REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 22 OF 2017

S C……..……....……APPELLANT

VERSUS

REPUBLIC…….……..…..RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 23 of 2014 of the Chief Magistrate's Court at Malindi – J.N. Wandia, RM)

JUDGEMENT

1. The Appellant, Said Chengo is currently serving a life sentence for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act, 2006 (SOA). Through amended grounds of appeal filed on 10th April, 2018 he seeks to overturn his conviction and sentence on the grounds that:

> **"1. That the learned trial magistrate did not consider that the victim's evidence was not admitted in accordance with the law.**
>
> **2. That the learned trial magistrate failed in the rule of law by admitting the prosecution evidence without seeing that there was no fair trial as the proceedings I have are incomplete.**
>
> **3. That the learned trial magistrate erred in law and fact in failing to see that the victim's age was not proved beyond reasonable doubt.**
>
> **4. That the learned trial magistrate erred in law and fact by not considering that the prosecution failed to prove its case beyond reasonable doubt.**
>
> **5. That the learned trial magistrate erred in law and fact in failing to consider my defence as the same was reasonable to create doubt on the prosecution case"**

2. This being a first appeal, the Appellant is entitled to a fresh review of the evidence that was adduced at the trial in order for this court to arrive at its own independent decision. In doing so, this court is alive to the fact that, unlike the trial court, it did not have the opportunity of seeing and hearing the witnesses as they testified in order to gauge their demeanour.

3. A perusal of the Appellant's amended grounds of appeal shows that he asserts that the case against him was not proved to the required standards. He also claims breach of his trial rights.

4. Was the charge against the Appellant proved beyond reasonable doubt? In the first count, the Appellant was charged with defilement contrary to Section 8(1) as read with Section 8(2) of the SOA. The particulars of the offence being that on 25th April, 2014 at [particulars withheld] village in Kilifi County, the Appellant intentionally and unlawfully caused his penis to penetrate the anus of L.S.C. a boy aged eleven years.

5. In the alternative to count 1, the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the SOA namely that on 25th April, 2014 at [particulars withheld] village in Kilifi County he intentionally and unlawfully touched with his penis the anus of L.S.C. a boy aged eleven years.

6. In count two the Appellant was charged with grievous harm contrary to Section 234 of the Penal Code. The particulars being that on 25th April, 2014 at [particulars withheld] village in Kilifi County the Appellant unlawfully did grievous harm to L.S.C.

7. In support of his appeal, the Appellant submitted that the evidence that was adduced showed that he lived in the same compound with his father. He wondered why his father, brother or neighbours were never called to testify in support of the case against him. He asserted that even if he had threatened the child and people feared him there was no reason why the matter was not reported to authorities.

8. According to the Appellant, no witness was availed as he never committed the offence. Further, that he was framed up so that his ex-wife who is the mother of L.S.C. could take away the child from him. He submitted that his ex-wife I.Z.M. who testified as PW2 told the court that she reported the matter to the village elder after she learned that the Appellant had taken the child from PW2's home.

9. Turning to the alleged breach of his trial rights, the Appellant submitted that there was a miscarriage of justice since no medical report in support of the evidence of L.S.C. who testified as PW1 was attached to the proceedings. The Appellant's view was that failure to adduce medical evidence rendered the claim by PW1 that he was penetrated unproved.

10. It was the Appellant's case that the only evidence in support of the child's evidence was that of the clinical officer PW4 Ibrahim Abdullahi who talked of the examination revealing that sodomy was highly possible. According to the Appellant, the evidence of PW4 did not confirm penetration as the witness simply testified about the possibility of penetration having occurred.

11. In the Appellant's opinion, failure to back the evidence of PW1 with a medical report rendered the evidence of no use. It was the Appellant's position that his right to information as guaranteed by Article 35 of the Constitution had been breached. The Appellant wrapped up his submissions on this ground by asserting that penetration had not been proved as Section 77(1) of the Evidence Act, Cap. 80 required the production of the P3 form.

12. On the alleged failure by the prosecution to prove the age of the complainant, the Appellant submitted that the age assessment report was not produced. Asserting that in a criminal trial there is no room for assumptions or speculations, the Appellant submitted that the prosecution must prove its case beyond reasonable doubt. The Appellant relied on the Court of Appeal decision in **Kaingu Elias Kasomo v Republic, Criminal Appeal No. 504 of 2010** and submitted that no conviction can arise in a defilement case where the age of the victim has not been proved.

13. The Appellant urged this court to find that the charge of defilement was not proved beyond reasonable doubt. His view was that the medical officer only guessed that the complainant might have been defiled thereby not corroborating the complainant's testimony that he had been defiled. The Appellant stressed that no P3 form nor birth certificate were attached to the proceedings in order to support the charge of defilement. Without providing the citation, the Appellant relied on **Mururi & another v Republic** and submitted that a court of law does not act on mere assertions but on evidence proved before the court.

14. It was the Appellant's case that no investigation was conducted into the matter as all that PW3 Police Constable Francis Michira did was to produce the statement of the investigating officer one Police Constable Andrew Wekesa. His opinion was that without the evidence of the investigating officer the charge against him was not proved. The Appellant stressed that the case against him was fabricated by the complainant and PW2. He therefore urged this court to allow his appeal.

15. The Republic opposed the appeal. It was pointed out that the trial magistrate had upon doing a thorough and exhaustive analysis reached the correct decision that the Appellant was guilty as charged. According to the Respondent the victim's evidence was subjected to intense cross-examination and the trial court correctly reached the decision, as allowed by Section 124 of the Evidence Act, that he was a truthful witness and relied on his evidence and the medical evidence to convict the Appellant.

16. In the Respondent's opinion, although the trial magistrate did not directly mention the Appellant's defence in her judgement, a reading of the judgement would lead to the conclusion that his defence was considered. It was submitted for the Respondent that the Appellant shared a house with the victim and thus had the opportunity of committing the offence without anyone else discovering the mischief.

17. Further, that the evidence of the prosecution witnesses was consistent and the same displaced the defence case. A dismissal of the appeal was thus urged on behalf of the Respondent.

18. In the evidence that was adduced at the trial, L.S.C. testified as PW1 and told the court that he lived with his father. He told the court that in December his father beat him up because he wanted to sodomise him. His evidence was that his father had slept with him before. The drill was that the Appellant would beat him, remove his clothes and enter his anus with his penis. He stated that the Appellant had done it several times. He would tell him to keep quiet since he was crying. His testimony was that he never told anyone apart from his friend. In April he beat him again and he sustained injuries on his face. He bled. He tried to have sex with him but he ran away. When his mother came on a date he did not know, he reported the matter to her. He was taken to hospital where he was seen by a doctor. They later proceeded to Malindi Police Station. L.S.C. stated that he was present when his father was arrested at the chief's place after he followed him and his mother there.

19. During cross-examination, the child told the court that the friend he had reported the ordeal to was called Julie. Further, that one Cobra had told his mother what the Appellant used to do to him. The child told the court that his mother and the Appellant lived far from each other. The complainant also told the court he had reported the incidences to his neighbours but he did not report the incident to his grandfather and uncle since the Appellant had threatened to kill him if he made any report to them. The child further testified that the Appellant was feared by people and had warned him not to go to his grandfather's place or eat there.

20. During re-examination, the child disclosed that he shared a house with the Appellant and no one saw what the Appellant was doing to him.

21. PW2 told the court that on 28th April, 2014 she arrived home from Garissa and learned that the Appellant had forcefully taken away her child from her parents' home. She also learned that the Appellant used to beat the child who would run away but the Appellant would go and

take the child to stay with him. On 29th April, 2014 she went to the village elder to enquire why the child was being beaten all the time. The Appellant was asked to take the child to the village elder the next day.

22. On 30th April, 2014 the child went to the village elder's place with his grandfather. The Appellant was not present. It was then that the child disclosed that the Appellant used to defile him and whenever he refused the Appellant would beat him forcing him to run away. The boy reported that the defilement had even happened the previous day. She noticed marks on the boy's face. They proceeded to the chief's office where they reported the incident. While there, the Appellant arrived. Police officers from Kakuyuni also came. They all escorted the child to Kakuyuni Dispensary before proceeding to Malindi Police Station. The child was also taken to Malindi General Hospital where a P3 form was filled. Age assessment of the child revealed that he was eleven years old.

23. Cross-examined, PW2 told the court that she worked at Garissa and received the report while there. She told the court that the child never disclosed to other people why the Appellant used to beat him. She stated that the doctor confirmed that the child had indeed been defiled.

24. PW3 Police Constable Francis Michira produced the statement of the investigating officer Police Constable Andrew Wekesa as an exhibit in this case.

25. PW4 Ibrahim Abdullahi a senior clinical officer at Malindi Sub-County Hospital stated that he examined the child on 1st May, 2014 and filled a P3 form for him. He noticed bruises on his cheeks and back. The anus was swollen and reddish. He formed the opinion that sodomy was highly possible. He produced the treatment notes, the P3 form and an age assessment report prepared by Dr. Ariba as exhibits. His evidence was that the boy was eleven years old as later confirmed by the age assessment done on 5th May, 2014.

26. In his defence, the Appellant stated that he married PW2 as his second wife in 1999. In 2000 she gave birth to the complainant. He worked in Malindi as a mechanic while his two wives stayed at home. His wives used to fight and his investigations revealed that PW2 was the troublemaker. He called his father-in-law in an attempt to resolve the issue and later told him to take away PW2.

27. In 2012, his first wife called him and told him that the complainant had been left at a neighbour's place by PW2. He looked for PW2 and learned that she was in Garissa. In 2013 PW2 came from Garissa wanting to take away the complainant. He instructed his first wife not to release the child to PW2 but instead instruct PW2 to go to the chief.

28. PW2 went away upto 23rd March, 2014 when she went and reported the matter to the chief. It was the Appellant's evidence that he was summoned by the village elder and when he went to the chief's place he was accused of sleeping with the child. He admitted that he indeed beat the child but this was because he had pushed another child into water.

29. Cross-examined by the prosecution, the Appellant stated that he could not call anybody as his witness as his first wife left after his arrest. He stated that PW2 is the one who claimed he had defiled the child. She also coached the child on what to say. The Appellant insisted that he was arrested in March and brought to court on 28th March, 2014.

30. Were the Appellant's rights breached during the trial? The Appellant's insistence that his trial rights were violated is without merit. His claim that the treatment notes, the P3 form and the age assessment report were not produced is not supported by the record. It is clear that the documents were indeed produced as exhibits by PW4 and form part of the record.

31. It is possible that copies of the said documents were not included in the record of appeal supplied to the Appellant. If this is the case, then this is an error which the Appellant ought to have brought to the attention of this court by seeking a complete record. He cannot use such an error as a ground of appeal as the evidence of PW4 clearly shows that he produced the documents as exhibits. Indeed the Appellant must have witnessed the production of the documents at the trial. The Appellant's claim that the evidence of PW1 was not backed by medical evidence is therefore without merit.

32. There was the assertion by the Appellant that the matter was not investigated as required by the law. This matter was actually investigated but the investigating officer never came to court to testify. Instead another officer came and gave testimony and produced the statement of the investigating officer as an exhibit.

33. It is not indicated in the proceedings as to why the investigating officer could not be called to testify. It is only stated that he had been transferred to Meru.

34. In my view, the statement of the investigating officer had no probative value. PW3 could not be cross-examined on that statement and neither could he answer questions relating to the actions taken by the investigating officer during the investigations. In this case, it is like the investigating officer never testified. However, failure to call the investigating officer is not fatal to the prosecution case in all situations. In cases where the evidence of the investigating officer is key in linking the accused to the crime, failure to call the investigating officer will cause irreparable damage to the prosecution's case. However, where evidence of other witnesses is sufficient to secure a conviction, failure to avail the investigating officer will do no harm to the prosecution case. It is however important that the prosecution avails investigating officers during trials. An investigating officer is the person who forms an opinion that a crime has been committed. He is the person to interlink the evidence of the witnesses and explain why the defence offered by an accused is not plausible. The role of the investigating officer in a criminal trial is crucial and the prosecution should always ensure that the investigating officer testifies. Having said so, I however do not think that the evidence of the investigating officer could have made any difference in this matter.

35. Was the evidence sufficient to warrant a conviction? A perusal of the testimony of the complainant shows a pattern that can only lead to the conclusion that he was a truthful witness. He told the court how the Appellant would beat him before sodomising him. The Appellant would then threaten him with dire consequences if he revealed the matter to his grandfather or uncle.

36. PW2 told the court that she did not go for the child at the home of the Appellant as he used to assault her. She instead went and reported the matter to the chief. Her evidence was that it was at the chief's place that the child disclosed the defilement. They immediately proceeded to Kakuyuni Dispensary.

37. The evidence of PW4 confirmed the evidence of the child and his mother. The mother of the child testified that the child had bruises on the face. This was confirmed by the medical report.

38. The treatment notes from Kakuyuni Dispensary showed that upon examination mild bruises and reddish anus were noted. The child was referred to Malindi District Hospital. Examination at Malindi on 1st May, 2014 disclosed bruises associated with some swelling at the anal sphincter.

39. The child was examined by two different medical officers who saw the same thing. Their evidence confirmed penetration of the complainant's anus thereby supporting the complainant's testimony that he was penetrated. The complainant identified the person who penetrated him as his father. They lived alone in one house and although there were other houses in the compound the child was warned not to tell anybody what was happening.

40. The Appellant's defence was that there was a conspiracy between PW1 and PW2 so that PW2 could take PW1 from him. That evidence cannot stand in light of the testimony adduced by the prosecution. The Appellant explained away the injuries on the complainant by stating that the complainant had pushed another child into a dam and he disciplined him. The evidence of the Appellant cannot be believed. He never named the child who was allegedly pushed into a dam and neither did he name the person who told him the complainant had pushed another child into water. According to the Appellant the children of the Appellant's first wife were aged 23 and 25 years. They could not have been pushed into a dam by the complainant who was younger than them.

41. The age of the complainant was assessed and he was found to be eleven years old. The Appellant's evidence that the child was born in 2000 and was therefore 14 years old at the time the offence was committed in 2014 was upstaged by the age assessment report. The prosecution therefore proved to the required standard that the complainant was eleven years old at the time of the commission of the offence.

42. The trial magistrate was thus correct in concluding that the Appellant had defiled the complainant. He ought to have been charged with incest but the offence of defilement with which he was charged was also applicable.

43. Although the Appellant was correctly sentenced to life imprisonment for defilement contrary to Section 8(1) as read with Section 8(2) of SOA as charged in count one, a perusal of the record shows that the Appellant was convicted both for defilement and the alternative charge of committing an indecent act with a child. Convicting the Appellant for both the main charge and the alternative charge was erroneous. Once the trial magistrate found the Appellant guilty as charged in the main count she ought not to have made any finding on the alternative charge. However, I note that no prejudice was caused to the Appellant as he was not sentenced on the alternative charge.

44. It is also noted that no finding was made on count two by the trial court. The trial magistrate ought to have made a finding on the second count.

45. A perusal of the evidence adduced shows that no evidence was led to show that the Appellant did grievous harm to the complainant. Count two was therefore not proved. Nevertheless, the evidence that was adduced established that the complainant had bruises on his cheeks and body. The complainant's testimony of being assaulted was corroborated by that of PW2 who talked of seeing the bruises. PW4 also talked of injuries on the face and back. He supported his evidence with a P3 form.

46. In view of what I have stated above, I find the Appellant guilty of the lesser charge of assault causing actual bodily harm contrary to Section 251 of the Penal Code.

47. Although the Appellant was a first offender, I find that the assault was carried out in order to subdue the complainant into surrendering to the Appellant's sexual assault. The circumstances leading to the infliction of the injuries on the complainant therefore call for a deterrent sentence. The Appellant is sentenced to three years imprisonment on count two. The sentence which shall run concurrently with the sentence imposed in the first count shall be served from 20th July, 2017 being the date the Appellant was sentenced by the trial court.

48. Apart from the changes stated above, I find no merit in this appeal and the same is dismissed. The conviction entered and the sentence imposed by the trial court in respect of count one stands. The Appellant will therefore continue to serve life imprisonment on the first count.

Dated, signed and delivered at Malindi this 27th day of September, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT