



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 29 OF 2016

JUMAA ABDALLA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the Judgment of Hon. D.W. Nyambu, SPM,

delivered on 23rd June, 2016 in Kilifi Senior Principal Magistrate's

Court Criminal Case No. 173 of 2015)

JUDGMENT

1. The appellant herein was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 1st day of March, 2015 within Kilifi County, intentionally and unlawfully caused his penis to penetrate the vagina of RKN [name withheld] a child aged 6 years.

2. The appellant was charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the alternative charge were that on the 1st day of March, 2015 within Kilifi County, indecently and intentionally touched the vagina of RKN [name withheld] a child aged 6 years with his hands.

3. The appellant was charged with the 2nd count of failing to register contrary to Section 14(1) of the Registration of Persons Act, Cap 107 Laws of Kenya. The particulars of the charge were that on the 18th day of April (sic) at Kilifi Police Station within Kilifi County, being a Kenyan above 18 years failed to register as required by the law.

4. The appellant pleaded guilty to the 2nd count and was sentenced to pay a fine of Kshs. 5,000/- and in default to serve 3 months imprisonment.

5. The appeal herein arises from the conviction on the 1st count of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006, for which the appellant was sentenced to life imprisonment.

6. The appellant being aggrieved by the decision of the lower court filed a petition of appeal on 6th July, 2016. On 7th March, 2018, he filed an application seeking leave to amend his grounds of appeal. The said application was allowed on 11th April, 2018. The amended grounds of appeal are outlined here below:-

(i) That the Learned Trial Magistrate erred in law and fact by failing to consider that the plea taking procedure was defective in that the court coram lacked an interpreter when the plea was taken during the trial, rendering the resultant trial a nullity;

(ii) That the Learned Trial Magistrate erred in law and fact by failing to consider that there was non-disclosure of the evidentiary material the prosecution was intending to rely upon to the appellant during the trial in breach of Article 50(2) (J) (K) of the Constitution;

(iii) That the Learned Trial Magistrate grossly erred in law and fact by admitting into evidence the report from PW5, other than the maker of the report in breach of Section 72 of the Evidence Act; and

(iv) That the Learned Trial Magistrate erred in law and fact by failing to consider that the sentence was harsh and excessive in all the

circumstances.

7. In his written submissions in support of the amended grounds of appeal, the appellant challenged the plea taking procedure which according to him, was unprocedural as there was no interpreter present which rendered the plea taking exercise a nullity and inadmissible in a court of law. The appellant contended that the foregoing contravened the provisions of Articles 25(c), 50(2) and 50(3) of the Constitution on the procedure for plea taking. He cited the case of **Adan vs. Republic** [1973] EA 445 and **Njeru Kathiani and Another vs. Republic** [2007] eKLR on how pleas are supposed to be taken.

8. The appellant's submissions indicate that he requested for witness statements during the trial and the Hon. Magistrate ordered that he be supplied with the same by the prosecution. He however states that the Hon. Magistrate did not bother to find out if he was supplied with the said statements. He cited the provisions of Article 50(2)(J) and (K) of the Constitution to show that his right to a fair hearing was contravened. The appellant expounded on the fact that witness statements are important aspects in any criminal trial as they assist an accused person to prepare for his defence and challenge the evidence tendered by the prosecution. He argued that failure to supply him with witness statements prejudiced his right to fair trial and hearing, thus breached the provisions of Articles 25(c) and 50(2) of the Constitution which guarantees an accused person the right to a fair trial.

9. The appellant contended that the evidence of PW5 was inadmissible as he was not the maker of the P3 form which he produced in court. He took the position that the court should have summoned the maker of the P3 form to produce it, as he was still within the country. It was argued that PW5 did not indicate to the lower court that he was familiar with the handwriting and signature of the Doctor who filled the P3 form.

10. The appellant also challenged the sentence meted out against him as being severe and relied on the provisions of Article 50(2)(p) of the Constitution to support his stand. He contended that the clause "*shall be liable to imprisonment for life*" does not connote a mandatory sentence but a maximum sentence. He relied on the case of **Daniel Kyalo Mwema vs. Republic** [2009] eKLR which cited with approval the case of **Opoya vs. Uganda** [1967] EA 752 where the said court stated that it appeared to them beyond argument that the words "*shall be liable to*" do not in their ordinary meaning require the imposition of the stated penalty which may be imposed at the discretion of the court. The appellant concluded his submissions by stating that he ought to have benefitted from the least severe of the prescribed punishment.

11. The respondent filed its written submissions on 16th August, 2017. It was submitted that that PW2's evidence was corroborated by that of PW1 and PW4. Their evidence was to the effect that the appellant defiled PW2 and he was found washing his penis after he defiled her. As at that time, he had cleaned PW2. The respondent's submissions indicate that medical evidence did confirm that PW2 was indeed defiled and that the Hon. Magistrate found the charge against the appellant to have been proved beyond reasonable doubt.

12. Out of the submissions filed by the respondent on 16th August, 2017, the foregoing is the only submission that is applicable to the appellant's written submissions for the reason that the respondent filed its submissions before the appellant filed his. The respondent's written submissions therefore address the issues raised by the appellant in his petition of appeal filed on 6th July, 2016. When the appellant filed his written submissions, he however based them on his amended grounds of appeal. In my view, it is not prudent for the Office of the Director of Public Prosecutions to file written submissions before appellants have filed theirs, as the two parties in this appeal seem to be working at cross-purposes.

13. This court gave an opportunity to Ms. Njoki Kenga'ra, Learned Counsel for the respondent, to orally submit on issues not addressed in their written submissions. She stated that inasmuch as the appellant argued that he did not understand the proceedings due to the language used, it was evident that the charges were read out to him in Kiswahili language and he pleaded guilty to count 2 and even mitigated, which means that he understood the charges facing him.

14. On the issue of witness statements, it was submitted that on page 14 of the proceedings, the appellant said that he was ready to proceed and extensively cross-examined all the witness who testified.

15. The respondent while addressing the appellant's 3rd amended ground of appeal stated that admissibility of PW5's evidence was not an issue as the said witness was a qualified Doctor and the provisions of Section 77 of the Evidence Act are applicable in the instant case, on the production of the P3 form.

16. In responding to the appellant's 4th amended ground of appeal, the respondent indicated that the appellant was sentenced to the mandatory sentence of life imprisonment as the victim who was defiled was 6 years old.

17. It was also submitted that the appellant underwent a fair trial, was not undermined in any way and that the provisions of Article 50 of the Constitution were not contravened. Ms. Keng'ara prayed for the conviction to be upheld and for the appeal to be dismissed.

THE EVIDENCE

18. MTK [name withheld], testified as PW1 before the lower court. She recounted how on 1st March, 2015 her daughter RKN [name withheld] (PW2) who was 6 years old and a pupil at VKA [name withheld] in KG3, left home at 6:30 a.m. At 7:00 a.m., she was told that PW2 was naked and was being washed by Jumaa Abdalla (appellant). She was told to rush to the scene. She and her daughter C [name withheld] (PW4), decided to go and check. On reaching the appellant's house, PW1 found PW2 at the door of the house. She was crying as she said that she was hurting. She was trembling and could not stand. PW1 further gave evidence that she found one Charo (PW3) holding the appellant who was hanging clothes to dry. PW1's sister who is a nurse advised her to rush PW2 to hospital, which they did.

19. PW1 further testified that she asked PW2 what had happened and she told her that when she left (home), the appellant called her and when she went to him, he placed her on the bed, undressed her and put his fingers in her vagina. He then penetrated her with his penis. She told PW1 that was the third time it had happened. PW1 gave evidence that PW2 told her that the appellant threatened to kill her if she told

anyone. PW1 stated that when PW2 was examined at Kilifi hospital, she had injuries, blood and pus in her genitalia. She added that the appellant had washed her. Her panties had blood and her lessso was handed over to the Police.

20. PW1 indicated that her son B [name withheld] took PW2 to hospital where she was put on treatment. PW1 reported the matter to the Police where a P3 form was issued. It was filled later at Kilifi Hospital. She produced a copy of PW2's birth certificate as P. exh. 1, which shows that she was born on 3rd April, 2009. She identified PW2's Post Rape Care Form (PRC form) as PMFI-3. She indicated that the appellant was someone she knew as her neighbour.

21. On cross- examination, PW1 stated that she found PW3 asking the appellant why he was washing PW2 and he said that she was a grandchild. PW1 stated that the appellant sought forgiveness from her. She denied having planned to frame the present offence against the appellant with PW3 in order to take his plot. PW1 testified that they found the appellant at his home cleaning himself. He had put PW2 in the bathroom and he stated that PW2 was sweet and he would defile another child again.

22. PW2, RK [name withheld], a 6 year old girl gave unsworn evidence after going through voire dire examination. She indicated that she was a pupil at V [name withheld] Primary School. She gave her mother's name as M [name withheld] and the appellant's name as Juma. She gave the name of her friend and playmate as H [name withheld].

23. She recalled how the appellant called her when she was playing with H [name withheld] and removed her lessso, he removed his clothes and then put fingers in her genitals, after which he put in his penis (dudu) in her private parts. She stated that he lay her on the bed in his house. PW2 further gave evidence that she started crying but he told her to stop or else he would kill her. She stated that after the appellant finished, he washed her and then washed himself. She indicated that was the 3rd time the appellant had defiled her.

24. PW2 testified that the appellant had tied himself with her lessso as he washed her. He was seen by H's father [name withheld] as he washed her. PW2 stated that she told her mother what had happened and her brother took her to hospital. She said that the appellant's house was not far from theirs.

25. CKP [name withheld] a resident of Takaungu and a Village Elder of Takaungu Centre testified as PW3. He recounted that at 7:00 a.m., on 1st March, 2015, he received a report from one Mohamed Katana Munyoko that he should go to the appellant's house urgently as something was ongoing. It was his evidence that on reaching the appellant's house, he peeped through the fence and saw PW2 and the appellant standing near each other. He stated that the appellant was naked holding a tin as he washed his penis in it. PW2 was stark naked and had water from her waist downwards. PW3 observed that PW2's lessso was on the roof while the appellant's underwear was next to it. He indicated that both PW2 and the appellant were naked. On asking the appellant why PW2's private parts were wet, he responded that she had urinated on herself, but when PW3 checked the spot where it was said that she urinated, it was dry. He gave evidence that the appellant asked PW3 to allow him to cover his nakedness as people were drawing close. He stated that PW2 was trembling but calm. PW3 testified that PW2's brother, PW4 and her sister R [name withheld] reached the scene and they covered PW2 with a lessso. He indicated that PW1 followed later as she walks on crutches.

26. On cross-examination, PW3 denied that he the appellant Kshs. 7,800/= and that he sells fish to him. He indicated that the appellant takes his fish directly to the market and denied threatening to deal with the appellant because of the alleged debt. He denied assaulting the appellant.

27. PW4, CK [name withheld] of Takaungu and a sister to PW2 gave evidence that while asleep at 7:00 a.m., on 1st March, 2015, they were called by their neighbour, Athman and told that PW2 was naked and was being washed by the appellant. On reaching the appellant's house, she found him being interrogated by PW3. She found PW2 trembling and on asking her what had happened, she was afraid to speak. She took PW2's lessso which had been hanged and carried her home. She changed PW2 into other clothes and her brother, B [name withheld] took her to Kilifi District Hospital. PW4 indicated that on asking PW2 what happened she never spoke but kept on crying. PW4 identified the appellant as a neighbour. On being cross-examined, PW4 stated that she found PW2 stark naked.

28. Dr. Hassan Bachu testified as PW5. He indicated that he had worked at Kilifi District Hospital for 2 years as at the time he testified in the lower court. He had with him a P3 form for PW2 aged 5½ years, which was filled by Dr. Suchira on 12th March, 2015. He stated that he had worked with Dr. Suchira. In making reference to the P3 form, he stated that Dr. Suchira found PW2's hymen broken but there were no bruises or lacerations on her vaginal wall. He indicated that the P3 form was signed by Dr. Suchira on 12th March, 2015. He produced it as P. exh. 3. He also produced PW2's PRC form that was filled on 2nd March, 2015 as P. exh. 2. He indicated that the report showed that a whitish discharge was noted from PW2's vagina and her hymen was broken. An infection was seen in her urine for which she was treated. She was referred to trauma and counselling.

29. PW6, Corporal Clara Bufo attached to the Gender and Children Desk at Kilifi Police Station stated before the lower court that she took over the case from PC Koitaba who was transferred when the case was proceeding in court. She found that witness statements had been recorded and the complaint was one of defilement of PW2, a girl aged 6 years. She stated that the said child was treated in hospital and the appellant arrested and charged.

30. The appellant was put on his defence and gave an unsworn statement. He stated that he was a resident of Takaungu. On 6th April, 2015 he was outside his house when 2 people went there and greeted him. They sat down and he ordered soda for them. They introduced themselves as Policemen and took him to the Police Station. He indicated that he was taken to court on a Monday where he was charged with the offence of defilement. He denied the said offence. The appellant stated that there was a grudge between him and PW1 as they were carrying on the business of selling fish, which she would collect from him. He further said that in February (sic), she started paying in installments, which led to an argument.

31. The appellant further stated that PW1 was hostile and demanded that he sells to her the plot he was living in that had been purchased by his son. He refused to do so and was framed for this offence so that they could get the plot from him. He indicated that on 5th August, 2014

he asked people who were pouring stones what they were doing, he told them to leave and take the stones to PW3, who confronted and beat him up. The appellant said that he picked a stone and smashed PW3's head and that on 1st March, 2015, PW3 went and attacked him as he wanted the appellant to be burnt and killed by the mob. He further said that on 10th March, 2016, he was arrested and charged. He claimed having been framed for the offence, but was innocent.

ANALYSIS AND DETERMINATION

32. The duty of the first appellate court is to analyze and re-evaluate the evidence tendered before the lower court and come to its own conclusion. This was so held in the case of **Simiyu vs. Republic** [2005] 1 KLR at p.192 where the Court of Appeal stated thus:-

“It is the duty of the first appellate court to reconsider the evidence, evaluate it and draw its own conclusions in order to satisfy itself that there is no failure of justice. It is not enough for the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the trial court’s findings and conclusions.”

33. The issues for determination are:-

- (i) Whether the appellant was accorded a fair hearing;
- (ii) If the sentence imposed can be varied.
- (iii) If penetration was proved; and
- (iv) If the age of the victim was established.

34. The appellant in his written submissions went to great length to shred into bits the manner in which the plea was taken in that the record does not show if there was an interpreter in court, thus the plea taking was defective. The proceedings before the lower court however reveal that on 20th April, 2015 the appellant was arraigned in court but no plea was taken as the Prosecutor sought time to amend the charge. On 21st April, 2015 the appellant attended court. The Coram of the day shows that the Court Assistant was one Barua. The court made the following remarks; *“Amended charges to be read over to the accused. Amendment to include another count of failing to register. The amended charges to be read over to the accused in Kiswahili.”*

35. In count 1, the appellant responded in Kiswahili language by saying “*Nakataa*”. In the alternative count, the appellant said “*Nakataa*”. In count No. 2 which is not the subject of this appeal, the appellant said “*Nakubali*”. The foregoing proceedings are indicative of the fact that the charge was read out to the appellant in Kiswahili language to which he responded. The argument therefore that there was no Interpreter in court does arise. I therefore find the 1st ground of appeal to be without merit.

36. In ground No. 2, the lower court record shows that the Hon. Magistrate on 23rd April, 2015 ordered for the appellant to be supplied with witness statements for Count 1. On 26th June, 2015, the appellant requested that he be supplied with witness statements and the Hon. Magistrate made orders to that effect. The case was mentioned several times thereafter but the appellant did not indicate to the court that he had not been supplied with witness statements. The appellant herein submitted that it was the duty of the court to ascertain if he had been served with the same. I do not subscribe to that line of argument and this court cannot agree with such thinking for the sole reason that the appellant was under obligation to bring to the attention of the court any failure on the part of the Prosecution to supply him with copies of witness statements.

37. The hearing of the case commenced on 23rd November, 2015. On the said date the appellant said he was ready to proceed. PW1, PW2, PW3 and PW4 testified on the said date. PW1 and PW3 were cross-examined at length by the appellant. If at the time the hearing commenced the appellant had not been supplied with copies of witness statements, that was the most opportune time for him to have indicated to the Hon. Magistrate that he was ill prepared to cross-examine the witnesses due to lack of statements. He however failed to do so. The only presumption that can be drawn from his conduct is that he was supplied with the same.

38. The appellant gave a lengthy unsworn statement in his defence alleging that PW1 and PW3 had framed him in the present case due to a grudge about the plot he lives in. The foregoing factors are indicative of an appellant whose right to fair hearing as enshrined in Article 50 of the Constitution was not infringed upon. I therefore find the 2nd amended ground of appeal to be without merit.

39. The appellant challenged the admission of PW5's evidence as he was not the maker of the reports he produced in court and stated that it breached the provisions of Section 72 of the Evidence Act. The said Section provides as follows:-

“Where evidence is required of a document which is required by law to be attested, and none of the attesting witnesses can be found, or where such a witness is incapable of giving evidence or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.”

40. Looking at the manner in which the P3 and PRC forms were produced in court, it is clear that the Prosecutor did not rely on the provisions of Section 72 of the Evidence Act to facilitate the production of the said reports by PW5. If that had been the case, the Prosecutor

would have laid a sound basis for production of the reports under the said provisions of the law. This court's understanding of the lower court proceedings is that the P3 and the PRC forms were produced under the provisions of Section 77 of the Evidence Act which provides as follows:-

“(1) In criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner or any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.

(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, documents examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.”

41. The above provisions permit the court to presume that the documents stated in the above provisions are genuine but the makers of the same **may be called** to be examined on them. In essence, it was therefore not a mandatory requirement for the P3 and PRC forms to be produced by Dr. Shuchira who examined PW2 and filled the P3 form or by Justine who examined PW2 and filled the PRC form. PW5 indicated that he had worked with Dr. Suchira and secondly the said documents originated from Kilifi County Hospital where he was working as a Doctor. It is also worth noting that the appellant did not make a request to the court for the makers of the reports in issue to be called for cross-examination.

42. On the last ground of appeal, the appellant submitted that under the provisions of Section 8(2) of Sexual Offences Act, the phrase that *"a person who commits an act of defilement of a child aged 11 years or less shall upon conviction be sentenced to life imprisonment"*, means that life imprisonment is the maximum sentence but a lesser sentence can be imposed. This court does not agree with the said proposition. The operative words under the provisions of Section 8(2) of the Sexual Offences Act are ***"shall upon conviction be sentenced to imprisonment for life."*** The appellant in his written submissions mixed up the foregoing operative words and the penal clauses that state that an accused person once convicted *"shall be liable to imprisonment for life."*, while the latter clause, gives a court the discretion in sentencing, the former clause does not confer any discretion to a court with regard to sentencing. I therefore hold that the sentence of life imprisonment meted against the appellant was lawful and sound.

43. I do agree with submissions of by the respondent that penetration was proved by the P3 and PRC forms. The age of PW2 was established to be 6 years through the birth certificate produced by her mother, PW1. In light of the foregoing, I hold that the conviction was safe. The appellant's defence was considered and found to be based on falsehoods. I hold a similar view as the Hon. Magistrate that the defence advanced by the appellant was an afterthought. I also find that PW1 and PW3 dispelled through cross-examination the appellant's allegation of a grudge between them him.

44. This court's finding is that the appeal is without merit. It is hereby dismissed. The appellant has the right of appeal within 14 days from the date of delivery of this Judgment.

DELIVERED, DATED and SIGNED at MALINDI on this 18th day of April, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Mr. Alenga for the respondent

Mr. Oliver Musundi - Court Assistant