REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 33 OF 2016

HARRISON KINYUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

A. Introduction

1. The appellant was charged with three counts of defilement contrary to **Section 8(1)** as read with S**ection 8(2) of the Sexual Offences Act No. 3 of 2006** and three alternative charges of indecent acts with a child contrary to **Section 11(1) of the Sexual Offences Act No. 3 of 2006.**

2. The trial court convicted him of all the three counts and sentenced him to imprisonment for a cumulative term of 100 years.

3. In the amended memorandum of appeal, the appellant raises the following grounds;

a) ***The Learned Trial Magistrate erred in law and fact when he failed to give the accused/appellant all evidence materials and sufficient time to prepare himself for trial. In particular, he failed to do the following;***

i. ***Give the accused/appellant all the witness statements, medical records and all documentary evidence and any other material that was used by the prosecution in the criminal case.***

ii. ***He failed to give the accused/appellant sufficient time to prepare for his case and defence.***

iii. ***He failed to undertake a pre-trial to satisfy himself that the accused/appellant was ready for trial.***

b) ***The accused/appellant further wishes to state that due to the failures raised in ground one of the appeal, his constitutional rights as provided in Section 50 of the Constitution of Kenya 2010, which provides for fair trial were violated and the trial, conviction and sentence should be set aside***

c) ***The learned trial magistrate erred in law and fact and he failed to take the plea of the accused/appellant as required in law by failing to do the following;***

i. ***Failing to explain the nature, particulars and material particulars of all the charges preferred against him. The learned trial magistrate failed to appreciate the fact the charges preferred against the accused/ appellant were extremely serious and grave and the law placed upon him the duty of carefully taking the plea since the accused/appellant was not represented by counsel.***

ii. ***Failing to explain and record the answers to every element of all the charges preferred against the accused/appellant. The learned trial magistrate failed to appreciate the fact the charges preferred against the accused/appellant were extremely serious and grave and the law placed upon him the duty of carefully taking the plea, record all the answers given by the accused/appellant and accurately record such answers as stated by the accused/appellant since the accused/ appellant was not represented by counsel.***

d) ***The learned trial magistrate erred in law and fact, when he allowed consolidation of charges from files that were not disclosed to the court from the record available in which the following was illegally done: -***

i. ***The prosecution did not state which files were being consolidated.***

ii. ***The prosecution did not give any reasons for such consolidation.***

iii. ***The honourable court did not explain or seek the position of the accused/appellant before making the orders of consolidation.***

iv. ***The accused/appellant states that this consolidation without proper reasons and explanation to the accused/appellant caused extreme prejudice in the case.***

e) ***The accused/appellant wishes to consolidate all the grounds stated in his memorandum of appeal and the grounds therein particularly grounds three, four, five, six seven and eight of the memorandum filed by the appellant on the 21st day of September 2016.***

f) ***The learned trial magistrate erred in law and fact when he imposed a sentence of thirty (30) years imprisonment in count one, thirty (30) years imprisonment in count two and forty years imprisonment, all to run consecutively (total prison sentence of one hundred years) which sentence was manifestly excessive and failed to consider the matters that the accused/appellant raised in his mitigation, which were: -***

i. That the accused/appellant was a first offender.

ii.That he was aged twenty-one years.

iii. That he was not married and no children.

iv. That he was supporting his siblings.

v.That the sentence of one hundred years was manifestly excessive and considering the matters set above, the sentence simply ended his life without giving him a second chance in life.

4. I do note that the appellant put in the amended memorandum of appeal on the 1/10/2018, almost 2 months after the respondents had filed their written submissions on the 2/08/2018. However, here was no objection by the prosecution. It was agreed that the appeal be disposed of way of written submissions.

B. Appellant's Case

5. The appellant filed combined submissions on 17/10/2018 in place of the earlier ones filed on 15/10/2018.

6. On grounds number 1 and 2, It was the appellant's submission that he did not receive a fair trial and this was prejudicial to him on the basis that the consolidation of charges against the appellant was not done as required by the law and further that the appellant was not provided with some crucial documents such as P3 form and other medical records. He relied on the cases of **JOSHUA NJIRI V REPUBLIC KAJIADO Criminal Revision No. 11 of 2017, KANDA V GOVERNMENT OF MALAYSIA [1962] AC 322** and **WANJIKU V REPUBLIC [(2002] KLR 825.**

7. On grounds 3 and 4 the appellant submitted that the appellant was not granted a fair trial as the charges preferred against him were not explained effectively to him especially since the appellant was not represented by counsel and as such counsel for the appellant submitted that the appellant's plea was unequivocal. He relied on the case of **ADAN VS REPUBLIC (1973) EA, REPUBLIC VS YONASAMI EGALU & OTHERS (1965) 9 EACA 65, NJUKI V REPUBLIC** and **SUMANYA ISSAH TORR VS THE NATIONAL PARK SERVICES OF NIGERIA [2008] LT ELR 8475.**

8. On ground 5, it was the appellant's submission that there were material contradictions in the evidence of the prosecution witnesses and further that the prosecution deliberately omitted to call material witnesses. He relied on the cases of **JEREMIAH OKWUNNA OBIOHA VS REPUBLIC High Court Criminal Appeal No. 115 of 2016** and **BUKENYA VS REPUBLIC (1972) EA, 549.**

9. On ground 6, the appellant submitted that the sentence of 100 years was extremely harsh.

C. Respondent's Case

10. The respondent submitted that a prima facie case was proved as against the appellant and that the grounds of appeal were mere denials, which the court ought to dismiss. In response to the first ground of appeal, it was the respondent's submission that the appellant was convicted on the strength of evidence of 8 witnesses. The respondent relied on the case of **OKEMO VS REPUBLIC [1972] EA at Page 36.**

11. In response to ground 2 of the memorandum of appeal, the respondent submitted that the trial court in its judgement stated the basis upon which it found that a prima facie case had been established and further stated that the appellant failed to raise his complaint in cross examination and thus the trial court was not able to test the veracity of the allegation.

12. In response to grounds 3 and 4, the respondents submitted that the evidence adduced by the prosecution clearly disclosed the offence of defilement and further that the appellant failed to disclose the part of the prosecution evidence that was not proved in accordance with the law. The respondent urged the court to re-evaluate the evidence on record as enumerated in **SIMIYU & ANOR V REPUBLIC [2005] eKLR.**

13. **In response to ground 5**, the respondents submitted that it was their discretion to decide the material witnesses to call and further that they called all the crucial witnesses to prove the ingredients of defilement. They relied on the case of **BUKENYA & OTHERS V REPUBLIC EACA.**

14. **In response to ground 6**, the respondent submitted that the identification of the appellant was not disputed during the course of trial with the minors having spent considerable time with the appellant and as such there was no mistake in the identity of the accused. They relied on the cases of **WAMUNGA VS REPUBLIC [1989] KLR 426** and **R VS TURNBULL [1973] 3 ALL ER 549.**

15. **In response to ground 7,** the respondent submitted that the Criminal Procedure Code provides for variance between the evidence and the charge and the amendment of charges by the prosecution. In response to paragraph 8 it was submitted that the trial court considered the defence by the appellant in its judgement and the same was dismissed as it was unfounded and consequently the respondents prayed that the appeal be dismissed and conviction upheld.

D. Analysis of Law

16. This being a first appeal, this court is mandated to analyze and re-evaluate 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 demeanour".***

17. The starting point in my view would be to address whether the appellant's constitutional rights were infringed. The appellant contended that his rights under Article 50 were violated. That the appellant was not provided with statements and documentary exhibits that the prosecution relied upon and that the trial court failed to explain to the appellant that he had the right to be supplied with the same. He further argued that he was not given an explanation as to his right to legal representation. Further trial was not conducted.

18. The appellant said that the trial court did not conduct a pre-trial to ensure that he was ready for the hearing. I have looked at the entire record and I do not see anything to suggest that the trial was rushed. In fact, after consolidation of the charges, the trial began afresh which presented the appellant with a fresh breath to prepare for the trial or to raise an issues at hand.

19. It is my considered view that the failure to hold a formal pre-trial by the trial court caused failure of justice or prejudiced the appellant in any way.

20. On this ground, I wish to associate myself with Justice Mativo's observation in **JOSEPH NDUNGU KAGIRI VS REPUBLIC [2016] eKLR.** The Judge held:

> ***I find that failure by the prosecution to provide the accused persons with prosecution witness's statements amounted to a violation of their constitutional rights to a fair trial."***

21. It must be noted that rights go hand in hand with responsibilities. Nowhere in the court record is it revealed that the appellant asked to be supplied with the witness statements and was denied. It is unclear why the appellant did not raise the issue at the earliest instance for the court to deal with it. In the absence of such record, the appellant cannot convince this court that he was denied his right.

22. In the circumstances, I find that the appellant's constitutional right were not in any way violated. This ground fails.

23. The appellant further pleaded that there was material contradictions in evidence of the prosecution witnesses. I have looked at the testimony of the prosecution witnesses and I am convinced that they were credible witnesses as the trial magistrate stated. It is also noteworthy, especially in the instant case, that minor contradictions by themselves are not sufficient to impeach the testimonies of the prosecution witnesses.

24. In **ERICK ONYANGO ONDENG' VS REPUBLIC [2014] eKLR** the Court of Appeal stated that not every contradiction would cause the evidence of witnesses to be rejected. There would need to be more to the contradiction. The Court cited with approval the findings in Court of Appeal case **TWEHANGANE ALFRED VS UGANDA, Crim. App. No 139 of 2001, [2003] UGCA.**

25. *As noted by the Uganda Court of Appeal in* ***TWEHANGANE ALFRED VS. UGANDA, Crim. App. No 139 of 2001, [2003] UGCA, 6*** *it is not every contradiction that warrants rejection of evidence. As the court put it:*

> ***"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."***

26. I find that the contradictions pointed out by the appellant related to the reasons given to the relatives as to why the complainants went home late. These were minor and did not relate to the narrative on how the incident occurred.

27. The appellant complained that he was not informed of which files the court was consolidating. The appellant knew that he was facing three cases of defilement to which he had already taken plea.

28. These were **Embu Criminal Cases Nos. 1500,1600 and 1601 of 2015** which were later registered as **Sexual Offences Nos. 26, 27 and 28 of 2015**. The charges and the court files were not new to him.

29. It is the practice of the court to explain to an accused person of his cases upon an application to consolidate being made. If the appellant did not understand anything during consolidation, he should have asked to be explained.

30. I am of the considered view that the appellant who was aware of the two cases facing him was well aware of what transpired during consolidation.

31. The appellant further pleaded that the prosecution deliberately omitted material witnesses to cure the contradictions of some of its witnesses. I am not persuaded by this. In the case of **Criminal Appeal No. 31 of 2005 JULIUS KALEWA MUTUNGA VS REPUBLIC** *(unreported)*, the Court of Appeal held that:

> ***"As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."***

32. I am in agreement with the decision in the **Mutunga** case (supra) that this court should not interfere with the discretion of the prosecution on the number of witness to be called. The appellant alleged that the plea was not unequivocal citing the case of **Adan vs Republic** (supra).

33. The law and practice related to the taking and recording of pleas of guilt was stated in the following iconic paragraph in the decision in ***Adan v Republic [1973] EA 445* at 446**:

> ***When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts, which, if true, might raise a question as to his guilty, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, off course, be recorded.***

34. The first point for analysis is an important point of departure namely the trite law stated by the Court in ***OMBENA VS REPUBLIC [1981] KLR 450*** to the effect that whether a guilty plea is unequivocal or not depends on the circumstances of the case. Differently put, an appellate or a revising court must take the totality of circumstances into account in determining the equivocality or otherwise of a guilty plea.

35. Looking at the present appeal with this in mind, I have concluded that the guilty plea was unequivocal. The Court record is very clear that after the charges were consolidated, they were read to the appellant and explained to him in a language he said he understood being Kiswahili. This was before the trial magistrate Hon. V. O. Nyakundi.

36. Upon being required to admit or deny the charges, the appellant responded in the words "not true" and subsequently the trial court entered a plea of not guilty and proceed to hear the witnesses afresh. This is the procedure upon consolidation of charges.

37. It is not correct to say that only one charge was read to the appellant by Hon. Oigara at the initial stage. The plea in the instance case was unequivocal in my view.

38. After considering the grounds of appeal relating to conviction, I am of the considered view that the prosecution proved the offences of defilement in the three counts beyond any reasonable doubt. The convictions were supported by cogent evidence.

39. The appellant has pleaded that the sentence passed by the trial court was extremely harsh and manifestly excessive.

40. From the record, the accused faced a charge of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006 and three alternative charges of indecent acts with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.The appropriate sentence on conviction is provided in Section 8(3) of the Act to be minimum of 20 years.

41. The law requiring the power and jurisdiction for an appellate court to interfere with any sentence passed by a trial court is well stated in the case of ***OGALO S/O OWUORA [1954] 24 EACA 70.*** It is well set out that:

> ***"This court has powers to interfere with any sentence imposed by a trial court if it is evident that the trial court acted on wrong principles or over looked some material factor or the sentence is illegal or manifestly excessive or as to amount to a miscarriage of justice"***

42. I have looked at the mitigation of the appellant. He was a first offender and said he had no family and was born in 1994. Although the magistrate said he considered the mitigation, he does not seem to have done so given the sentence meted out of 100 years. The appellant is a young man and being a first offender, he ought not have been considered for the minimum sentence under Section 8(3) of the Act.

43. I take into consideration that the offences were committed in the course of the same transaction, though separate. For this and the foregoing reasons, I find that the trial magistrate left out some material factor in meting out sentence, namely, the mitigation.

44. In my view, it appropriate to reduce the sentences in each county to twenty (20) years imprisonment which I hereby do.

45. The sentences will run concurrently.

46. The sentences imposed by the trial magistrate in the three counts are hereby set aside.

47. In effect the convictions in the three counts are hereby upheld.

48. The appeal is partly successful.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF NOVEMBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for Respondent

Mr. Njiru for Appellant

Appellant in person