REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 8 OF 2016

JUMA SAID WANJE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the Judgment of Hon. Wandia, R.M., delivered on 12th February, 2016 in Malindi Chief Magistrate's Court Criminal Case No. 46 of 2013).

JUDGMENT

1. In a Judgment delivered by the lower court on 12th February, 2016, the appellant was convicted for the offence of defilement. On 15th February, 2016, he was sentenced to life imprisonment. The charge was that of defilement of a girl contrary to Section 8(1)(2) (sic) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 22nd day of October, 2013 in Malindi District within Kilifi County, intentionally and unlawfully caused his male genital organ namely penis to penetrate to (sic) the female genital organ namely vagina of EM [name withheld] a girl aged 3 years.

2. In an alternative charge, the appellant was charged with the offence of committing indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 22nd day of October, 2013 in Malindi District within Kilifi County, committed an indecent act by touching the female genital organ namely vagina of EM [name withheld] a girl aged 3 years using his penis.

3. The appellant being aggrieved by the decision of the lower court filed a petition of appeal on 31st March, 2016. On 22nd June, 2017, he filed amended grounds of appeal, upon which he based his written submissions. The amended grounds of appeal state as follows:-

> (i) That the Learned Trial Magistrate erred in law and fact in failing to see that there was no fair trial in this matter thus the life sentence imposed was unsafe;
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> (ii) That the Learned Trial Magistrate failed to see that the mother of the victim failed to testify hence the whole matter remained unproved;
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> (iii) That the Learned Trial Magistrate did consider (sic) that PW5's evidence was unreliable to warrant the appellant's conviction and sentence;
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> (iv) That the Learned Trial Magistrate erred in law and fact by not considering that the prosecution case was not proved to the required standard of law; and
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> (v) That the Learned Trial Magistrate erred in law and fact by not considering the appellant's defence which was reliable, to award him the benefit of doubt.

4. In expounding on his amended grounds of appeal, the appellant in his written submissions contended that although Article 50(2) of the Constitution provides that every person has the right to a fair trial, he was not accorded one as he was not supplied with witness statements. He was therefore unable to cross-examine PW1.

5. The appellant argued that the victim of the sexual offence who was 3 years old should have been brought to court although she could not talk and that the victim's mother did not attend court to testify. He therefore stated that there was no evidence tendered against him that could lead to him being sentenced to life imprisonment.

6. The appellant submitted that PW3 who purported to see him with the alleged victim stated that she knew the appellant by face but not by name. The appellant therefore wondered how the nexus between his identification by PW3 and his name came about. He relied on the case of **Ndege Maragwa vs. Republic** [1964] EA to show that the burden of proof in criminal cases is throughout on the prosecution and the duty of the trial Judge is to look at the evidence as a whole.

7. With regard to pus cells found on the victim, the appellant submitted that these could not determine who committed the alleged offence. He referred to Sections 36(1) and 36(2) of the Sexual Offences Act to fortify his submission.

8. The appellant also challenged the fact that he was not cross-examined by the prosecution after he gave his defence statement. He submitted that failure to follow the said process led to a miscarriage of justice.

9. The respondent filed its written submissions on 18th May, 2017 opposing the appeal. It was submitted that PW1 was told by PW3 that she had heard screams coming from behind a house within a certain homestead and when PW3 went to the scene, the appellant ran away. She further stated that the appellant had lifted a child's skirt and was holding the victim who was later taken to hospital. It was confirmed that the child had been violated and grossly defiled. It was submitted that the appellant was positively identified.

10. The respondent further stated that the P3 form showed evidence of penetration. The respondent indicated that the evidence of PW1 and PW2 was corroborated by that of PW3 who saw the child being defiled. Submissions indicate that when PW4 was called to the scene, he found the appellant therein and PW1 and PW3 identified the appellant.

11. On failure by the trial court to order for the appellant to be examined as provided under the provisions of Section 36 of the Sexual Offences Act, it was submitted by the respondent that the said provisions are discretionary.

12. The respondent relied on Machakos HCCA No. 1 of 2014, **Josphat Muoki vs. Republic** [2016] eKLR to show that ingredients of defilement are the age of the complainant, proof of penetration and positive identification of the assailant. The case of **George Owiti Raya vs. Republic**, Kisumu High Court Criminal Appeal No. 24 of 2013 was also cited to fortify the said submissions.

13. The respondent argued that all the ingredients of defilement were proved beyond reasonable doubt and the only punishment for an offender who defiles a child of 11 years of age or below is life imprisonment. It was submitted that was the only sentence that could have been meted against the appellant as the victim was 3 years old.

THE EVIDENCE

14. The hearing of the case in the lower court commenced on 23rd December, 2013. The mother of the victim of the sexual assault informed the Hon. Magistrate that the child could not talk. The prosecutor applied for the mother to give evidence. The court made the following remarks -"*The court observes that the child fears to talk and will therefore invoke Section 31 of the Sexual Offences"* (sic).

15. The child's mother, JK [name withheld] testified as PW1. She stated that she hails from [particulars withheld] in Malindi where she breaks stones. It was her evidence that on 22nd October, 2013 at 1:00 p.m., while at work, a woman by the name RK [name withheld] (PW3), told her that she had seen a man holding a child and that he had lifted the child's skirt while the child sat on him, facing him as she cried. PW1 went to the scene and when the man saw her, he let go of the child and ran off. PW1 took the child (her daughter) to hospital and to Malindi Police Station where she reported.

16. She testified that the child was treated and issued with a treatment book on 22nd October, 2013. It was marked as MFI-1. Laboratory tests were carried out on her child. The laboratory report was marked as MFI-2. A P3 form was filled on 6th November, 2013. It was marked as MFI-4. PW1 also had an age assessment report for the child, which was marked as MFI-4B.

17. On cross-examination, PW1 stated that she went and took her child and the appellant told her that women from Sabasaba were used to him as it was rumoured that he was raping children. PW1 asserted that she found the appellant still holding her child as R [name withheld] did not stop him from carrying on with what he was doing. She found that the appellant had dressed up the child but her skirt was inside out. The appellant gave the child her panty to hold. PW1 indicated that she and the Police did not find the appellant on the day he committed the offence. She saw him the following day and called "wazee wa mtaa" (Villager Elders) who arrested and took him to the Police Station.

18. PW2 was Ibrahim Abdulahi, a Senior Clinical (sic) working at Malindi Sub-County hospital. It was his evidence that on the 6th November, 2013 he treated and filled a P3 form for EM [name withheld] aged 3 years. They tried to trauma counsel her and gave her antibiotics. He classified the injuries the child sustained as physiological harm and on vaginal examination, he found that the hymen was broken. He stated that child was 3 years old and not a virgin. STD and HIV results were both negative but there was a lot of pus cells which was a sign of secondary infection. PW2 testified that he confirmed that there was penetration in a 3 year old girl. He produced the P3 form as P. exh. 2, age assessment report as P. exh. 4 and treatment notes as P. exh. 1.

19. PW3, RKC [name withheld] gave evidence that she lives at [particulars withheld], where she breaks chip stones. She recounted to the lower court that on 22nd October, 2013 at 1:00 p.m., while at work, she went to help (relief) herself in the bush. After doing so, she heard a child crying from a half built house. She then saw the appellant whom she knew by face defiling the child. When PW3 went back to work she found PW1 looking for her child. PW3 told her that she had seen a child being defiled but did not know whose child it was. She testified that PW1 went to the scene and returned with the child and told her that the child had been raped (sic). They told her to report to the Village Elder and go to hospital.

20. PW4, Mohamed Gogo Ndoro, a member of community policing and a resident of Sabasaba testified that on 18th November, 2013 when at home, two women went there and told him that a child had been defiled by a private security guard and that the person was being sought

by the Police. The women asked him to accompany them to where the person worked and he did so. PW4 stated that they found the appellant who was identified by the mother of the child (PW1). PW4 took the appellant to the Police Station.

21. PW5, No. 84868, CPl. Fatuma Ali took over the case from P.C John Keter who was the former Investigating Officer. She stated that PC Keter was transferred to Kabiet Police Station. She indicated that the P3 form and medical notes were produced by the Doctor and there were no other exhibits.

22. The appellant gave an unsworn defence to the effect that he was arrested by the Village Elder on the morning of 18th November (sic) while at work. He stated that he was taken to the Police Station without being told what was wrong. He was put in the cells and taken to court the following morning when charges were read to him that he had defiled a young child.

ANALYSIS AND DETERMINATION:

23. The duty of the first appellate court is to analyze and re-evaluate the evidence tendered in the court below and come to its own conclusion on the same. In **Okeno vs. Republic** [1972] EA 32 at p. 36, the court stated thus:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwalla vs. Republic [1957] EA 570), 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 conclusion, it must make its own findings and draw its own 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, see Peters vs. Sunday Post [1958] EA 424."***

24. The issues for determination are:-

(i) If the appellant was positively identified as the person who committed the offence;

(ii) If there was evidence of penetration; and

(iii) If a fair trial took place.

25. The evidence adduced by PW3 and PW1 (the child's mother) conclusively proves that the latter's daughter who was 3 years old, as per the age assessment report produced as P. exh. 4, was found on the lap of the appellant herein. The child was facing the appellant. It is indeed unfortunate that despite PW3 having seen that the child had been placed in such a compromising position by the appellant, she did nothing to assist. She therefore left the child who was crying being defiled. PW3 told PW1 where she had seen a child when she heard PW1 state that she did not know where her child was. On going to the scene, PW1 found her child being held by the appellant. Her skirt was inside out and the appellant gave her child her panty which she held in her hand.

26. Although PW3 did not know PW1's name, she knew him by face. PW1 however knew that the appellant was a watchman and even knew his place of work. She and another woman took PW4 to the appellant's workplace where he was arrested and taken to the Police Station. The evidence above shows that the appellant was properly identified at the scene of crime. The offence occurred during broad daylight and he was caught red handed by PW3 defiling PW1's child.

27. The issue of penetration was proved through medical evidence that was tendered by the Prosecution. PW2 testified that he found evidence of penetration of the child's vagina when he examined her. Her hymen was broken and there was a lot of pus cells seen in a laboratory examination of her urine.

28. Contrary to ground No. 3 of the appellant's amended grounds of appeal, that the child's mother did not testify, the proceedings of 23rd December, 2013 are a clear testament that she testified as PW1. On 15th February, 2016, Ms Sombo for the Prosecution when asking the trial court to impose the maximum sentence informed the said court that the mother of the child had not attended court because they moved to another place after the act and they could not be located. It is apparent from the foregoing that PW1 did not fail to attend court to adduce evidence. Her absence in court was during the sentencing of the appellant which could only have had a bearing on victim impact assessment. I therefore hold that the child's mother did testify.

29. The appellant argued that the charge against him was not proved as the child did not testify. The court notes that the child in issue was only 3 years old. The Hon. Magistrate was informed that the child could not talk and she invoked the provisions of Section 31 of the Sexual Offences Act. The Court of Appeal in the case of **MM vs. Republic** [2014] eKLR addressed at length the provisions of Section 31 of the Sexual Offences Act and in citing the provisions of Section 31(2) of the said Act stated as follows:-

> ***"It is clear from sections 31(2) and 32 that, first and foremost it is the duty of the prosecution to ascertain the vulnerability of the witness and to apply to the court to make a declaration before appointing an intermediary. In addition, the court, as we have earlier observed, can on its own motion, through voire dire examination, declare a witness vulnerable and proceed to appoint an intermediary. Any witness (other than the one to be declared vulnerable) can likewise apply to court for the declaration. The application must not be granted merely because the victim is young or too old or appears to be suffering from mental disorder. The court itself must be satisfied that the victim or the witness would be exposed to undue mental stress and suffering before an intermediary can be appointed."***

30. Section 2 of the Sexual Offences Act defines an intermediary to mean:-

> ***" ….. a person authorized by a court on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, a relative, psychologist, counselor, guardian, children's officer or social worker."***

31. The court in the said case of **MM vs. Republic** (supra) held that the work of an intermediary is not to give evidence on behalf of a vulnerable witness. In the said case the victim of defilement was 4 years old and did not testify as the Hon. Magistrate was of the view that the complainant's mother's evidence could serve as that of an intermediary in terms of Section 31(3) of the Sexual Offences Act, a view that was shared by the High Court Judge who heard the appeal. The Court of Appeal however proceeded to uphold the conviction and life imprisonment based on the independent evidence of the complainant's mother, father and Clinical Officer.

32. In the present case, the Hon. Magistrate did not follow the correct procedure as set out in **MM vs. Republic** (supra) to declare the victim of defilement in this case a vulnerable witness and thereafter, appoint an intermediary to undertake the role specified under the provisions of Section 31(7) of the Sexual Offences Act to convey the substance of any question to the vulnerable witness, inform the court at any time the victim was fatigued or stressed and to request the court for a recess.

33. The Court of Appeal in the said case went further to state as follows:-

> ***"Any requirement that insists on a child victim of defilement, irrespective of his or her age to testify in order to found a conviction would occasion serious miscarriage of justice. What fair hearing would a child victim aged six (6) months, like that in the case of Robinson Tole Mwakuyanda vs. Republic, High Court Criminal Appeal No. 227 of 2007, get if the courts were to insist on the evidence of such a child, who on account of his/her tender age cannot speak."***

34. It is this court's finding that despite the fact that PW1's 3 year old daughter did not testify, there was sufficient independent evidence upon which the Hon. Magistrate based her conviction, as adduced by PW1, PW2 and PW3.

35. The appellant submitted that he did not get a fair trial under the provisions of Article 50(2) of the Constitution of Kenya as he was not given witness statements. On 19th November, 2013 the court ordered the appellant to be supplied with copies of statements. On 20th January, 2014, the appellant asked for the said statements. The court then noted that the appellant indicated that he was ready to proceed on 23rd December, 2013. On 20th January, 2014, the appellant informed the court that he was not given statements. The Prosecutor told the court he would ensure that the appellant got the statements. The Hon. Magistrate noted as follows- "*court to facilitate statements and charge sheet so as to prepare for his case"*.

36. The lower court proceedings show that the appellant kept on asking for witness statements but at one time stopped doing so after the Hon. Magistrate ordered that he be supplied with the same. The proceedings reveal that the appellant was vocal and knew of his rights. On several occasions he asked for adjournments because he was unwell. On different dates, he expressed the view that his case was taking too long and even told the Hon. Magistrate, for no apparent reason, that he had no faith in her court. The appellant also cross-examined witnesses save for PW3 and PW5. His remarks to the court in regard to PW3 were *"I will not ask questions".* When it came to the cross-examination of PW5, the appellant said *"I have no questions"*. If at the said time the appellant had not been served with witness statements, he could as well have said that he was unable to cross-examine the said witnesses due to lack of the same. He did not say so. It is therefore my finding that the provisions of Article 50(2) of the Constitution were adhered to.

37. The appellant in his unsworn statement said he was arrested and only got to know of the charges he was facing when he was brought to court. The foregoing defence does not in any way weaken the prosecution case.

38. One last thing that this court would like address, though not raised by the appellant, is the manner in which the charge was drafted. The appellant was charged with the offence of defilement of a girl contrary to section 8(1)(2) of the Sexual Offences Act No. 3 of 2006. The above charge as drafted was defective as it ought to have read *"defilement of a girl contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act".* It is however clear from the proceedings that the appellant understood the charge leveled against him from his line of cross-examining PW1 and PW2 and he defended himself. He was therefore not prejudiced by the said defect. In any event, the defect is curable under the provisions of Section 382 of the Criminal Procedure Code.

39. I do agree with the submissions made by the respondent that the Prosecution proved its case beyond reasonable doubt. There is no iota of doubt that the appellant herein committed the offence he was charged with. The only sentence provided for the defilement of a child of the age of 11 years and below is life imprisonment. The sentence meted out was therefore a lawful one and cannot be varied.

40. The sum total of this court's finding is that the appeal is without merit. It is hereby dismissed in its entirety. The appellant has the right of appeal within 14 days of delivery of this Judgment.

DELIVERED, DATED and SIGNED at MALINDI on this 13th day of April, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Ms Njoki Keng'ara for the respondent

Mr. Oliver Musundi - Court Assistant