REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NUMBER 187 OF 2014

EDWARD MWOVE KAPILA ALIAS MKAMBA KIUNO…APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Mombasa Chief Magistrate's Court Criminal Case No. 643 of 2014, **Hon. V. Kachuodho**, **RM**)

BETWEEN

REPUBLIC.....PROSECUTOR

AND

EDWARD MWOVE KAPILA ALIAS MKAMBA KIUNO.....ACCUSED

JUDGEMENT

Introduction

1. The appellant herein, **Edward Mwove Kapila Alias Mkamba Kiuno**, was charged in the Mombasa Chief Magistrate's Court Criminal Case No. 643 of 2014 with the offence of defilement contrary to section 8(1) as read with section 8(3) of the ***Sexual Offences Act. No. 3 of 2006***. The particulars of this charge were that on 30th day of March, 2014 at Kwa Matei in Mikindani Changamwe within Mombasa County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of AR, a girl aged 12 ½ years old.

2. He also faced an alternative charge of indecent act with a child contrary to section 11(1) of the ***Sexual Offences Act. No. 3 of 2006*** in that on 30th day of March, 2014 at Kwa Matei in Mikindani Changamwe within Mombasa County, the appellant wilfully and unlawfully caused his penis to rub the vagina of AR, a girl aged 12 ½ years old.

3. After hearing, the Learned Trial Magistrate found that the element of penetration was not properly established but found that the evidence supported the alternative charge of committing an indecent act with a child.

4. Being dissatisfied with the conviction and sentence the appellant appeals against the conviction and sentence.

5. At the hearing of the case the prosecution called five witnesses.

6. After *voir dire* examination, the Court found that the complainant who testified as PW3 possessed sufficient intelligence to give evidence on oath. She was therefore sworn to do so. In her evidence, the complainant, AR, testified that she was at home when the appellant whom she called Buda called her to go and fetch water and wash his utensils for him and when she entered the appellant's house, the appellant pushed the door and when the complainant tried to scream, the appellant blocked her mouth telling her to keep quiet. According to her, the appellant's house was a one bedroomed house with a bed and a mattress, seat and utensils. The appellant then put her on the bed, pinned her there with his hands, removed her shorts since she was wearing a shirt, skirt and shorts, removed his shorts, took his *mdudu* (penis) and

inserted it in her vagina. According to the complainant, she felt pain and when the appellant was done, the complainant put on her shorts and went home. It was her evidence that this was the third time the appellant was doing the same thing to her in his house but she never told anyone what happened because the appellant threatened to kill her. However, on the day a village caught the appellant in the act, he was arrested and the complainant was taken to the hospital.

7. On 30th March, 2014, PW4, **Juma Deni Menza**, was going around the surrounding of his home when he saw the appellant who is his neighbour seated outside his door. PW4 then saw the complainant who was playing with other children trying to avoid the appellant's house. However the second time the complainant passed the appellant's door, PW4 saw the appellant giving the complainant space to knock and enter the house and the complainant entered the appellant's house. The appellant then stood from where he was sitting and entered his house after the complainant. Upon being suspicious, PW4 approached the appellant's house whose door was slightly opened as it was held by a stone and heard the complainant telling the appellant to leave her. On pushing the door and entering, PW4 found the appellant and the complainant on a bed inside a net with the appellant's short lowered. Upon asking the appellant what he was doing, the appellant started coming from the bed with liquid oozing from his penis and started putting on his short but. PW4 told him not to do so. The appellant then begged PW4 to ask for anything and the appellant would give to him. In the meantime the complainant went to a corner crying while her short was still on the bed which PW4 took, got hold of the appellant and restrained the complainant from getting out of the house. He then started shouting and **Saumu**, the sister to the complainant's mother went and PW4 told her to go and report the matter to the village elder, **Bakari**. When the elder went, PW4 informed him what had happened and they went to the AP's Camp where there is a Chief, at Mikindani. In the meantime people had gathered and they restrained them from beating up the appellant. The complainant's mother was then called as well as the Children's Officers and all of them went to Changamwe Police Station.

8. According to PW4 he knew the appellant very well and had known him for a long. According to him, the complainant disclosed that this was not the first time she was being defiled by the appellant. They later went to Coast general Hospital.

9. At the hospital, they found **Dr Lawrence Ngone**, who testified as PW1. According to him the complainant, aged 12½ years in 2014, was taken to the hospital on 30th March, 2014 with a history of habitual defilement which had taken place for a period of three months. On examination, the complainant had tender sore on public region and her hymen was not intact and she was not bleeding. She however had lacerations at the vaginal orifice and at anal opening. Vaginal swab revealed no spermatozoa though she was HIV positive. According to him, there was enough clinical evidence that the complainant had been defiled and examined on 30th March, 2014 and he assessed the degree of injury as maim, signed the P3 Form which he produced in evidence. He also confirmed that the PRC form confirmed his findings on the P3 form.

10. According to PW2, **Mwaka Bahati Mgaza**, on 30th March, 2014 she was called by her sister, **Saumu** and informed that her daughter had been defiled by the appellant, her neighbour whom she had known for a very long time. Sometimes later, she was again called by a police officer based at the Chief's Camp and was told that she was required urgently at the said Camp. When she went there she found the appellant, who had been beaten, there and she was informed that the appellant was found defiling her daughter who was also present. According to her the complainant informed her that she had been called by the appellant to his house to wash his utensils like he normally calls other children and when she entered the house the appellant entered the house, pushed the door and told her to remove her pants but on refusing to do so, covered her mouth and started defiling her. From the Chief's Camp they proceeded to Changamwe Police Station where their statements were taken and the complainant was taken to Coast General Hospital where she was given medication and the age assessment done. According to her the complainant was 12 years old. The Complainant however never revealed to her that she had been defiled though she stated that that was not the first time the appellant was defiling the complainant.

11. According to PW5, **Saumu Mgoza**, who was residing with he sister, PW2, on 30th March, 2014, he was seated at home when she heard screams coming from the house of the appellant who was their neighbour. Upon entering the appellant's house, she found PW4 in the house and saw the complainant in the bed with her pant on the bed. Though she had her skirt on, she had no pants while the appellant's short was down. After PW4 explained to her what had happened the village elder was called and thereafter they went to the Chief's Camp and she called PW2 on phone.

12. PW6, **Bakari Beja Abdalla**, the village elder was in the farm on 30th March, 2014 when he saw children going to his house running. The said children informed him that he was being called to PW2's house. Outside the appellant's house he found many people and upon entering the house, he found the appellant being held by PW4 while the appellant was holding his shorts which were lowered on his legs with his hand and sperms were still ozzing from him. PW4 was also holding the complainant's pants while the complainant was crying. Upon interrogating the complainant, the complainant informed him that the appellant called her and when she entered the house, the appellant started defiling her. When he sought the appellant's version, the appellant informed him that it was the first time he was defiling the complainant, sought for forgiveness and requested PW6 to save him from being killed by the crowd. PW6 then took the appellant to the Chief's Camp and later to Changamwe Police Station.

13. PW7, **Sgt Hellen Maloba** who was attached to Changamwe Police Station on 30th March 2014 received a phone from **Snr Sergeant Chalo** from AP Camp informing that they had brought a man who was alleged to have defiled a minor. In the company of two other officers, PW7 went to the said Camp where they found the appellant in custody and the complainant with a crowd, the Chief of the Area and the police. She then took the appellant, the complainant and the witness to Changamwe Police Station for interrogation during which the complainant informed her that the appellant called her to his house, closed the door with a stone, placed her on the bed where she defiled her. Five minutes into the act, PW4 pushed the door, found the accused on top of her, got hold of the appellant and called out for help. PW7 then told the aunt and the mother of the complainant to take her for treatment at Coast General Hospital where she was treated before the appellant was charged with the offence. The complainant was also taken for age assessment which indicated that she was 12 and ½ years. In her evidence, they did not take the appellant to the Hospital because the results of the P3 form showed that there was partial penetration.

14. At the end of the prosecution case, the appellant was placed on his defence. According to him, in the year 2005, one of his children was killed using a knife and when he went for funeral preparations, the villagers gave PW2 Kshs 9,800/= to give to him but PW2 did not give him the money. When the complainant's mother chased him from her house, he went to another house and on 24th March, 2014, he met PW2 around 12.00 noon and when he asked for his money, PW2 beat him up and took him to the Chief's Camp after which he was treated at Port

Reitz. Thereafter he was taken to Court and charged with the offence of defilement which charge he knew nothing about.

15. In cross examination he stated that whereas his son died in 2005, PW2 was a village elder in 2009 and was removed in 2009. He however did not see the money being given to PW2.

Determinations

16. I have considered the issues raised in this appeal. However, what has caused me concern is the judgement itself. Section 169(1) of the ***Criminal Procedure Code*** states as follows:

> ***Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.***

17. What was the Court's decision in this case? Before proceeding further, I must point out that the record of this appeal was not properly prepared. Neither the proceedings nor the judgement were certified. I also did not see the handwritten judgement, though it is possible that the judgement was typed by or at the direction of the Learned Trial Magistrate.

18. At page 6 of the judgement, the Learned Trial Magistrate at paragraph 2 expressed herself as hereunder:

> **"The remaining issue to be determined by this court is whether the accused was responsible for the penetration. Pw2 identified the accused person as the person who did *tabia mbaya* on her. Indeed she referred to the accused as *baba mdogo*. Pw3 testified he entered the house and caught the accused who is his cousin defiling pw2. He further stated he saw his daughter had no pants and accused zipper was open. Pw2 testified she found pw3 screaming outside the house and on inquiring why, pw3 told her to enter the house and see. She stated she entered the house and found accused putting pants back on her daughter. From the above evidence on record, the accused was therefore well known to both prosecution witnesses 1, 2 & 3 this testimony was not shaken at all on cross-examination. Thou (sic) accused in his defence states that at time of alleged incident he was in diani at family event attended by pw3. No family member was called to collaborate (sic) the same. However it is the duty of prosecution to prove its case beyond reasonable doubt, looking at the prosecution evidence, it is overwhelming, I find that the accused was placed at the scene of the crime on the date in issue and was correctly identified by PW1, PW2 and PW3. PW4 having confirmed that PW2 had been defiled, I further find all these evidences (sic) put together reinforces and corroborates the evidence of PW2.**
>
> **Thou (sic) having found earlier that the element of penetration was not properly established, the court however find the above evidence clearly supports the alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, No. 3 of 2006. And on this aspect I find that prosecution has proved their case beyond reasonable doubt. Their witness testimony was reliable and truthful, with no reason to lie against the accused person. I therefore find the accused guilty of the alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act no 3 of 2006 and do convict him of the same under section 215 CPC."**

19. By convicting the appellant on the alternative charge it presupposed that the Learned Trial Magistrate was not satisfied that the main charge had been proved. It is however clear that the contents of the said paragraphs are not supported by the proceedings. However, this was the judgement that was signed by the Learned Trial Magistrate and was incorporated in the record of appeal.

20. Surprisingly after convicting the appellant, the Court then proceeded to consider the issue of who defiled PW3, the complainant which evidence is correctly set out as per the proceedings and at the end of it the court found that the appellant defiled the complainant and that the case was proved beyond reasonable doubt and the appellant was convicted under section 215 of the CPC. That section provides that:

> ***The court having heard both the complainant and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to law, or shall acquit him.***

21. However section 169(2) of the ***Criminal Procedure Code*** provides that:

> ***In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.***

22. To my mind section 215 of the CPC is not the relevant section as the appellant was charged with an offence under the ***Sexual Offences Act*** and in that Act there is a specific conviction section. It is therefore my view that the errors contained in this judgement are those that can be cured under section 382 of the ***Criminal Procedure Code*** which provides that:

> ***Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.***

23. In my view what is before me is no judgement at all. It does not contain the actual reasons for the decision as part of it is not grounded on the evidence adduced. In this respect the Court of Appeal in **Njoroge vs. R [2002] 2 KLR 200,** dealing with section 169(1) of the ***Criminal Procedure Code,*** expressed itself as follows:

"The learned Judge's judgment clearly does not comply with the aforesaid provision. We wish to reiterate that trial courts should observe this provision scrupulously, otherwise, in an appropriate case an otherwise sound decision might be set aside."

24. There being no proper judgement what should the Court do in those circumstances? The Court of Appeal in the case of **Ahmed Sumar vs. R (1964) EALR 483** offered the following guidance:

"...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by 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... In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person."

25. The Court of Appeal likewise, while relying on **Lolimo Ekimat vs. R, Criminal Appeal No. 151 of 2004 (unreported)** had the following to say in the case of **Samuel Wahini Ngugi vs. R [2012] eKLR**:

"…the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it."

26. In **Muiruri –vs- Republic (2003), KLR, 552** and **Mwangi –Vs- Republic (1983) KLR 522 and Fatehali Maji –vs- Republic (1966) EA, 343** the view expressed was that:-

"Although some factors may be considered, such as illegalities or defects in the original trial, the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether on a proper consideration of the admissible or potentially admissible evidence a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for a retrial should only be made where the interests of justice requires it."

27. **Makhandia J.** (as he then was) in the case of **Issa Abdi Mohammed –vs – Republic [2006] eKLR** opined that:-

"An order for retrial would have been most appropriate in the circumstances of this case. To do so however, in the circumstances of this case would cause irreparable prejudice to the appellant since the prosecution may have become wiser and would wish to plug the loopholes already alluded to in this judgment. In the result there is only one channel left to this court and that is to allow the appeal, quash the conviction and set aside the sentence. The appellant may be set at liberty forthwith unless otherwise held on a lawful warrant."

28. In determining the justice of the case, it is my view that both the interests of the accused and the complainant must be taken into account. In this case the complainant was alleged to have been 12½ years old. The appellant was convicted on 24th December, 2014. From the charge sheet he was arrested on 30th March, 2014 and though he was admitted to bail pending trial, there is no evidence that he was released. Therefore he has been in custody for a period of slightly more than 4 years. He was however convicted to serve 20 years. As was appreciated by **Madan, J** (as he then was) in **Yasmin vs. Mohamed [1973] EA 370**:

"The High Court is especially endowed with the jurisdiction to safeguard the interests of infants, as the court is the parent of all infants. The welfare of the infants is paramount and it is dear to the heart of the court. There would be no better tribunal to perform the task more wisely as well as affectionately. All infants in Kenya of whatever community, tribe, sect fall within the ambit of the Guardianship of Infants Act and the court is charged with the sacred duty of ensuring that their interests remain paramount and are duly preserved."

29. See also **Omari vs. Ali [1987] KLR 616.**

30. In my view the circumstances of this case cry loudly for a retrial. If the appellant is convicted the Court will no doubt take into account the provisions of section 333(2) of the Criminal Procedure Code which provides that:

(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

31. In the premises, I allow the appeal, set aside the appellant's conviction, quash the sentence and direct that the matter be heard *de novo* before any other magistrate other than **Hon. V. Kachuodho**.

32. In conclusion, I am mindful of the sentiments of the Eastern Court of Appeal in **Shah vs. Aguto Civil Appeal [1970] EA 263** that:

> **"…the Judge was not being altogether fair to the Senior Resident Magistrate. A Resident Magistrate is usually an extremely busy man and trials before him are of a summary nature, and the law does not require him to deliver that full and detailed judgement which the Judge appears to have considered necessary. Order 20 rule 4 sets out what a judgement should contain and it appears that the Resident Magistrate sufficiently complied with requirements of this rule. The law presumes that a judge or magistrate knows the law and is always mindful of the principles of the law applying to particular case and in particular as to where the onus of proof lies. A judge or magistrate is under no duty to set out in detail all the various principles of law which he is applying except, of course, where there is any particular question of law to be decided or where there is a dispute between the parties as to what is the law in any particular matter. It is, of course, a different matter if it appears from his judgement that the Judge or magistrate has misdirected himself on any particular question of law and it is, of course, also different when a judge or magistrate has to sum up or explain the law to the assessors."**

33. However, the trial courts ought to make effort to ensure that their judgements are correct so as not to do injustice to the parties before them. In this case the error might have been avoided by simply proof reading the judgement before its delivery.

Judgement read, signed and delivered in open court at Mombasa this 17th day of December, 2018.

G V ODUNGA

JUDGE

In the presence of: