REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 1 OF 2016

BENJAMIN MUKEKE MULA…….……..... APPELLANT

VERSUS

REPUBLIC…….……..……RESPONDENT

(From original conviction and sentence in Criminal Case Number 120 of 2012 in the Senior Resident Magistrate's Court at Voi delivered by Hon E. M. Kadima (RM) on 10th July 2015)

JUDGMENT

1. The Appellant herein, Benjamin Mukeke Mula, was tried and convicted by Hon E. M. Kadima, Resident Magistrate for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No 3 of 2006. He was sentenced to serve life imprisonment. He had also been charged with the alternative offence of committing indecent act with a child contrary to Section 11(1) of the said Act.

2. The particulars of the main charge were as follows:-

"On the 19th day of January 2015 at around 6.30 pm at [Particulars withheld] area within Taita Taveta County, intentionally caused your male genital organ (penis) to penetrate the female genital organ (vagina) of C T a child aged 10 years."

ALTERNATIVE CHARGE

> **"On the 19th day of January 2015 at around 6.30 pm at [Particulars withheld] area within Taita Taveta County, intentionally touched the female genital organ (vagina) of C T a child aged 10 years with your male genital organ (penis)."**

3. Being dissatisfied with the said judgment, on 25th November 2015 the Appellant filed a Notice of Motion application in **HCCRA No 65 of 2015 Voi** seeking leave to file his appeal out of time. However, this was file was closed. Subsequently, counsel for the Appellant filed another Notice of Motion application dated 7th February 2016 on 8th February 2016 in **HCCRA No 1 of 2016 Voi** which had sought the same orders. The said application was allowed and the Petition of Appeal deemed to have been duly filed and served. His Grounds of Appeal were as follows:-

> **1. THAT the Hon court erred in law and fact by holding that the prosecution had proved its case as required by the law** (sic) **proceeded to convict and sentence the appellant when there was no sufficient evidence or at all to warrant such findings.**

2. THAT the Hon court failed to consider or at all the defence by the appellant which was weighty and rebutted the weak prosecution case.

3. THAT the Hon court erred in law and fact by refusing to consider that the defence of alibi was never challenged and/or disproved by the prosecution or at all.

4. THAT the trial court erred in law and fact and misdirected itself in not taking into account the defence of alibi as demanded by the law and went on to disregard it without assigning any reasons for such rejection.

5. THAT the Hon court refused and/or failed to find the glaring contradictions, outright lies and/or lack of coraboration (sic) **by the prosecution witness and give the appellant benefit of such contradictions.**

4. The Appellant's Written Submissions were dated 5th December 2016 and filed on 6th December 2016 while those of the State were dated 6th February 2017 and filed on 7th February 2017.

5. When the matter came up on the same date 23rd February 2017, both the Appellant and the State asked the court to rely on their respective Written Submissions in their entirety, which were not highlighted. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

6. 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".**

7. Having looked at the Appellant's and State's Written Submissions, it appeared to this court that the only issue that had been placed before it for determination was whether or not the Prosecution had proved its case beyond reasonable doubt. It therefore dealt with all the Amended Grounds together as they were related.

8. The Appellant contended that the evidence of the Complainant, C T (hereinafter referred to as "PW 1"), her mother, A N (hereinafter referred to as "PW 2") and Florence Wachengu (hereinafter referred to as "PW 3") did not corroborate each other but instead it contradicted each other. He pointed out that these contradictions were glaring particularly in relation to the bloodstained bedsheet and the date when the alleged defilement was said to have occurred. He was emphatic that the said witnesses' evidence was not clear when the alleged defilement took place and the surrounding circumstances thereof.

9. He pointed out that the Learned Trial Magistrate did not warn himself on acting on uncorroborated evidence. To buttress his argument, he placed reliance on the cases of **Otili vs Republic [1992] KLR** and **Musikiri vs Republic (1987) KLR 69** where in the latter case, it was held as follows:-

"The necessity of **material corroboration of the evidence of a child of tender years is, under Section 124 of the Evidence Act (Cap 80), an indispensable condition to a conviction of a person charged with an offence."**

10. He argued that the P3 Form contained unconclusive **(sic)** and unambiguous findings which did not support the charge or at all. It was his further argument that although PW 1's hymen was not intact, that was not proof that he had penetrated her. He stated that in any event, the external genitalia were normal and no bruises or lacerations were noted. He submitted that in the absence of express evidence by Dr

Walid Marei (hereinafter referred to as "PW 4") that there was actual penetration, the offence of defilement could not be said to have been proven.

11. It was also his further contention that the Prosecution's failure to produce in evidence, the clothes PW 1 was wearing on the material date and the bedsheets that were said to have been bloodstained and to call crucial witnesses to wit, PW 1's brother who was alleged to have been sent to the shop, the village elder (Mzee wa Mtaa) and Sauti Ya Wanawake to whom PW 2 had reported the said defilement, dealt its case a fatal blow.

12. He further submitted that the Learned Trial Magistrate ignored the fact that there existed a grudge between him and PW 2 after he broke his relationship with her and that his failure to adduce a travelling ticket in his evidence was because he was ambushed during his Cross-examination. He said that this resulted in a violation of his constitutional rights to a fair hearing and which vanquished and/or weakened his defence of alibi.

13. In urging this court to allow his Appeal, he stated that the Prosecution ought to have disproved his defence of alibi when he raised it and that the Learned Trial Magistrate ought not to have shifted the burden of proving the defence of alibi on him. He referred this court to the case of **Republic vs Kirima & Another [2005] I KLR** in this regard.

14. On its part, the State submitted that in sexual offences, evidence of single witnesses was sufficient to convict accused persons. It relied on the Proviso of Section 124 of the Evidence Act Cap 80 (Laws of Kenya). The same stipulate as follows:-

> **"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.**

15. It pointed out that PW 1's identification of Appellant was by recognition evidence. It explained how the Appellant sent her brothers to buy oil whereafter he pushed her inside the house, removed his trousers and defiled her. It stated that that her brother was three (3) years and could not have been able to corroborate her evidence many months after the said defilement occurred and further that it was not necessary that DNA be conducted as was held in the case of **Criminal Appeal No 32 of 2013 Fappyton Mutuku Ngui vs Republic** (full citation not provided).

16. It was, however, categorical that her evidence was corroborated by PW 2 who found bloodstained bedsheet hidden under her bed, by PW 3 who was assisting PW 2 wash clothes and saw the said blood stained bedsheet and by PW 4 who conducted medical examination two (2) weeks after the alleged defilement and noted that her hymen was not intact. It pointed out that that was sufficient time for the bruising and lacerations to have healed.

17. It argued that the Prosecution decided the number of witnesses to prove its case and that it could not have called PW 1's brother as a witness in the case due to his tender age or the village elder and Sauti Ya Wanawake because their evidence would have been heresay. It referred this court to the case of **Julius Kalewa Mutunga vs Republic** (unreported) where it was held as follows:-

> **"" 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."

18. It said that the Appellant's defence of alibi and his assertions of an affair with PW 2 were only brought during the defence. It thus urged this court to disregard his evidence as it was unsworn and not tested through Cross-examination and that in any event, he had not demonstrated that a grudge existed between him and PW 2.

19. It also stated that an Age Assessment Report was adduced in court by PW 4 which showed that the Appellant was ten (10) years at the time of the said defilement and as a result, the sentence that was meted upon him was in accordance with Section 8(2) of the Sexual Offences Act. It therefore urged this court to dismiss the Appeal herein.

20. This court perused the proceedings in the Trial Court and noted that this was matter that came within the ambit of the proviso to Section 124 of the Evidence Act that provides that where there are no eye witnesses other than a person who has been defiled, the trial court shall receive evidence of such alleged victim, if it satisfied that such alleged victim is telling the truth. Such a trial court must record the reasons for believing that witness and not the alleged perpetrator.

21. The circumstances of the case herein were that it was PW 1's word against that of the Appellant as there were no other actual eye witnesses to the alleged incident. There was therefore the need to critically analyse her evidence as her evidence required to be corroborated by some material fact as was held in the cases of **Otili vs Republic** (Supra) and **Musikiri vs Republic** (Supra) that the Appellant had relied upon.

22. Before delving into the evidence that was adduced by the Prosecution witnesses, this noted right at the outset that the *voire dire* examination was not properly conducted. The same was conducted by the Prosecutor instead of the Learned Trial Magistrate as ought to have been the appropriate procedure. This court also noted that PW 1 adduce evidence on oath without the Learned Trial Magistrate having established that she understood the meaning of taking an oath.

23. It is abundantly clear that a child witness must indicate that he understands the importance of saying the truth and his knowledge of what an oath is before the oath is administered. Where a minor has no knowledge of what an oath is, the trial magistrate must clearly set the same out in his proceedings. It is for that reason that this court took the view that a *voire dire* examination ought to be conducted by the trial court itself. The questions such a court poses assists it in satisfying itself the level of intelligence of a child witness in adducing evidence to enable it make an informed decision as to whether such a child witness will adduce sworn or unsworn evidence.

24. Bearing in mind that the Appellant's liberty could be curtailed for the rest of his life time, the procedure for the *voire dire* examination must therefore be properly done. Indeed, the issue of adducing evidence on oath for a child witness is not a matter to be taken lightly because an accused person can be found liable of a sexual offence based on sworn evidence of such a child.

25. The importance and seriousness of a *voire dire* examination was addressed in the case of **Johnson Muiruri vs Republic [2013] eKLR** where the Court of Appeal stated as follows:-

> **"We once again with to draw attention of our courts as to the proper procedure to be followed when children are tendered as witnesses. In Peter Kariga Kiune, Criminal Appeal No 77 of 1982(unreported) we said:**
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> **"Where in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a *voire dire* examination , whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if it is the opinion of the court he is possessed of sufficient intelligence and understands the duty of talking the truth. In the latter event an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him (sec.19, Oaths and**

Statutory Declarations Act, cap 15. The Evidence Act (section 124, cap 80). It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided, and not be forced to make assumptions."…"

26Having considered the procedure that was adopted by the Learned Trial Magistrate against the backdrop of the aforesaid case and Section 19 of the Oaths and Statutory Declarations Act Cap 15 (Laws of Kenya), there was therefore no doubt in the mind of this court that the threshold of a *voire dire* examination herein was not met as had been correctly argued by the Appellant. The same fell short of the required standard.

27. Despite the aforegoing, this court also noted that the Appellant was given an opportunity to Cross-examine PW 1. He could not therefore be said to have been prejudiced by the irregular procedure that was adopted by the Learned Trail Magistrate. A re-trial would then not be suitable in the circumstances of the case herein.

28. Bearing the above into consideration, it was therefore evident that the procedure that was adopted by the Learned Trial Magistrate in conducting the *voire dire* examination was clearly irregular and would have vitiated the entire trial resulting in the court considering whether or not the matter should have been referred for a re-trial. Having said so, the Learned Trial Magistrate was required to record the reason why he believed PW 1 as the single witness. In his Judgment, the said Learned Trial Magistrate stated that PW 1 gave a graphic and sad narration of what happened to her on the material date of 19th January 2015. He added that her sworn evidence remained uncontroverted and that in his opinion, she appeared truthful and honest.

29. He also observed that the Appellant's actions of dispensing with the attendance of other children and locking the room accorded him ample opportunity to defile PW 1. It was also his conclusion that the Appellant failed to adduce the travelling tickets and that Kennedy John (hereinafter referred to as 'DW 2") was an untruthful witness and therefore treated his sworn evidence with caution.

30. Notably, the Learned Trial Magistrate made certain observations and he was well within his discretion to have done so. However, this court re-evaluated the evidence that was adduced by the Prosecution witnesses and came to a very different conclusion from his.

31. A perusal of PW 1's evidence as adduced needed to be corroborated because no other person witnessed the alleged defilement. She said that she had known the Appellant since she was a child. It was not clear from her evidence why PW 2 told her that she would give him money so that he could bring for them "sukuma, mtura and tomato" more so because she and PW 2 had testified that he was their neighbour.

32. Appreciably, as it is not strange for neighbours to assist each other in times of need, taken in isolation, this court overlooked the circumstances under which the Appellant was to take provisions to PW 2's house. However, what caught the court's eye in this piece of evidence was that PW 2 said that the Appellant was to take paraffin to her house but when she returned to her house at night, she found PW 1 and the other children in darkness. She did not mention anything about the foodstuffs PW 1 had mentioned. This was a material contradiction between PW 1's and PW 2's evidence that this court kept at the back of its mind while analysing the remainder of the evidence that was adduced herein.

33. In view of the aforesaid contradictions that this court could have ignored, it was particularly concerned about PW 1's evidence about the bloodstained bedsheet. Her testimony was that after the Appellant defiled her, she removed the bedsheet and hid it under her bed. What was puzzling to this court was why a ten (10) year old would remove a bedsheet after a violent sexual act and why the Appellant did not destroy it as it was said to have been bloodstained. However, as the world works in mysterious ways and such a scenario could have enfolded as a result of poor judgment on the part of PW 1 and the Appellant herein. This court similarly decided to put this piece of evidence at the back of its mind.

34. However, this court could not ignore the circumstances under which PW 2 came to be in possession of the said bloodstained bedsheet. This bedsheet was key to the Prosecution's case as PW 1 and PW 3 had also mentioned the same. PW 2's evidence was that the following day, which this court assumed was 20th January 2015, she found a bloodstained bedsheet under PW 1's bed as she was removing the mattress.

35. Her evidence contradicted that of PW 3 on who stated that she went to assist her to wash clothes on 19th January 2015 and that it was while "they" were washing clothes that "they" saw the bloodstained bedsheet. Clearly, the date of the washing of this bloodstained bedsheet as well as PW 3's presence at the time she was washing clothes were at variance. She said that she was washing clothes on 20th January 2015 while PW 3 stated that it was 19th January 2015. She also never mentioned of PW 3 having to come to assist her to wash clothes.

36. Notably, inconsistencies and/or contradictions in testimonies in a trial are expected because each witness will normally testify as to what he perceived and/or observed at any given time. However, these inconsistencies and/or contradictions must not be so glaring as to lead a trial court to entertain doubt as to what really transpired at any given time. The version of unfolding events must more or else be similar so as to render the inconsistencies and/or contradictions immaterial and irrelevant.

37. The fact that PW 3 went to assist her to wash clothes was a material piece of evidence that PW 2 ought not to have omitted. The omission of the same and inclusion of other facts by PW 3 led this court to find this was a glaring contradiction that it could not ignore and made it entertain doubt as to whether PW 1's, PW 2's and PW 3's evidence was really consistent, credible and cogent.

38. Going further, in her Cross-examination, PW 2 stated that she took the bedsheet to Voi Police Station but she was told to take it back. If this is what transpired but which this court found to have been highly unlikely, then the investigators failed in their duty in collecting all the evidence they could to make their case water tight.

39. This court did not find favour with the Appellant's submissions that the Village elder and the Sauti Ya Wanawake ought to have been called as witnesses but agreed with the State's submissions that their evidence would have been of little value as it would have been heresay. However, this court was concerned why the Village elder and the Sauti Ya Wanawake failed to take any action which made this court entertain doubts as to whether PW 2 really reported the matter to them or if she reported the same to them, why they did not take action when the alleged offence was a serious one.

40. Whereas this court took into account the provisions of Section 143 of the Evidence Act which stipulates that the prosecution determines the number of witnesses it calls to prove a fact and that a fact need not be proven by a particular number of witnesses, it was this court's considered opinion that Mama Bonnie was a crucial witness who should have been called to corroborate PW 1's evidence and failure to have called her greatly weakened the Prosecution's case.

41.Notably, in her evidence, PW 2's merely stated that she discovered that PW 1 had been defiled. In her Cross-examination, she said that PW 1 never told her what transpired. As PW 1 never told her what transpired but only told the details of the incident to the aforesaid Mama Bonnie.

42. Further questions were raised in the mind of this court as PW 2 testified that she reported the matter at Voi Police Station on 2nd February 2015, which was about thirteen (13) days after the alleged incident and that when she took the bloodstained bedsheet, she was told to take it back. If this is what transpired but which this court found to have been highly unlikely, then the investigators failed in their duty in collecting all the evidence that could assist the Prosecution's case by making it watertight.

43. PW 1 was also examined by PW 4 seventeen (17) days after the alleged incident. Indeed, there was no plausible reason that was proffered by the Prosecution to explain why PW 2 took such a long time to report the incident to the Police or to take PW 1 for medical examination. This piqued this court's curiosity considering that the Appellant was said to have committed such a heinous act on a child.

44. Whilst the State rightly argued that the period was long enough for bruises and lacerations in PW 1's genitalia to have healed, this court found that the same lengthy period between the date of the alleged incident and the date of examination was sufficient for this court to have entertained doubt as to whether the Appellant was responsible for the breaking of PW 1's hymen.

45. As the Appellant rightly pointed out, PW 4's evidence that PW 1's hymen was not intact was ambiguous as to whether it was torn or broken. Indeed, PW 4 did not adduce any evidence to suggest that the absence of the hymen was caused by penetration but in any event, there was no evidence that was placed before the Trial Court that linked the Appellant to the absence of PW 1's hymen.

46. Although the Appellant adduced unsworn evidence, he was under no obligation to prove his alibi when the Prosecution had not even established a *prima facie* in the first instance. In fact, this court came to the firm conclusion that the Prosecution had not met the threshold of proof in criminal cases which is proof beyond reasonable doubt due to the glaring gaps, inconsistencies and contradictions in PW 1's, PW 2's and PW 3's evidence which could be excused if each was taken in isolation of the other but could not be ignored when they were looked at and considered collectively.

47. Whilst the Prosecution adduced in evidence an Age Assessment Report contrary to what the Appellant contended, this court was of the view that having considered his Grounds of Appeal, his Written Submissions and those of the State, the Learned Trial Magistrate misdirected himself when he found that the Prosecution had proven its case beyond reasonable doubt based on the evidence that was placed before him.

48. In the circumstances foregoing, this court that all the Appellant's Grounds of Appeal were merited.

DISPOSITION

49. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 8th January 2016 was successful and same is hereby allowed. The doubts that were raised in the mind of this court led it give the Appellant benefit of doubt that led to hereby quash the conviction and set aside the sentence that was meted upon him by the Trial Court 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.

50. It is so ordered.

DATED and **DELIVERED** at **VOI** this **27th** day of **April** 2017

J. KAMAU

JUDGE

In the presence of:-

Benjamin Mukeke Mula-for Appellant

Miss Anyumba-for State

Josephat Mavu– Court Clerk