REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO 22 OF 2018

ANTHONY NG'ANG'A KIMANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 5413 of 2012 in the

Chief Magistrate's Court at Thika by Hon L. Komingoi (CM) on 22nd August 2016)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Anthony Ng'ang'a Kimani, was charged with the offence of defilement contrary to Section 8 (1) (2) of the Sexual Offences Act No 3 of 2006. The particulars of the charge were that on the 23rd day of December 2012 at [particulars withheld] Estate Makongeni, within Kiambu county, he intentionally caused his penis to penetrate the vagina of S K G (hereinafter referred to as "PW 2"), a child aged 4 ½ years with his hands and penis.

2. He had also been charged with the alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences. The particulars of the charge were that on the aforesaid date and place, he intentionally touched the breasts and vagina of PW 2 a child aged 4 ½ years with his hands and penis.

3. The Learned Trial Magistrate, Hon L. Komingoi, Chief Magistrate, convicted and sentenced him to serve life imprisonment.

4. Being dissatisfied with the said judgment, on 14th October 2016, the Appellant filed a Chamber Summons application seeking leave to file his Appeal out of time, which application was allowed and the Petition deemed to have been duly filed. He relied on four (4) Grounds of Appeal. Subsequently, he filed Amended Grounds of Appeal and Written Submissions. This time he relied on seven (7) Amended Grounds of Appeal.

5. When the matter came up for hearing on 21st March 2018, the State submitted orally in court.

LEGAL ANALYSIS

6. As this is a first appeal, this court analysed and re-evaluated 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 demeanor".**

7. Having looked at the Appellant's and State's Written Submissions, it appeared to this court that the issues that had been placed before it were:-

> **1. Whether or not the Appellant was accorded a fair trial;**

2. Whether or not the Prosecution proved the case against the Appellant beyond reasonable doubt.

8. The court therefore dealt with the said issues under the different heads shown herein below.

I. RIGHT TO FAIR TRIAL

A. WITNESS STATEMENTS

9. Amended Ground of Appeal Nos (5) was dealt with under this head.

10. The Appellant submitted that he was not accorded a fair trial contrary to Article 50(2) (b), (c), (e) and (f) of the Constitution of Kenya, 2010 because after several requests to be furnished with the witness statement of Agnes Ngendo (hereinafter "PW 5") which resulted in adjournment of the matter, he opted to proceed without her statement as he had continued to suffer in custody.

11. He relied on the case of **Simon Githaka Malombe vs Republic [2005] eKLR** where the Court of Appeal held as follows:-

> **"... It is the prosecution that assembles and retains custody of evidence against an accused person. The duty of disclosure (**sic) **with the prosecution and not with the court. In the face of clear constitutional provisions, it is not a responsibility that the office of the Director of Public Prosecutions can shirk…"**

12. He added that his rights were also violated when the Trial Court declined his request to recall witnesses who had testified pursuant to the provisions of Section 200 of the Criminal Procedure Code. He relied on the cases of **Criminal Appeal No 106 of 2009 Bob Ayul alias Edward Gabriel Mbwana alias Robert Mandinga vs Republic Criminal Appeal No 294 of 2010 David Kimani Njuguna vs Republic** and several other cases where the common thread was that where a new magistrate or judge takes over conduct of the case, that magistrate or judge is mandated by the provisions of Section 200(3) of the Criminal Procedure Code Cap 75 (Laws of Kenya) to inform an accused person of his right to recall witnesses. The State did not submit on this issue.

13. Notably, the sub-section of Article 50 (2) of the Constitution of Kenya that the Appellant relied upon provide as follows:-

> **"Every accused person has the right to a fair trial, which includes the right-**
>
> **(a) …**
>
> **(b) To be informed of the charge, with sufficient detail to answer it;**
>
> **(c) To have adequate time and facilities to prepare a defence;**
>
> **(d) …**
>
> **(e) To have the trial begin and conclude without unreasonable delay;**

14. A perusal of the proceedings shows that when the Appellant took plea on 31st December 2012, the Trial Court did not order that he be furnished with Witness Statements. When the matter came up on 27th February 2013, he informed the Trial Court that he was not ready to proceed as he had not been furnished with witness statements. On this day, the Trial Court directed that he be furnished with the said Witness Statements. The hearing did not take off on this day.

15. When the matter came up on 24th April 2013 and 29th April 2013, evidence of PW 2's mother, M K (hereinafter referred to as "PW 1"), and Bernard Mbote (hereinafter referred to as "PW 3") was taken. The Appellant did not inform the Trial Court that he had not received any Witness Statements.

16. On 2nd April 2014, the Trial Court ordered that the Appellant be furnished with the Witness Statements of Agnes Ngendo (hereinafter referred to as "PW 5"). The matter was adjourned on 18th June 2014 because he had still not been furnished with her Witness Statement. The Trial Court once again directed that he be issued with Witness Statements.

17. On 21st August 2014, the evidence of No 60139 Diana Mbula (hereinafter referred to as "PW 4") and PW 5 was taken. The Appellant did not indicate to the Trial Court that he had not been furnished with any Witness Statements. Notably, he even cross-examined both witnesses who adduced their evidence on this day.

18. His contention that he proceeded with the hearing even without having received PW 5's Witness Statements was not documented in the court file. In view of the fact that he did not raise the issue before the said evidence was taken, he could only have been said to have waived his right to peruse PW 5's Witness Statements before she testified. He could not now be heard to complain as he had a right to seek an adjournment until such time that he was furnished with the said Witness Statements.

19. In the premises foregoing, this court did not find any merit in Ground of Appeal No (5) and the same is hereby dismissed.

B. *VOIRE DIRE* EXAMINATION

20. Although, the Appellant did not raise any issue regarding the conducting of the *voire dire* examination of PW 2, this court noted that the same was not done at all. This was contrary to the mandatory provisions of Section 19 (1) of the Oaths and Statutory Declarations Act Cap 15 (Laws of Kenya). The same provides as follows:-

> **"Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with Section 233 of the Criminal Procedure Code (Cap 75), shall be deemed to be a deposition within the meaning of that section".**

21. Indeed, Honourable S.N. Mbungi, Ag CM, who was hearing the case ought to have satisfied himself that PW 2 understood the duty to tell the court the truth. He merely recorded as follows:-

> **"The minor is small. She cannot understand the meaning of taking an oath but she is able to understand what is happening. She is not sworn."**

Failure to satisfy himself that she understood the duty to tell the truth rendered her evidence irregular. It was not enough for the Trial Court to have concluded that she could not understand the meaning of taking an oath but that she understood what was happening. The Trial Court should have conducted a *voire dire* examination similar to the one he conducted prior to taking PW 5's evidence. The importance of establishing that a witness of tender years understands the duty to tell the truth can never be understated because an accused person can be held liable on such evidence.

22. Having said so, this court took the view that although no proper *voire dire* examination was conducted in respect of PW 2, the Appellant did in fact Cross –examine her. This court did not therefore see the prejudice that he suffered following the irregularity of the proceedings in that regard and thus proceeded to analyse her evidence as adduced.

II. PROOF OF THE PROSECUTION'S CASE

23.Amended Grounds of Appeal Nos (1), (2), (3), (4), (6) and (7) were dealt with together as they were all related.

24. The Appellant submitted that despite PW 2's blood stained pullover, white blouse and flowery dress having been taken for examination, there was no mention of the said examination in the Medical Report. He pointed out that Dr Eunice Mugweru (hereinafter referred to as "PW 6") testified that she saw PW 2. He averred that this contradicted her evidence that she did not examine PW 2 on 24th December 2012 but that she merely filled the P3 Form based on treatment notes.

25. He also argued that he ought to have been examined for presence of a venereal disease as pus cells that were found in PW 2's vagina were an indication of presence of a veneral disease. He averred that this raised doubt as to who defiled PW 2. He placed reliance on the cases of **Amos Kinyua Kugi vs Republic [2015] eKLR** and **Francis Muniu Kariuki [2017] eKLR** to buttress his argument.

26. It was also his submission that as the doctor who examined PW 2 was never called as a witness in the case, the Trial Court ought to have satisfied itself that PW 6 was well acquainted with the handwriting of the doctor before she could adduce the P3 Form in evidence. He further questioned why it took so long for PW 6 to stamp the P3 Form.

27. He further averred that failure of the doctor to testify in the case herein would entitle this court to draw an inference that his evidence would have been adverse to the Prosecution's case. He stated that his evidence was crucial despite the fact that under Section 143 of the Evidence Act Cap 80 (Laws of Kenya), the Prosecution had a discretion to decide the number of witnesses to prove a fact.

28. His further submission was that there were contradictions in PW 1's evidence because it was not possible for PW 2 to have walked by herself after being defiled. He relied on the cases of **Criminal Appeal No 277 of 2006 (UR) Jesiah Afuna Angulus vs Republic** and **Criminal Appeal No 77 of 2009 (UR) Charles Kiplangat Ngeno vs Republic** where the convictions of appellants were quashed due to inconsistencies in the Prosecution's case.

29. On its part, the State submitted that PW 6 produced a P3 Form that showed that PW 2 was defiled and that her clothes were blood stained. It also stated that PW 2's immunisation card showed that she was aged four and a half (4 ½) years old at the material time and that her evidence was corroborated by PW 1, PW 3 and PW 5. It submitted that the Prosecution had proven the offence of defilement beyond reasonable doubt and urged this court to dismiss the Appellant's Appeal.

30. A careful perusal of the evidence that was adduced by the Prosecution witnesses showed several inconsistencies. It was not clear in whose house a pig had been slaughtered. According to PW 1, she went to Julius Nganga's house where pork was being slaughtered (**sic)**. According to PW 5, the Appellant had come to their house to eat pork. It was not clear if PW 5 who was a minor aged ten (10) years at the time meant that the Appellant went to a house in the plot as PW 1 stated that they lived in the same plot with Julius Ng'ang'a.

31. Further, in PW 1's evidence, she testified that she was with PW 2 when the Appellant came to Julius Ng'ang'as house and sent PW2 to buy a cigarette. She also said that Julius Ng'ang'a was the one who sent PW 2 for cigarettes. PW 3 said that the Appellant came to his house and called PW 2 and sent her to buy a cigarette where after the Appellant followed her. On her part, PW 5 told the Trial Court that the Appellant found them playing and he then called PW 2 and sent her to the shop whereafter he followed her.

32. It was crystal clear that there were inconsistencies and contradictions as to how PW 2 was sent to buy cigarettes by the Appellant, if at all. Where she was when the Appellant sent her to the shops was contradictory. Notably, PW 2 was silent as to where she was at the time. This court found that it could not have ignored the circumstances under which PW 2 was allegedly sent to the shop by the Appellant for several reasons. If as PW 5 said that the Appellant found her, PW 2 and other children playing and he sent PW2 for cigarettes and that she went home thereafter, this suggested that the place they were playing may have been away from her house. If this was the scenario, it was difficult to visualise how PW 3 saw the Appellant giving PW 2 money to buy cigarettes because he was at home.

33. Further, it was not clear who sent PW 2 to purchase cigarettes. According to PW 1, she stated that Julius Ng'ang'a sent PW 2 to buy cigarettes. On the other hand, PW 2, PW 3 and PW 5 stated that it was the Appellant who sent PW 2 to purchase cigarettes. If as PW 1 testified that it was Julius Ng'ang'a who told her that he left the Appellant waiting for PW 2 at the shop, the evidence of the said Julius Ng'ang'a was crucial as the same could have shed light as to where the Appellant was at the material time. In any event, PW 1's evidence of what Julius Ng'ang'a told her remained as heresay evidence that was not admissible before the court.

34. Going further, the time the incident occurred was pertinent. Both PW 1 and PW 2 stated that it was about 8.00 pm. PW 2 said that the incident occurred at night. Two (2) issues arose out of this evidence.

35. The first issue was that of identification. If as PW 5 testified that the Appellant followed PW 2 after he sent her to buy cigarettes, this court found the lighting conditions in that area to have been a pertinent issue. It was the view of this court that the Prosecution did not interrogate this issue so as to rule out a case of mistaken identity because the incident was said to have occurred at 8.00 pm.

36. The second issue related to the authenticity of PW 3's evidence. If as he stated that it was 8.00 pm and he saw the Appellant send PW 2 to the shops to buy cigarettes, this court was puzzled as to why PW 3 was not concerned that a four and a half (4 ½) year old child would be sent to purchase cigarettes in the cover of darkness. If the shop was near their house, the Prosecution erred in not having demonstrated that the distance between the shop and PW 2's house would not have raised any suspicion on PW 3's part.

37. It was the view of this court that the inconsistencies, contradictions and gaps in PW 1's, PW 2's, PW 3's and PW 5's evidence were not of the nature that this court would have ignored. They were material in nature.

38. Julius Ng'ang'a also ought to have been called as witness to corroborate PW 1's evidence that he left the Appellant at the shops with PW 2. The Prosecution ought also to have called Dishon's father and his son who PW 1 said came holding PW 2's hand after the ordeal to corroborate PW 1's evidence. Dishon's father would also have corroborated PW 1's evidence that the Appellant ran away when he was accosted and PW 2's evidence of where she was found by Dishon's father. This was critical because PW 1's evidence that PW 2 was bleeding from her vagina was inconsistent with her admission that PW 2's pant was not blood stained. This court arrived at that conclusion because there was no evidence to show that PW 2 did not wear her pant after the ordeal

39. To assist the court on how the scales should tilt, this court considered PW 6's evidence and noted that she completed the P3 Form on 14th January 2013. Although she had testified that she saw PW 2 on 24th December 2012, on Cross-examination, she stated that she did not treat her and merely relied on treatment notes. This court made an inference that she was not a truthful witness.

40. Whereas the Prosecution has the discretion to decide the number of witnesses to call to prove a particular fact as provided for in Section 143 of the Evidence Act, it was duty of the Prosecution to have made its case water tight. Failure to call Julius Ng'ang'a, Dishon's dad and his son as witnesses in this case dealt a fatal blow to the Prosecution's case.

41. Having carefully considered the evidence that was adduced by the Prosecution witnesses, this court was hesitant to find that the Prosecution had proven its case due to the existing inconsistencies and contradictions. Instead, this court came to the conclusion that the Prosecution did not discharge its burden of proof. As the Appellant was under no obligation to assist the Prosecution's case, this court found and held that the Prosecution did not prove its case to the required standard; the standard being proof beyond reasonable doubt.

42. In the premises foregoing, this court found that the Amended Grounds of Appeal No (1), (2), (3), (4), (6) and (7) were merited and the same are hereby upheld.

DISPOSITION

43. For the foregoing reasons, the Appellant's Petition of Appeal that was lodged on 14th October 2016 was merited and the same is hereby allowed.

44. In view of the fact that the evidence that was adduced before the Trial Court created doubt in mind of this court, that benefit of doubt leads it to quash, set aside the conviction and sentence that was meted upon the Appellant by the trial court as it would be clearly unsafe to confirm the same. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

45. It is so ordered.

DATED and **DELIVERED** at **KIAMBU** this **14th** day of **August** 2018

J. KAMAU

JUDGE