REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 27 OF 2017

JONATHAN MJOMBA MWACHOFI…..……..……... APPELLANT

VERSUS

REPUBLIC…… RESPONDENT

(From original conviction and sentence in Criminal Case Number 1 of 2016 in the

Senior Principal Magistrate's Court at Voi delivered by

Hon E. G. Nderitu (SPM) on 27th January 2017)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Jonathan Mjomba Mwachofi, was 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 this charge were that on diverse dates during the month of September 2015 in Taita Taveta County within the Republic of Kenya, he intentionally caused his male genitalia organ (penis) to penetrate the female genital organ (vagina) of M S M (hereinafter referred to as "PW 1").

2. The Learned Trial Magistrate Hon E. G. Nderitu (SPM) convicted and sentenced him to serve twenty (20) years imprisonment.

3. Being dissatisfied with the said judgment, on 26th April 2017, the Appellant filed a Notice of Motion application seeking leave to be allowed to file an Appeal out of time, which application was allowed and the Petition of Appeal deemed to have been duly filed and served. He relied on five (5) Grounds of Appeal.

4. His Written Submissions and six (6) Amended Grounds of Appeal were filed on 27th July 2017. He filed his Further Written Submissions in response to the State's Written Submissions dated 17th October 2017 and filed on 19th October 2017 on 16th November 2017.

5. When the matter came up on 14th December 2017, both parties asked this court to deliver its Judgment based on their respective Written Submissions. This Judgment is therefore based on the said Written Submissions.

LEGAL ANALYSIS

6. As this is a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

> **"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

7. It appeared to this court that the issues that had been placed before it for determination were as follows:-

a. **Whether or not a proper *voire dire* examination was conducted;**

b. **Whether or not the Appellant's right to fair trial was infringed upon; and**

c. Whether or not the Prosecution proved its case beyond reasonable doubt.

8. The said issues were dealt with under the following distinct heads.

I. *VOIRE DIRE* EXAMINATION

9. Amended Ground of Appeal No (2) was dealt with under this head as it was a preliminary issue and that could determine whether or not the trial was properly conducted.

10. The Appellant submitted that it was very clear from the proceedings that PW 1 was a minor and consequently, the Learned Trial Magistrate erred when he failed to conduct a *voire dire* examination before he took her evidence under oath. It was his contention that this was of paramount importance because he relied on the evidence of a single witness.

11. On its part, the State argued that Section 19 of the Oaths and Statutory Declarations Act Cap 15 (Laws of Kenya) provides that a *voire dire* examination must be conducted where a child of tender years adduces sworn or unsworn evidence.

12. It was, however, emphatic that PW 1 was aged fifteen (15) years and was not a child of tender years and consequently, the Learned Trial Magistrate did not err when he did not conduct *voire dire*examination before he took her evidence on oath.

13. It referred this court to the case of **Criminal Appeal No 16 of 2014 Samuel Warui Karimi vs Republic** where the Court of Appeal stated that the definition of a child in the Children Act was not of general application or a test of competency to testify but was only intended for the protection of children.

14. In addressing what age would be appropriate for a trial court to conduct a *voire dire* examination, this court had due regard to the case of **Maripett Loonkomok v Republic [2016] eKLR** where the Court of Appeal sitting in Mombasa found and held that children under the age of fourteen (14) ought to be taken through a *voire dire* examination. It rendered itself as follows:-

> **"…that the definition in the Children Act is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for *voir dire* examination. It follows from a long line of decisions that *voir dire* examination on children of tender years must be conducted and that failure to do so does not *per se* vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that;**
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> ***"In appropriate case where voir dire is not conducted, but there is sufficient independent evidence to support the charge… the court may still be able to uphold the conviction.""***

15. Notably, the age at which a *voire dire* examination should be conducted depends on the circumstances of a particular case and is not cast in stone. Indeed, a child could be aged seventeen (17) years yet be of such mental incapacity that would require that a trial court to conduct a *voire dire* examination to determine if he or she should adduce sworn or unsworn evidence. The ascertainment of whether such a witness understands the meaning of taking an oath cannot be taken lightly as an accused person can be convicted on the basis of sworn evidence of such a witness.

16. Bearing in mind that there was no evidence that PW 1 was mentally incapacitated, this court came to the firm conclusion that the threshold of fourteen (14) years as was stated in the case of **Maripett Loonkomok v Republic** (Supra)was applicable herein. In view of the fact that PW 1 was aged fifteen (15) years at the time she testified, this court found and held that the Learned Trial Magistrate did not err when she did not conduct a *voire dire* examination before he took her evidence on oath.

17. In the circumstances foregoing, this court found and held that Amended Ground of Appeal No (2) was not merited and the same is hereby dismissed.

II. THE APPELLANT'S RIGHT TO FAIR TRIAL

18. Amended Grounds of Appeal Nos (1) and (3) were dealt with under this head.

19. The Appellant contended that his rights to fair trial under Article 50(2)(c) and (j) of the Constitution of Kenya, 2010 were violated as he was not furnished with all the materials the Prosecution intended to rely upon throughout the trial which denied him an opportunity to prepare for trial.

20. He added that he was not arraigned in court within twenty four (24) hours of his arrest or given an explanation why he was detained at Voi Police Station which contravened Article 49(1)(f)(ii) of the Constitution of Kenya.

21. On its part, the State argued that the plea was read to the Appellant in a language that he understood and that he informed the Trial Court that he was ready to proceed with the trial.

22. It also pointed out that the fact the Appellant was arrested on 14th January 2016 and brought to court on 18th January 2016, an error that was committed at the Police Station, it did not vitiate the trial or prejudice him in the trial process. It referred this court to the case of

Criminal Appeal No 50 of 2008 Julius Kamau Mbugua vs Republicwhere it was held as follows:-

> **"Ordinarily and particularly where the prejudice alleged is not trial related, there is a range of appropriate remedies less radical than barring the prosecution… The Court of Appeal made it crystal clear that "…it is not correct to say that the court has no jurisdiction to try a suspect after his rights to personal liberty have been breached by police before he was charged "…"**

23. Article 49 (1)(f)(i) of the Constitution of Kenya, 2010 stipulates that:-

> **"An arrested person has the right to be brought before a court as soon as reasonably possible, but not later than—**
>
> **i. twenty-four hours after being arrested; or**
>
> **ii. if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day."**

24. It was evident from the Charge Sheet that the Appellant was arrested on 14th January 2016 and first arraigned in court on 18th January 2016. This was clearly a violation of his rights that are guaranteed under Article 49(1)(f) of the Constitution of Kenya.

25. However, as was rightly pointed out by the State, a contravention of the said Article 49(1)(f) of the Constitution does not vitiate a trial because an aggrieved party has the option of seeking compensation from the State by way of damages or any other relief set out in the Constitution of Kenya.

26. Article 22 of the Constitution of Kenya provides as follows:-

> **"Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."**

27. In Article 23(3) of the Constitution of Kenya, it is provided as follows:-

> **"In any proceedings brought under Article 22, a court may grant appropriate relief, including—**
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> **a. a declaration of rights;**
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> **b. an injunction;**
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> **c. a conservatory order;**
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> **d. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;**
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> **e. an order for compensation; and**
>
> **f. an order of judicial review.**

28. This court did not therefore find any merit in the Appellant's arguments that the conviction against him ought to quashed and sentence set aside on that ground.

29. Turning to his arguments that he was denied an opportunity to prepare his defence, this court had due regard to the provisions of Article 50(2)(c) and (j) of the Constitution of Kenya, 2010 that provide as follows:-

> **"Every accused person has the right to a fair trial, which includes the right—**
>
> **(c) to have adequate time and facilities to prepare a defence;**
>
> **(j)to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."**

30. It was evident from the proceedings that when the Appellant was arraigned in court on 18th January 2016, he took plea and was granted a cash bail of Kshs 250,000/=. The matter was subsequently fixed for hearing on 12th February 2016 when the Appellant indicated that he was ready to proceed with the two (2) witnesses who had been presented by the Prosecution. There was no indication that the Statements of the two (2) witnesses were ever supplied to him.

31. On 23rd February 2016, he indicated that he was ready to take the doctor's evidence. As of this time, there was also nothing on record to

show that he was supplied with the said doctor's documentary evidence. On 8th March 2016, the Prosecution sought to have two (2) more Witness Statements recorded. On 5th April 2016, the Prosecutor informed the Learned Trial Magistrate that a further statement was being taken and on 19th April 2016, she indicated that she would supply him with the statements.

32. The matter proceeded on subsequent dates but there was still no indication on record that the Appellant was furnished with the Witness Statements until the matter was concluded. It was also evident that he never asked to be furnished with the Witness Statements at any time during the trial.

33. In addressing this right of an accused person being furnished with the relevant evidence, in the case of ***Thomas Patrick Gilbert Cholmondeley v Republic*** **[2008] eKLR,** the Court of Appeal rendered itself as follows:-

> ***"We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under Section 77 of our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items. If for any reason the prosecution thinks it ought not to disclose any piece of evidence in its possession, for example, on the basis of public interest immunity, they must put their case before the trial judge or magistrate who will then decide whether the claim by the prosecution not to disclose is or is not justified."***

34. Notably, if a trial court grants an order that an accused person should be furnished with the evidence the prosecution intends to rely upon and he fails to follow up the same from the prosecution, the blame would lie squarely on him. He would be expected and/or required to inform such trial court that he has not been supplied with the same before he proceeds with the trial. Indeed, such accused person has the right to refuse to commence participation in the proceedings until such time he is furnished with the said evidence.

35. Where an accused person is a layman on issues pertaining to law and procedures in court, the trial court is charged with a higher burden to satisfy itself that such a person has been supplied with witness statements. If such person is a first offender as was the Appellant herein, he would not have been expected to know that he was entitled witness statements or other oral and/or documentary evidence to enable him prepare for trial.

36. Appreciably, the Appellant was not represented by counsel during the trial and may not have been aware of his right to be furnished with the said documentary evidence. In the absence of such counsel, it was the responsibility of the Trial Court to have ordered that he be furnished with the said documentary evidence and for the Prosecution to have furnished him with the same.

37. In the absence of any evidence that the Appellant had access to the said documentary evidence before and during trial, there was no doubt in the mind of this court that the whole trial was a nullity and a mistrial. It was indeed the considered view of this court that the omission by the Learned Trial Magistrate to establish if he had been furnished with the said documentary evidence before trial commenced occasioned him great injustice and prejudice and was a gross violation of his fundamental right to a fair trial guaranteed under the Constitution of Kenya,2010.

38. As it was not clear whether the mistake was occasioned by the Trial Court or the Prosecution, this court took the considered view that a Re-trial would be the best option so as to cure the irregularities during trial. Having said so, a re-trial is not ordered as a matter of course. It is not to be ordered to give an applying party a second bite of the cherry or to fill gaps or lacuna in a case. Rather, it is intended to ensure that a fair trial is accorded to a party without causing prejudice to the party against whom such an ordered is sought to be made.

39. **As was stated in the case of Ahmed Ali Dharmsi Sumar vs Republic 1964 E.A 481** and restated in **Fatehali Manji vs The Republic 1966 E.A. 343**:-

> **"In general a re-trial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the Prosecution to fill up gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial Court for which the Prosecution is not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to the accused person."**

40. In addressing the question of prejudice to be suffered by an appellant when a matter is to be referred for a re-trial, in the case of **Joseph Ndungu Kagiri v Republic [2016] eKLR**, Mativo J had the following to say:-

> **"As held above under no circumstances should prejudice be caused to an accused person. I therefore find that the entire trial was conducted in total breach of the jealously safe guarded constitutional provisions which guarantee a fair trial, and therefore the entire proceedings in criminal case number Nyeri Criminal Case Number 254 of 2011, *Republic vs. Simon Murage Mutahi & Another* are hereby declared to be a nullity and are hereby quashed. I therefore find that this appeal is successful. Accordingly, I hereby allow the appeal, quash the entire proceedings and set aside the orders made in the said case."**

41. Faced with a similar scenario in the case of **Sammy Nganga Kamau v Republic [2017] eKLR,** Maureen Odero J ordered a re-trial where the appellant who had been charged with defilement had not supplied with witness statements.

42. Bearing in mind the length of sentence the Appellant would be liable to be sentenced to, it was the considered view that this matter ought to be referred to a re-trial to enable him prepare his defence during trial.

43. In the circumstances foregoing, this court found and held that Amended Ground of Appeal No (1) was merited and the same is hereby allowed. This court did not therefore consider the issue of whether or not the prosecution had proved its case beyond reasonable doubt as the same had been rendered mood.

DISPOSITION

44. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 26th April 2017 was successful as he succeeded on Ground of Appeal No (1) of his Petition of Appeal. Indeed, it would be unsafe to allow his conviction to stand. The said conviction is therefore hereby quashed and the sentence also hereby set aside.

45. However, in view of the fact that an offence was alleged to have been committed, it is hereby directed and ordered that there shall be a Re-trial of the Appellant herein so that the matter can be heard on its own merits. The Appellant shall be arraigned afresh before a different magistrate at the Voi Law Courts other than the Learned Trial Magistrate to hear and determine this matter.

46. In this regard, it is hereby directed and ordered that the Applicant shall remain in custody for production before the Senior Principal Magistrate Voi Law Courts on 8thMay 2018 for allocation of the matter to a new magistrate for purposes of taking a plea and further hearing of this matter. It is the expectation of this court that the new trial court will proceed to hear and determine this matter expeditiously in view of the fact that the Appellant has been in custody since 18thJanuary 2016.

47. It is so ordered.

DATED and **DELIVERED** at **VOI** this **27th**day of **March** 2018

J. KAMAU

JUDGE

In the presence of:-

Jonathan Mjomba Mwachofi- Appellant

Miss Anyumba for State

Susan Sarikoki– Court Clerk