REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 43 OF 2016

ALLOYCE MUMO MWANZIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 475of 2015 in the Senior Resident Magistrate's Court at Taveta delivered by Hon W.K. Kitur (RM) on 6th May 2016)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Alloyce Mumo Mwanzia had initially been charged with the offence of defilement of a girl contrary to Section 8 (1) as read with Section 8 (4) (sic) of the Sexual Offences Act No 3 of 2006. The alternative charge was for committing an indecent act with a child contrary to 11(1) of the said Act.

2. After hearing the case, the Learned Trial Magistrate, Hon W.K. Kitur (RM) found that the Prosecution did not prove the offence of defilement against the Appellant herein and therefore acquitted him under Section 215 of the Criminal Procedure Code Cap 75 (Laws of Kenya).

3. However, the said Learned Trial Magistrate invoked the provisions of Section 179 of the Criminal Procedure Code and made a finding that the Prosecution had instead provided evidence that proved the lesser charge of kidnapping with intent to confine contrary to Section 259 of the Penal Code Cap 63 (Laws of Kenya).

4. He sentenced the Appellant to serve four (4) years imprisonment with no option of a fine. As the Appellant had already served six (6) months in remand, he directed that he serve three (3) years and six (6) months in prison.

5. The particulars of the main charge were that :-

> **"Between 2nd November 2015 and 9th November 2015 at unknown times at Chumvini Village within Taita Taveta County, intentionally and unlawfully caused your penis to penetrate the vagina of Nzisa Matheka Simbi a child aged 16 years."**
>
> **ALTERNATIVE CHARGE**
>
> **"Between 2nd November 2015 and 9th November 2015 at unknown times at Chumvini Village**

within Taita Taveta County, intentionally and unlawfully touched the vagina of Nzisa Matheka Simbi a child aged 16 years with your penis."

6. Being dissatisfied with the said judgment, on 17th November 2016, the Appellant filed a Notice of Motion application seeking leave to file an appeal out of time. The said application was allowed and the Petition of Appeal deemed to having been duly filed and served. The Grounds of Appeal were as generally follows:-

1. THAT he was an old man aged 37 years who was divorced by his wife after being accused of the offence herein.

2. THAT he was the only son and sole breadwinner of his family consisting of four (4) children and aged parents who depended on him.

3. THAT he had undergone several operations which were making it hard for him to do prison work.

4. THAT the custodial sentence of three and a half (3½) was harsh, severe and manifestly excessive and it ought to be reduced or he be given the option of a fine.

7. His Written Submissions which were written in Swahili language and which this court interpretedwere filed on16thDecember 2016. When the matter came up on 20th December 2016, he informed this court that he did not wish to respond to the State's Written Submissions that were dated and filed on 7th February 2017. Counsel for the State also asked this court to rely on its Written Submissions in their entirety. This Judgment is therefore based on the said Written Submissions by the respective parties herein.

LEGAL ANALYSIS

8. This being a first appeal, this court is mandated to analyse 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".**

9. Having looked at the Grounds of Appeal, it appeared that all the Appellant was seeking was a reduction of his custodial sentence from the three and a half (3 ½) years imprisonment to a non-custodial sentence on the ground that he was the sole breadwinner of his family and that he was unable to perform works he was being allocated at the prison due to several operations he had undergone previously.

10. However, in his Written Submissions, he appeared to have abandoned the said Grounds of Appeal and poked holes into the weight and relevance of the evidence that was adduced by the Prosecution witnesses. As he was a lay person with no legal knowledge, this court found it prudent to analyse the evidence that was adduced herein as it had at the back of its mind the provisions of Article 159(2)(d) of the Constitution that mandates courts to administer justice without undue regard to technicalities.

11. He submitted that the Complainant, Nzisa Matheka Simbi(hereinafter referred to as "PW 1") initially testified that the person who had married her was not in court and that she only changed her evidence after being placed in police custody for two (2) days. It was his contention that PW 2 gave her evidence only after being coerced by Silvester Sauti Kimariu alias Maglobe (hereinafter referred to as "PW 2") and Rose Matheka (hereinafter referred to as "PW 5"), the latter whom he said, had a grudge against him.

12. He argued that if PW 1 had lied to her mother, then she could also have adduced false testimony to the

court. He also pointed out that PW 1's evidence contradicted that of PW 5 because she told the Trial Court that was aged seventeen (17) years and was in Class Eight (8) at Njukini while PW 5 stated that she was aged sixteen (16) years and was in Class Seven (7) at Njukini.

13. He argued that it was not clear whether Nzisa Matheka Simbi, the Complainant herein was one and the same person as Nsisa Rose as had been shown in the clinic card that was produced in court to prove her age or Nsisa Metheka Sumbi who was said to have been examined at Taveta Hospital.

14. He questioned why PW 2 did not inform PW 5 that he had seen him and PW 1 at Tambarare on the Kenya- Tanzaniaborder, report to the police immediately he saw them or scream so that members of public could apprehend him. He also wondered why PW 2 who had said he took him and PW 1 to Tambarare did not inform his family members of the incident yet from his evidence and that PW 3, No 2007121912 APC Moses Amadadi (hereinafter referred to as "PW 4"), they started looking for PW 1 as from 2nd November 2015. It was his averment that PW 2 had sufficient time between 5th November 2015 and 9th November 2015 to fabricate evidence against him.

15. It was his further contention that it was difficult to tell who between PW 5 and No 88066284 APC Juma Mandani (hereinafter referred to as "PW 3") was telling the truth about when the incident was reported. He pointed out that PW 5 told the Trial Court that she reported the incident on 3rdNovember 2015 while PW 3 said that she reported the incident to him on 9th November 2015.

16. He was emphatic that there should have been an independent witness as all the Prosecution witnesses were family members. It was his averment that the failure by the Prosecution to call the village elder to whom PW 5 said she had reported the incident to testify in the case herein was fatal to its case as he could have corroborated her evidence. He asked this court to disregard the evidence of No 34054 Sergeant Simon Mathuku (hereinafter referred to as "PW 7") as his evidence was mere heresay.

17. He therefore urged this court to uphold his Appeal as the case that had been preferred against him had not been proved beyond reasonable doubt.

18. On its part, the State submitted that the *voire dire* examination was properly conducted and that although there were no other eye witnesses, PW 1's evidence that she was defiled by the Appellant herein sufficed because the same was corroborated by PW 2's and PW 6's evidence. PW 6 was Patterson Mwabulu, a Clinical Officer from Taveta Hospital.

19. It submitted that PW 1's age had been proven and referred this court to the case of **Criminal Appeal No 12 of Dominic Kimaru Tanui vs Republic** where the Court of Appeal dealt with the issue of proof of age. It also placed reliance on the case of **Aml vs Republic [2012] eKLR**on the issue of medical evidence in sexual offences.

20. It added that the Prosecution determined which witnesses to call and that failure to call the witnesses the Appellant had referred to was inconsequential. It therefore urged this court to dismiss the Appellant's Appeal as Section 8(4) of the Sexual Offences Act provided for a minimum sentence of fifteen (15) years.

21. In its Written Submission, the State argued that the offence of defilement was proved beyond reasonable doubt. It set out the evidence that had been adduced by the Prosecution witnesses in this regard. It was not clear to this court whether this was an oversight on the part of the State or it was suggesting that this court should find that the Appellant ought to have been convicted for the offence of defilement. Indeed, it never submitted on the finding of the said Learned Trial Magistrate that the Appellant was guilty of the offence of kidnapping but not that of defilement of PW 1.

22. In his Judgment, the Learned Trial Magistrate observed that PW 1 had stated that she was defiled on 2nd and 3rd November 2015 but the P3 Form that was tendered in evidence by PW 6 showed that she had been defiled on 9th November 2015, the same day she allegedly returned home. He pointed out that the initial report that had been made was that PW 1 had been kidnapped and that it was only after she

resurfaced that the allegations of defilement were preferred.

23. He added that PW 1 lied to PW 5 before she disappeared and lied to the Trial Court on 12th January 2016 when she was stood down and returned to Tanzania instead of going to Njukini to pursue her education. He said that this pointed to the complainant he was expected to believe.

24. It was his finding that PW 1 was a child and she had no consent to go to Tanzania and the Appellant never asked for permission to take her to Tanzania. It was on that basis that he found and held that the evidence that was adduced in court proved the lesser charge of kidnapping and not that of defilement.

25. A perusal of the proceedings shows that during her testimony when she first took the stand in court, PW 1 admitted to having gone to Tanzania with "somebody" who wanted to marry her but that that person was not the Appellant herein. The Prosecutor stood her down for having disowned her own statement. On 12th January 2016, she attended court and indicated that after her first appearance she went to Tanzania. She now stated that she had had a relationship with the Appellant for about three (3) months.

26. Her further evidence was that the Appellant picked her from her place on 2nd November 2015 at about 7.30 pm and took her to his farm where he asked her to stay by the river at Elerai. She said that her clothes were in a bag and that the following day, the Appellant came with PW 2 in a motor cycle and they took her to Soko Muchinja from where she trekked to Tanzania accompanied by the Appellant herein to an area called Masharti where his parents were.

27. She added that on 4th November 2015, the Appellant left her at Masharti and went to his family at Lumi. He came back the following day with his children but left for Kenya leaving her with his child called Mary. It was her testimony that the Appellant returned to Masharti on 6th November 2015 at midnight and informed her that her parents were looking for her. They left Masharti and arrived in Kenya at 5.00 am. He then left her by the river where she stayed until mid-day when she went home.

28. She said that she went to Njukini AP Camp after her neighbour called Mary told her that PW 5 had already reported the incident and found the Appellant already arrested. It was her testimony that she had sex with the Appellant in the bushes, a fact she reiterated in her Cross-examination and that he had introduced her to his parents in Tanzania as he wanted to marry her.

29. PW 2 said that he met the Appellant on 5th November 2015 and they went to get fuel for his motor vehicle. He stated that they met a young girl and gave her a lift to Tambarare in Tanzanian border. He later heard that a child had disappeared. It was then that he informed the Appellant's wife who in turn told PW 5. He did not say what it was that he informed the Appellant's wife about and what the Appellant's wife told PW 5.

30. In his Cross-examination, he stated that they picked the girl on the roadside and dropped her at the border and that no one saw them that morning. He denied ever having known the young girl before they picked her. However, this contradicted his examination-in-chief when he stated that PW 1 was a Chagaa from Tanzania and that she was his relative.

31. PW 3 said that PW 5 reported PW 1's disappearance on 9th November 2015 at his workstation at Njukini AP Post and informed him that the Appellant who had taken PW 1 had been seen. PW 2 was called to the Post and he confirmed that he was with the Appellant and PW 1 on the day she disappeared. His evidence was corroborated by PW 4.

32. PW 5's testimony was that the Appellant stayed a hundred (100) metres from her home and they were in good terms. She said that PW 1 disappeared from their home on 2nd November 2015 at about 7.30 pm and after she came from reporting to the Appellant's wife, she found PW 1's clothes, shoes and other belongings were missing. Her evidence was that the Appellant's wife then told her that the Appellant had taken PW 1 to Tanzania.

33. She said that she reported the matter at Chumvini Police Station on 3rd November 2015 and that the Appellant was arrested on 9th November 2015, the same day that PW 1 resurfaced. During her Cross-examination, she stated that she was informed of PW 1's disappearance by Charles Nambiye and Leo and emphasised that she had no intention of snatching the Appellant's land.

34. PW 6 examined PW 1 and tendered in evidence a P3 Form that was signed on 25th November 2015. On examining her, he observed that she was limping, her labia minora was tender which was evidence of a recent penetration of her genitalia and that the hymen was broken and of long standing. He never found any spermatozoa. PW 7 adduced in evidence the clinic card to show that PW 1 was aged sixteen (16) years of age as at the time of the alleged defilement.

35. In his sworn evidence, the Appellant contended that PW 5 had fabricated the charges against him following the loss of her sheep and she had never forgiven him for that. He said that he had been unwell from 28th October 2015 and only left the house on 9th November 2015 when he was arrested. In his Cross-examination, he stated that PW 2 was PW 5's brother and he had no grudge against him.

36. Right at the outset, this court wishes to point out that the Appellant completely deviated from his Grounds of Appeal as he never amended the same. He raised completely new issues in his Written Submissions. On the other hand, this court noted that the question of whether or not the *voire dire* examination of PW 1 was properly conducted though addressed by the State was not raised by the Appellant.

37. This court thus saw no value in analysing the procedure of how the *voire dire* examination was conducted as the same was not in contention herein. It did not also find the Appellant's submissions relating to the disparity of PW 1's age or her name to have been relevant in the circumstances of the case herein.

38. Indeed, PW 1's age had no bearing on the penalty of the offence of kidnapping that he had been convicted of or and the disparity in the way her names had been written in different documentation presented before court as there was a possibility that the same may have been typographical errors affected by vernacular language of the recorders of the information.

39. Turning to the more substantive issues, this court carefully analysed the evidence that was adduced by the Prosecution witnesses and found itself in agreement with the findings of the Learned Trial Magistrate that the Prosecution did not prove its case of defilement of PW 1 against the Appellant herein.

40. There were material contradictions and inconsistencies that this court found very difficult to overlook. For instance, PW 1 said that she returned home on 7th November 2015, as she had said that the Appellant took her to Kenya on the night of 6th November 2015. From her evidence, if they arrived Kenya at 5.00 am, they could only have arrived in Kenya on 7th November 2015. On the other hand, PW 5 said that she returned home on 9th November 2015. As dates and times in a trial are critical, the divergence in the evidence of when PW 1 returned to Kenya was irreconcilable. She was said to have been sixteen (16) years of age. If she was so detailed about the dates when she was in Tanzania, there was no reason why she could not be accurate about the date she returned to Kenya.

41. Going further, this court was concerned that there was a considerable gap between 7thor 9th November 2015 as had been given by PW 1 and PW 5 respectively and 23rd November 2015 when the P3 Form was completed. The question that disturbs this court's mind was whether that was proof that PW 1 had sexual contact with the Appellant as she had contended.

42. Evidently, none of the Prosecution witnesses adduced any evidence to connect the Appellant to the recent sexual activity PW 1 had engaged herself in because the hymen was broken and of long standing. Notably, the P3 Form indicated that PW 1 had had recent sexual activity. PW 6 failed to qualify what he meant by long standing.

43. It must be noted that after she testified in court the first time, PW 1 went back to Tanzania and if she returned on 7th or 9th November 2015 as she and PW 5 had alleged, there was no guarantee that she never indulged in sexual contact with a person other than the Appellant herein.

44. This court took the firm position that an assertion by a victim of defilement ought to be backed by some sort of physical examination to establish penetration with a view to sustaining a water tight case at trial. Whereas there is no window that has been imposed on a defiled person within which he or she should be examined by a medical officer, it is critical that medical examination be done at the earliest time possible not necessarily for purposes of obtaining DNA of a perpetrator but rather to observe, preserve and document all the relevant physical evidence of such defilement.

45. This is particularly critical where there are no other eye witnesses because at this point it would be the victim's word against that of a perpetrator. If such proof was not necessary, any malicious person could accuse another of such an offence on the strength of the fact that his or her assertion would be taken as the uncontroverted or gospel truth.

46. In view of the time taken between the time of alleged offence and the time PW 1 went for the P3 Form, this court was not convinced that the Prosecution had sufficiently demonstrated that indeed, PW 1's hymen was broken as a result of the Appellant's actions as she had contended.

47. This court was not therefore persuaded by the submissions by the State that PW 1's evidence was corroborated by that of PW 6. It found itself in agreement with the Learned Trial Magistrate's findings that the Prosecution did not present cogent evidence that would have proved the charge of defilement against the Appellant herein.It was for that reason that this court found the case of **Aml vs Republic** (Supra) that was relied upon by the State to have been distinguishable from the facts of this case.

48. The said Learned Trial Magistrate was therefore correct when he exercised caution in relying on PW 1's evidence to prove the case of defilement as she had lied both to PW 5 and the Trial Court. Indeed, this court found her not to have been a truthful witness so as to bring her within the ambit of the proviso toSection 124 of the Evidence Act Cap 80 (Laws of Kenya) that stipulates that:-

> **"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:**
>
> **Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."**

49. Turning to the Learned Trial Magistrate's findings on the charge of kidnapping against the Appellant herein, this court was far from impressed by the evidence that was adduced by the Prosecution witnesses as the same was inconsistent and contradictory.

50. Notably, there were material contradictions and inconsistencies between PW 1's and PW 5's evidence and that of PW 2 as regards when PW 2 left home to go to Tanzania. In her evidence, PW 1 said that the Appellant picked her up on 2nd November 2015. PW 5 corroborated her evidence. However, PW 2 said that he was with the Appellant on 5th November 2015 on his motor cycle when they dropped PW 1 at Tambarare.

51. PW 1's and PW 2's evidence regarding how PW 1 found herself at Tambarare also differed. PW 1 stated that the Appellant picked her and dropped her by the river from where he collected her the following morning. On his part, PW 2 stated that he dropped PW 1 at the border with the Appellant herein on his motor cycle.

52. Further, PW 2's and PW 5's evidence on how the Appellant's wife came into the picture differed. PW 2 said that when he heard about a missing girl, whom he had initially said he did not know prior to dropping her at the border, he informed the Appellant's wife who in turn informed PW 5. On her part, PW 5 stated that when PW 1 disappeared, she went to the Appellant's home to enquire from his wife whether she had seen PW 1.

53. It was baffling to this court why when PW 1 went missing, the first person PW 2 went to tell was the Appellant's wife. If he did not know the girl as he had contended, how then would he have known that that the Appellant's wife would inform PW 5 about the said disappearance. If this was a coincidence, then it was a very queer coincidence. It was equally baffling to this court that when PW 1 disappeared, the first person PW 5 went to ask was the Appellant's wife. Clearly, there was more than met the eye in this matter.

54. Appreciably, kidnapping connotes the taking of a person forcibly and illegally detaining such person with the intention of extorting ransom from others to secure the release of such kidnapped person. The ingredients of kidnapping can be one or a combination of more than one of the following:-

a. The person must have been taken forcibly and without their will;

b. Such person must have been illegally detained in a secret place;

c. Such person must be held captive or hostage;

d. The person who has detained such person must have the intention of confining the abducted person secretly, illegally and wrongly;

e. The person who has detained such person must want to extort monies from others to secure the release of the detained person.

55. Notably, Section 259 of the Penal Code provides as follows:-

> **"Any person who kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined is guilty of a felony and is liable to imprisonment for seven years."**

56. Having evaluated the evidence that was tendered herein, this did not appear to have been a case of kidnapping as the Learned Trial Magistrate had concluded. Indeed, PW 1 said that her clothes were in a bag and she waited for the Appellant by the river. She also allegedly stayed at the Appellant's house on her own free will. PW 5 confirmed that PW 1 had carried her clothes, shoes and other belongings on the said date. PW 2 also said how he and the Appellant herein dropped the girl at Tambarare.

57. From PW 1's, PW 2's and PW 5's evidence, there was no suggestion that the Appellant took PW 1 by force. The mere carrying of a bag with clothes showed that PW 1 accompanied whomever she accompanied on her own free will. She could have escaped from the place at the river where the Appellant allegedly told her to stay. She could also have escaped when the Appellant supposedly took her to his home in Tanzania. She had more opportunity to escape when the Appellant allegedly left her with his daughter, Mary and came to Kenya.

58. Whilst it was correct as the State submitted that the Prosecution determines the witnesses that it calls to adduce evidence, it was the view of this court that the Prosecution failed to present witnesses who would have testified as to the alleged kidnapping of PW 1. If she had been abducted as Prosecution had contended and found to have been the position by the Learned Trial Magistrate found, then this court did not discern such evidence in the proceedings of the Trial Court.

59. In the mind of this court, the Prosecution's case that PW 1 was kidnapped and/or abducted and/or unlawfully confined was not proven. In this regard this court placed reliance on the case of **Criminal**

Appeal No 31 of 2005 Julius Kalewa Mutunga v Republic(unreported) where theCourt 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".**

60. Accordingly, having carefully considered the submissions supported by the case law that was relied upon by both the Appellant and the State, the court came to the firm conclusion that the evidence that was presented in the trial court by the Prosecution was not sufficient to sustain a conviction of the Appellant on the charges of defilement or kidnapping as was envisaged by the State and the Learned Trial Magistrate.

61. It was incumbent upon the Prosecution to have adduced sufficient and cogent evidence and presented its case diligently to prove that the Appellant herein had actually committed the alleged offence as had been contended by PW 1.

62. Unfortunately, the proof that was adduced in the trial court was not to the standard required which in criminal cases, has to be beyond reasonable doubt. To this court, it did appear that the case against the Appellant herein was determined on a balance of probability.

63. Indeed, great injustice will be occasioned to the Appellant herein if this court were to uphold the conviction and sentence that was meted to the Appellant based on the evidence that was presented before the trial court. Great doubts in the mind of this court were raised as to what actually happened on the date of the alleged offence. Once doubt was case its mind, this court found and held that it would be unsafe to uphold the Appellant's sentence.

DISPOSITION

64. Although this court did not find any merit in the Appellant's Grounds of Appeal that were lodged on 17th November 2016 as they were merely mitigation grounds, it nonetheless found merit in the submissions that he made before this court regarding proof of the Prosecution's case.

65. For the foregoing reasons that raised doubts in the mind of this court, this court has no option but to give the Appellant the benefit of doubt. The conviction hereinis hereby quashed and sentence that was meted upon the Appellant by the Trial Courtset aside 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.

66. It is so ordered.

DATED and **DELIVERED** at **VOI** this **23rd** day of **March** 2017

J. KAMAU

JUDGE

In the presence of:-

Alloyce Mumo Mwanzia …….Appellant

Miss Anyumba…….for State

Josephat Mavu……. Court Clerk