirmed that she had had sexual intercourse. She told the court that the John she had sex with was not in court and she did not know his other name. She also stated that she did not know John who was in court. When she was referred to her statement, she told the court that she had said she meta friend known as John Mbugua, and that she wrote that statement because her mother had told her to do so but she did not know the John in the dock.

13. At that stage, the prosecutor requested an adjournment to enable her attend to a pressing personal issue and asked that the witness be stood down. The case was adjourned to 10th November 2016. On that day, 10th November 2016, the complainant did not attend court. The appellant objected to a request for adjournment but the court adjourned the case to 6th December 2016. On 6th December 2016, the complainant was again not in court and summons were issued to her mother and the hearing set for 10th of January 2017 when again the complainant did not attend. She finally attended on 24thJuly 2017, when she testified and concluded her testimony.

14. Next was **PW2: JWG,** mother to the complainant. She told the court that the complainant was born on 19th September 2001; that she did not return home on 2nd October 2016 by 4pm as expected. She told the court that her husband called her to inquire whether she had sent the complainant to Ngong. She testified that she later called him at 5pm to inquire whether the complainant had returned home but she had not. When she finally went home at 6pm, PW1 was still not at home and she never turned up that evening.

15. She told the court that she inquired about the complainant's where about, and went to church after she learnt that the complainant had a boy friend called J. Prince. At the church, pastor Kahoro agreed to call the boy but when it was taking long, the witness decided to trace J. Prince's home which she did but nobody was at home. She testified that she then called the Pastor to inquire of any update and the Pastor told her that PW1 had been with J. Prince the previous day.

16. She testified that she went to Kiserian Police station where she had reported the matter the previous day and informed the police that she had traced J. Prince's home. She also got J. Prince's cell phone number and with the help of a friend they called J. Prince who told them that he was at Ongata Rongai. They asked him to call them once he was at Kiserian since she wanted to know where the complainant was.

17. The witness further testified that she was later that night called by the police and informed that the complainant was at Parliament Police Station and required that she be picked from there the following day. According to the witness, she went and picked the complainant; that the complainant told her that she had spent the night with the appellant at his place and that they had sex. The witness learnt that J. Prince was also known as Mbugua and that the pastor had described him to her. She told the court that she took the complainant to Nairobi Women Hospital where tests were done and she was treated. She later took her Ngong Sub-County Hospital. They took the documents to the police station and the appellant was later arrested and charged.

18. **PW3: Peter Ngatia,** from Nairobi Women Hospital, told the court that he examined the complainant and found a freshly perforated hymen. Genitalswab showed pus cells and spermatozoa. He formed the opinion that here was penile penetration. The complainant was given STI and anti-pregnancy treatment.

19. **PW4: Dr. Karen Gisare** testified that on 6th October 2016, the complainant went to Ngong sub-County Hospital with a history of defilement. She had a P3 form and a report from Nairobi women Hospital which showed that she had been defiled.

20. **PW5 No. 92355 PC Caroline Khatieve** attached to Kiserian police station told the court that on 4th October 2016, a report of a missing child was made by PW2 the mother; that the child was later found at Parliament Police Station who called the mother to go for her. She told the court that she tookPW1 to Ngong Sub-County Hospital and it was confirmed that she had been defiled. The P3 was filled and the appellant was later arrested and charged.

21. It was after that evidence that the trial court ruled that the appellant had a case to answer prompting this appeal. As itclearly emerges from the grounds of appeal and submissions, the appellant in this appeal was unhappy with when the trial court put him on his defence. This is therefore an interlocutory appeal and not an appeal following a conviction since the appellant was yet to testify.

22. The appellant has raised several grounds of appeal most of which touch on the merit of the prosecution's case. The appellant argues, in principle, that the trial magistrate fell into error in finding that he had a case to answer. The trial court's record shows that the minor requested to withdraw the case which was however objected to by the prosecution. The objection was upheld and the court ordered that she testifies. She was sworn and gave her testimony.

23. I have carefully considered the prosecution's evidence on record. It clearly gives the chronology of events leading to the arrest of the appellant. In my view, there was sufficient evidence to call upon the appellant to explain himself. I must also point out that there is no requirement that a ruling on a case to answer must be a detailed one. It is sufficient for the trial court to state that having considered the prosecution's evidence it is satisfied that there is a ***prima facie*** case to require the accused to defend himself or herself.

24. It must be understood that the fact that the court ruled that there was a case to answer did not mean the appellant had been found guilty. It means the prosecution had made out a case requiring him to offer an explanation after which the court would consider the totality of the evidence and make a determination either to convict or acquit. It is inappropriate to mount an interlocutory appeal against a ruling that there is a case to answer. In a way, the party delays his trial. This court would also not have the benefit of the appellant's version of the case to balance the interests of the parties. The victim just like the appellant (the accused), is entitled to justice, for justice looks both ways.

25. There is a general view against filing interlocutory appeals in criminal trials unless there is a clear violation of fundamental rights which cannot wait conclusion of the trial in order to lodge an appeal against the final outcome.

26. This view was expressed by the Court of Appeal in ***Thomas Patrick Gilbert Cholmondeley v Republic***[2008] eKLR, thus:

> ***"In ordinary criminal trials, there is generally no interlocutory appeals allowed for section 379 (1) of the Criminal Procedure Code allows only appeals by persons who have been convicted of some offence. The Appellant has not been convicted of any offence. As far as we understand the position the basis of an appeal cannot be that an order made in the course of a trial is highly prejudicial to an accused person; MugaApondi, J ruled that the appellant had a case to answer and even if that order would be seen as being prejudicial that alone would not have entitled the appellant to appeal…[T]he fact that a trial Judge has made an adverse ruling against an accused person in a criminal trial does not and cannot mean that the Judge will inevitably convict. The Judge might well acquit in the end and the adverse ruling, even if it amounted to a breach of fundamental right, falls by the wayside and causes no harm to such an accused."***

27. I have on my part gone through the prosecution's evidence on record and I am satisfied that the learned magistrate properly ruled that the appellant had a case to answer. That ruling though thought to be adverse to the appellant, was made in exercise of the courts discretion and

within the law. It did not violate his fundamental rights or cause him any prejudice to warrant this court's interference.

28. Consequently and for the above reasons, I find no merit in this appeal.It is declined and dismissed. The prosecution having closed its case, I direct that the trial court's filed be returned to that court and the appellants do appear before that court on 5th November 2019 for directions on defence hearing.

Dated, Signed and Delivered in open court at Kajiado this 25thday of October 2019.

E. C. MWITA

JUDGE