REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 42 OF 2016

GEORGE KALUME KATSUI..APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(From the Original Conviction and Sentence in the Sexual Offences Case No. 36 of 2016 of the Chief Magistrate's Court at Malindi – J.N. Wandia, RM)

JUDGEMENT

1. The Appellant, George Kalume Katsui was tried, convicted and sentenced to life imprisonment for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act, 2006 ("the Act"). Being dissatisfied with both conviction and sentence the Appellant appeals to this court on the grounds that his conviction was based on insufficient evidence and his defence was not considered.

2. The appeal was canvassed by way of written submissions. The Appellant submits that the evidence was insufficient to secure his conviction; that the evidence of the victim did not tally with the main charge of defilement but instead disclosed a lesser offence; and that the evidence did not indicate that the victim was defiled as the Appellant's intention was thwarted by the appearance of one Sammy. The Appellant urges the Court to be guided by Section 179(2) of the Criminal Procedure Code (CPC) and find that a lesser offence may have been committed.

3. The Appellant discredited the authenticity of the treatment notes pointing out that the doctor who produced the same did not shed light as to its origins hence vitiating the medical evidence. He further states that the delay in taking the victim to hospital was questionable. According to him, if the victim had indeed been defiled she would have been immediately taken to hospital. In his view, a torn hymen meant that it was intact and there was therefore no penetration as it was simply torn.

4. The State represented by the Director of Public Prosecutions (DPP) in a nutshell submits that all the ingredients of the offence of defilement were proved beyond reasonable doubt. It is the DPP's case that the evidence of the victim was corroborated by that of her brother PW2 J F and that the trial court found that there was penetration. The trial court, the DPP asserts, believed the evidence of the victim and her brother which was further corroborated by PW5 Ibrahim Abdullahi, a senior clinical officer.

5. It is further submitted that the victim recognized the Appellant. To buttress this point, reliance was placed on the High Court decision in **Joseph Githagi Waruguru v Republic [2018] eKLR** and the Court of Appeal case of **Francis Muchiri Joseph v Republic [2014] eKLR**.

6. In the Respondent's view, the age of the victim was likewise proved by the evidence of the complainant and her mother and the same was supported by the production of birth notification card. It is the Respondent's position that the defence was considered and that the conviction and sentence were safe. The State urges this Court to affirm the findings of the learned trial magistrate.

7. It is the onus of this court in its appellate mandate to reconsider and re-evaluate the evidence and subsequently reach its own conclusion taking note of the fact that the trial court had the opportunity and advantage of hearing and seeing the witnesses testify thus observing their demeanour in the process. In saying so, I am guided by the decisions in **Okeno v Republic [1972] EA 32, Pandya v Republic [1957] EA 336**, and **Peters v Sunday Post [1958] EA 424**. Secondly, the court must be guided by the principle that a finding of fact made by the trial court shall not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or the trial court acted on the wrong principles – see **Chemagong v Republic [1984] KLR 611** and **Gunga Baya & another v Republic [2015] eKLR**.

8. The Appellant was in the main count charged with defilement contrary to Section 8(1)(2) of the Act. The better way to word the charge is to state **"contrary to Section 8(1) as read with Section 8(2)"**. However, the framing of the charge did not in any way prejudice the Appellant as the substance and every element of the charge were read and explained to him in Kiswahili, a language he understood. He was thus all along aware of the charge facing him.

9. The particulars of the offence disclosed that on 17th October, 2013 the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of H.F., a girl aged seven years.

10. The alternative charge was that of committing an indecent act with a child contrary to Section 11(1) of the Act. The particulars being that on the date mentioned in the main count, the Appellant committed an indecent act by touching the vagina of the named child using his penis.

11. The prosecution called six witnesses. The victim, H F testified as PW1 after undergoing a *voir dire* examination. She gave unsworn testimony and stated that on the material date she was playing at home with her brother, PW2, when the Appellant gave PW2 five shillings to buy sweets. After the sweets were bought the Appellant gave her two sweets and gave the remaining three to PW2. The Appellant then took her behind their house removed her shorts, unzipped his pants and put his **"dudu"** in her. It was her evidence that Sammy knocked at their door to have his phone charged, as phones used to be charged at their home, causing the Appellant to take off. She wore her shorts, went into the house and slept. Her testimony was that the said Sammy did not find her naked and she did not tell anyone.

12. It was PW1's testimony that the Appellant did not touch her and that he **"removed his dudu and wanted to put it inside me but Sammy knocked the door."** She further stated that PW2 was at the front of the house as the Appellant had required that of him. PW1 testified that she felt sick in her **"dudu"** and felt pain when **"susuing"** so her father took her to hospital then to the Police Station at Malindi where she told the police what had transpired. The child identified the Appellant in court stating that they came from the same area though their houses were far apart.

13. PW2, J F, a minor aged 9 years gave unsworn testimony after undergoing *voir dire* examination. He stated that on the material day he was playing at home with PW1 when the Appellant came over. They were on half term break. The Appellant gave him five shillings to buy sweets and he complied. He then gave him three sweets and gave two sweets to his sister, PW1. The Appellant then took his sister to the back of the house, placed her under a tree, removed her panties, unbuckled his belt and opened his zip. PW2 stated that the Appellant intended to do **"bad manners"** to his sister. He put his **"dudu"** into his sister's **"dudu"** and that is when Sammy came to charge his phone. Sammy witnessed the incident and the Appellant ran into a thicket to hide. The Appellant later resurfaced and threatened them with death if they reported the incident to their parents. PW2 informed their brother, U, who in turn notified their mother of the act. PW2 identified the Appellant in court stating that he knew him as they lived in the same neighbourhood.

14. E K, the mother of the complainant, testified as PW3. The father of the child testified as PW4. They told the court that upon receiving the report of the incident from their children they inspected PW1 before reporting the matter to the police. They confirmed that the child who was aged seven at the time of the incident was indeed defiled.

15. PW5 told the court that he examined the child and noted that the vagina was tender. The hymen was torn. He concluded that there was vaginal penetration. PW6 Corporal Mariam Hussein testified on how the complaint was investigated before the Appellant was arrested and charged.

16. The trial court having found that the Appellant had a case to answer placed him on his defence. The Appellant denied the charges in his defence. His testimony was that in 2013 he was living with his siblings who were all girls and they had no parents. At that time he went to the shop to purchase bread, milk and other provisions and headed home. On his way home the two children accosted him pelting him with stones and taunting him about his short stature. He chased them, caught up with the boy and beat him up while the girl ran off. He went home and the third day after the incident his brother sent him fare and he travelled to Mtwapa to sell juice as he was jobless. He was in Mtwapa for three months before police went and arrested and charged him.

17. In a charge of defilement the prosecution has a duty to establish that the victim who was a child at the time of the offence was penetrated by the accused person. Failure to prove any of the three elements of age, penetration and identification of the perpetrator should lead to an acquittal.

18. A perusal of the record will show that the parents of the child testified that she was born on 22nd February, 2007 and was six years at the time of the alleged offence. The birth notification card produced in evidence was actually the child's health card which indicated she was born on 22nd February, 2007. The prosecution therefore discharged the burden of proving that the victim was a **"human being under the age of eighteen years"** and therefore a child as defined by Section 2 of the Children Act. The Appellant did not challenge this evidence. I am therefore satisfied that it was sufficiently proved that the victim was a child below eleven years at the time of the commission of the alleged offence. The punishment provided by Section 8(2) of the Act for defilement of a child below eleven years is life imprisonment. The sentence imposed was therefore the one provided by the law.

19. Penetration is defined by Section 2 of the Act as **"the partial or complete insertion of the genital organs of a person into the genital organs of another person."**

20. The trial court found that PW2 witnessed the Appellant defile PW1. For reasons to be stated later in this judgement, I will not analyse the evidence of PW1 and PW2. I will look elsewhere in order to determine whether penetration was proved.

21. The medical evidence adduced was based on the examination of the victim by PW5 who reached the conclusion that her vagina was penetrated. The view by the Appellant that a torn hymen means that it was still intact is skewed for the reason that the term intact means something is complete. To tear on the other hand means to rip apart or damage. The evidence of PW5 therefore established that the hymen had been interfered with through penetration. It was no longer in its original state. On the evidence of PW5 alone I would agree with the trial court that there was penetration.

22. The identification of the perpetrator is where the matter gets into troubled waters. The evidence of identification is found in the testimony of the victim and her brother. Another witness who was identified by the minors as Sammy was not procured to testify and neither was any reason advanced as to why this witness was never availed in court.

23. The two minors (PW1 and PW2) were subjected to *voir dire* examination whereupon the court directed that they should give unsworn testimony. The problem is that the Appellant was denied an opportunity to exercise his right to cross-examine the minors.

24. In my view, the right of an accused person to adduce and challenge evidence as guaranteed by Article 50(2)(k) of the Constitution encompasses the right to cross-examine witnesses. One way of challenging evidence is through cross-examination. The right to a fair trial protected by Article 50 of the Constitution as per Article 25 of the same Constitution a non derogable right. It is absolute and cannot be limited.

25. In **HOW v Republic [2014] eKLR; Criminal Appeal No. 326 of 2010 (Busia)** the Court of Appeal dealt with the question of cross-examination of prosecution witnesses by an accused person. It is important to quote the decision in extenso:

> **"The first such matters and which is the main one is on point of procedure which in law, we feel fundamentally prejudiced the entire case and the appellant. This is that the complainant, J.S. who was a minor was taken through *voire dire* examination and this was proper in law for whatever evidence was given on age, she was not above twelve (12) years in age. The learned trial Magistrate found as a result of *voire dire* examination that she did not know the normal duty of telling the truth and its normal consequences. She was ordered to give unsworn statement and she did so. That evidence seriously implicated the appellant, but at the end of it, for some reasons unrecorded, it was not subjected to cross-examination by the appellant who was present in court. There was no indication or any record to show that the appellant was afforded an opportunity to cross-examine this witness and no reasons were recorded as to why that procedure was not done. Unfortunately the appellant was unrepresented and clearly could not apprehend his right to cross-examine the witness. He clearly relied on the trial court which had a duty to invite him, at the end of the witnesses' evidence in chief to cross-examine the witness, which invitation did not come forth in respect of this witness. We can find no reason for this serious omission except that we think perhaps the court erroneously felt that as an accused person who gives unsworn evidence is not to be cross- examined so would any witness who gives unsworn evidence not be cross-examined. Of course that was a misapprehension of the law. An accused person who chooses to give unsworn statement in his defence does so as a result of the provisions of the Criminal Procedure Code which protect him from being cross-examined if he chooses to give unsworn statement in his defence. It must be appreciated that the accused person cannot in law be charged with the offence of perjury in respect of a statement he gives in defence of himself in a criminal case brought against him. That protection is not available to a witness in a criminal case.**
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> **Section 208 of the Criminal Procedure Code is clear on this aspect. It states:**
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> > **"208 (1) If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence (if any).**
> >
> > **(2) The accused person or his advocate may put questions to each witness produced against him.**
> >
> > **(3) <u>If the accused person does not employ an advocate, the court shall, at the dose of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any questions to that witness and shall record his answer</u>."**
>
> **(underlining supplied)**
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> **This provision is clear on the duty of the court to ensure that at the end of any evidence in chief, the accused is not only afforded opportunity to cross-examine that witness but if he is unrepresented, he is asked by the court to do so if he wishes and his answer to that question shall be recorded. The learned trial Magistrate did not do this, perhaps because he thought as we have stated that as J.S. gave unsworn evidence she would not be subjected to cross-examination. With respect he was wrong and the learned Judge of the High Court failed to note and to act on this serious failure in law.**
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> **In the case of Sula v Uganda (2001)2 EA 557The Supreme Court Uganda stated as follows:**
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> > **"Although an accused person is not liable to cross-examination if he chooses to give unsworn testimony, the law does not prohibit the cross-examination of a child witness who has not given sworn testimony because she did not understand the nature of oath. A child witness who gives evidence not on oath is liable to cross-examination to test the veracity of his/her evidence."**
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> **In Kenya, that position was taken by this court in the case of Nicholas Mutula Wambua v Republic - Criminal Appeal No. 373 of 2006 heard at Mombasa where this Court stated:**
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> > **"The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined..... it would appear that misconception arises from a view that because accused persons are not cross examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined. That thinking is expressed in Section 208 of the CPC which governs hearing of criminal proceedings in the Magistrates' courts. It provides that during the hearing, "the accused persons or his advocate may put questions to each witness produced against him."**
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> **Accordingly, all prosecution witnesses are liable to be cross-examined in order to test the credibility and the veracity of the**

witness. The trial courts should always observe that requirement of the law in all criminal trials to obviate an otherwise stable case from being lost on that omission."

This is the law. We only need to add for emphasis that the proviso to *Section 19* of the Oaths and Statutory Declarations Act, the section that gives guidance on the evidence of children of tender years states:

> **"If any child whose evidence is received under subsection (1) willfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of adult with imprisonment."**

In our view, unless such a child's evidence is subjected to cross-examination, it would be impossible to know whether the evidence he gives is false or not. This provision in our view strongly supports the law as above that *Section 208* of the Criminal Procedure Code applies to all witnesses who give evidence and is not confined to only those witnesses who give sworn evidence. It covers children giving evidence not on oath as well. Thus the learned court erred in law in failing to ask the appellant to cross-examine J.S. if he wished to do so, and the High Court erred in failing to direct its mind to that serious legal lapse. We say serious legal lapse because the conviction was based on that evidence on the main."

26. The complainant and PW2 testified on 10th December, 2015. After conducting *voir dire* examination of PW1 the trial magistrate stated that:

"This is an 8 year old girl. She understands the difference between a lie and truth. She has indicated that she doesn't want the accused to ask her questions and is hiding behind the prosecutor. She will give an unsworn statement."

27. The statement by the trial magistrate clearly shows that it was the court which denied the Appellant an opportunity to ask questions. Indeed the trial magistrate hindered instead of facilitating the Appellant's right to ask questions as was required of her by Section 208(3) of the Criminal Procedure Code.

28. In regard to PW2, the record will also show that the trial court denied the Appellant an opportunity to ask questions. The record is as follows:

"Court

The court has observed that the subject/minor understands the importance of saying the truth but however does not want to be cross-examined. Evidence will be taken without taking oath

Accused: Why shouldn't I ask questions?

Prosecutor

The witness is a minor. He has explained that he doesn't want to be asked questions.

Court

The matter will proceed with the minor giving an unsworn statement."

29. It is clear from the record that it was the trial court which denied the Appellant the opportunity of cross-examining the two witnesses whose evidence on the identification of the Appellant was crucial. It cannot therefore be said that the evidence the two children gave was **"false or not"** as per **HOW** (supra). Their evidence as recorded is therefore not of any assistance to the court.

30. Maybe if Sammy had been availed as a witness the prosecution could have made out a case against the Appellant. In the circumstances of this case no case was established against the Appellant. There was no evidence adduced to link him with the defilement of the complainant. The evidence of the minors having been rejected, there is no evidence linking the Appellant with the penetration of PW1.

31. I have agonized as to whether to remit this matter to the subordinate court for retrial. None of the parties addressed this issue in their submissions. An order for retrial should only be made in the interests of justice. Even where a conviction is quashed as a result of 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 – see **Joseph Lekulaya Lelantile & another v Republic [2002] eKLR; Criminal Appeal No. 33 of 2000 (Nyeri)**. In **HOW** (supra) where the appeal was allowed for, among other reasons, lack of cross-examination of a witness by the appellant, the Court of Appeal did not order a retrial.

32. In my view it would be prejudicial to order a retrial as the parties did not address the court on the issue. In any case, the Appellant's case was that his conviction was based on insufficient evidence. He has succeeded in convincing the court that minus the evidence of PW1 and PW2 the evidence adduced was not sufficient to lead to his conviction.

33. The outcome of this appeal is that the conviction is quashed and the sentence set aside. The Appellant is set at liberty unless otherwise lawfully held.

Dated, signed and delivered at Malindi this 25th day of October, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT