REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 1 OF 2017

JOSEPH MACHARIA NJOROGE……..…….…….APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(From original conviction and sentence in Criminal Case Number 151 of 2013 in the Senior Resident Magistrate's Court at Wundanyi delivered by Hon K. I. Orenge (SRM) on 17th July 2015)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Joseph Macharia Njoroge, was tried and convicted by Hon K.I. Orenge, Senior Resident Magistrate on two (2) Counts for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No 3 of 2006. He was sentenced to serve twenty (20) years imprisonment on each Count, which sentences were to run concurrently. He had also been charged with the alternative offences of committing indecent acts with children contrary to Section 11(1) of the said Act.

2. The particulars of the charges were as follows:-

COUNT I

"On the 28th May 2013 at [particulars withheld] area in Mwachabo Location within Taita Taveta County, intentionally and unlawfully caused his penis to penetrate the anus of J M a child aged 13 years."

ALTERNATIVE CHARGE

"On the 28th May 2013 at [particulars withheld] area in Mwachabo Location within Taita Taveta County, intentionally and unlawfully touched the anus of J M a child aged 13 years with his penis."

COUNT II

"On the 28th May 2013 at [particulars withheld] area in Mwachabo Location within Taita Taveta County, intentionally and unlawfully caused his penis to penetrate the anus of W K a child aged 13 years."

ALTERNATIVE CHARGE

"On the 28th May 2013 at [particulars withheld] area in Mwachabo Location within Taita Taveta County, intentionally and unlawfully touched the anus of W K a child aged 13 years with his penis."

3. Being dissatisfied with the said judgment, on 13th January 2017, the Appellant filed a Notice of Motion application seeking leave to file his appeal out of time. 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 prosecution did not prove its case to uphold the conviction at all.

2. THAT the prove of age and penetration did not also prove the object used, the place where it happened nor who penetrated if at all there was penetration(sic)**.**

3. THAT the Hon. Magistrate erred by not finding that the evidence of PW 1 and PW 2 had contradictions.

4. THAT the Hon. Magistrate erred by not finding that the prosecution failed by not providing the evidence/Exhibits especially the clothing(sic)**.**

5. THAT there was no scientific evidence nor (sic)**any independent evidence connecting the Appellant with any of the charges.**

6. THAT the evidence/exhibits proving the ages of the complainants was questionable as from the time the charges were being preferred to the time of judgment.

4. On 23rd February 2017, this court directed the Appellant to file his Written Submissions. Instead of doing so, on 9th March 2017, he filed the said Written Submissions along with fresh Grounds of Appeal. The Amended Grounds of Appeal were as follows:-

1. THAT the learned hon. trial magistrate erred in law and fact in convicting and sentencing him while relying on the evidence of PW 1 and PW 2 who were minors and never knew the meaning of giving evidence under oath.

2. THAT the learned hon. trial magistrate erred in law and fact in relying on the evidence of the prosecution witnesses who were not honest and truthful.

3. THAT the learned hon. trial magistrate erred in law and fact in convicting and sentencing him while relying on the alleged money that was not exhibited by the victims themselves.

4. THAT the learned hon. trial magistrate erred in law and fact in basing his conviction and sentence on the prosecution evidence without considering that the same was full of contradictions.

5. THAT the learned hon. trial magistrate erred in law and fact in basing his conviction and sentence on the medical evidence without humbly considering that the same had totally failed to prove his case beyond reasonable doubt.

6. THAT the learned hon. trial magistrate erred in law and fact in basing his conviction and sentence without humbly considering that he had bad blood with PW 3 who happened to be the sister of PW 2 one of the complainants.

7. THAT the learned hon. trial magistrate erred in law and fact in not considering his defence which he gave under oath.

5. The State was to file its Written Submissions by 30thMarch 2017. However, when the matter came up in court on 5th April 2017, counsel for the State indicated that the State had opted not to file its Written Submissions becauseit was conceding to the Appeal herein.

6. It submitted that although the evidence of the two Complainants herein, J M and W K (hereinafter referred to as "PW 1" and "PW 2" respectively), who were children aged 13 years, could corroborate each other, the truthfulness of the same could be challenged because they both adduced evidence on oath without their *voire dire* examination having been conducted.

7. It averred that there was discrepancy in their evidence as they stated that after the alleged offence, they slept at the Appellant's house. In addition, it stated that it was questionable why S M K (hereinafter referred to as "PW 3") did not report that PW 2 was missing or report to the school that she did not sleep home on the material night.

8. It also pointed out that a key witness by the name of Mary was not called to testify yet she was said to have been present when the offence was alleged to have occurred. It added that the Learned Trial Magistrate did not also properly evaluate the evidence of the Appellant's wife, Faith Macharia (hereinafter referred to as "DW 2") who had testified under oath that she was with the Appellant on the material night.

9. It was therefore its submission that the evidence that was adduced by the Prosecution witnesses was inconsistent and as a result it had been persuaded to concede to the Appeal herein.

LEGAL ANAYSIS

10. Despite the State conceding to the Appeal herein, this court found it prudent to consider if the reasons it gave for conceding to the appeal were fair and reasonable. Appreciably, an appellate court should consider the facts of a case even where the State has conceded to an appeal to establish if such a concession should be granted.

11. In the case of **Mwanguo Gwede Mwarua vs Republic [2015] eKLR,**the Court of Appeal made a similar observation when it stated as follows:-

> **"The concession notwithstanding, it is still our duty as a second appellate Court to consider the issues of law raised by the respondent as grounds for conceding the appeal in order to determine whether the said concession is merited."(*See NORMAN AMBICH MIERO & ANOTHER VS REPUBLIC, CR.APP.NO.279 OF 2005 (NYERI))."***

12. This court therefore carefully perused the proceedings of the Trial Court and noted that it was correct as the State had indicated that the Learned Trial Magistrate did not conduct a *voire dire* examination of PW 1 and PW 2 before he directed that they would adduce evidence on oath.

13. In the case of **Johnson Muiruri vs Republic [2013] eKLR**, the Court of Appeal rendered itself as follows:-

> **"We once again wish 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:**
>
> **"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."…"

14. Bearing in mind the consequences of relying on sworn evidence adduced by a child in convicting an accused person when such a child adduces evidence without confirming if he or she understands the meaning of taking an oath before he or she is sworn, this court treated PW 1's and PW 2's evidence with a lot of caution.

15. Be that as it may, it does not always follow that a convicted person will be acquitted merely because a *voire dire* examination has not been conducted or properly conducted. This is because an appellate court has the power to order that a matter be referred for re-trial. Even so, a re-trial is also not automatic.

16. A re-trial must only be ordered where no prejudice would be occasioned to an appellant or where it will not give a party seeking a re-trial a second bite at the cherry by panel beating its case to fill gaps in a fresh trial. Indeed, an appellate court will not order that a re-trial be conducted where it finds that a conviction cannot be sustained based on the evidence that is currently before it at the time of hearing and determination of an appeal.

17. In this regard, this court fully associated itself with the holdings in the cases of **Ahmedi Ali Dharamsi Sumar vs Republic [1964] E.A. 481** and re-stated in **Fatehaji Manji vs Republic [1966] E.A. 343** that Mutende and Thuranira Jaden JJ cited in the case of **Jackson Mutunga Matheka vs Republic [2015] eKLR** where it was stated as follows:-

"… a retrial will only be ordered when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence of for the purpose of enabling the prosecution 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, each case must depend on particular facts and circumstances and an order for retrial should only be made where the interest of justice required it and not ordered where it is likely to cause an injustice to the accused."

18. It was on the basis of the above holding that this court deemed it prudent to analyse the evidence on record with a view to establishing whether this matter would be ideal for a Re-trial.

19. According to PW 1, on 28th May 2013, she was in the company of PW 2 coming from school when the Appellant greeted her and pulled her into his house "at the door steps. "She said that he then pulled PW 2 into his house and locked them inside the house. PW 2 corroborated PW 1's evidence by reiterating the same facts.

20. However, this court found that both PW 1's and PW 2's evidence not to have been convincing because they were both aged thirteen (13) years at which age it was reasonable to have expected them to have raised an alarm. Indeed, PW 2 did not proffer a reasonable explanation why she could not have run away to seek help when the Appellant was said to have been pulling PW 1 into the house and sodomising her.

21. It was unclear under what circumstances both PW 1 and PW 2 found themselves in the Appellant's house. In her Cross-examination, PW 1 stated that she found the Appellant at his home. On her part, PW 2 merely stated that they met the Appellant along the way from school and he pulled them into his house.

22. Appreciably, both No 63384 Sergeant Joshua Kimeu (hereinafter referred to as "PW 6") and DW 2 stated that the Appellant's house was by the road. It was reasonable to have expected that at the time both PW 1 and PW 2 were coming from school, there would been several people at the shops and that if any one screamed for help as PW 2 had said she had done, passers-by could have assisted. Unfortunately, no

witness was called to testify that he or she saw the Appellant pull PW 1 and PW 2 into his house.

23. It was not lost to this court that the Prosecution is not required to call a particular number of witnesses to prove a fact as provided in Section 143 of the Evidence Act Cap 80 (Laws Kenya) that stipulates as follows:-

> ***"In the absence of any provision of law to the contrary, no particular number of witnesses shall be required for the proof of any fact."***

24. Be that as it may, failure to call a crucial witness can deal a fatal blow to a prosecution's case. In arriving at this conclusion, this court had due regard to the holding in the case of **Julius Kalewa Mutunga v Republic [2006] eKLR** which the Court of Appeal reiterated in **Alex Lichua Lichodo v Republic [2015] eKLR** 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".**

25. This very court made similar observations relating to calling of crucial witnesses in the case of **Paul Mwakio Mwashumbe vs Republic [2016] eKLR**, where a child witness was said to have narrated what had happened to her in the presence of her teacher. It concluded as follows:-

> **"Failure to have called the persons who interrogated PW 1 and the other children and established that PW 1 had been defiled dealt a fatal blow to the Prosecution's case."**

26. As was rightly pointed out by the State, the child called Mary, who both PW 1 and PW 2 said they were with at the material time, was a vital witness as she would have corroborated their evidence. Failure by the Prosecution to have called her as a witness weakened PW 1's and PW 2's testimony to a certain degree.

27. It was also strange that both PW 1 and PW2 could go to purchase food first thing in the morning after undergoing such a harrowing experience supposedly at the Appellant's hands the whole night. PW 1 said that she bought chapati with the sum of Kshs 700/= the Appellant allegedly gave her while PW 2 said that after the Appellant opened for them at 4.00 am, she passed by the shops and bought food at the shops.

28. Going further, it was reasonable to have expected that both PW1 and PW 2 who were both aged thirteen (13) years would have first reported their ordeal to the police or authorities immediately the Appellant released them at 4.00 am.

29. However, they did not explain or proffer any plausible explanation to show why they did not report as aforesaid choosing to go to school instead. They also failed to explain where they were between 4.00 am when the Appellant supposedly opened the door for them and the time they went to school after purchasing food at the shops.

30. PW 1's and PW 2's failure to report the alleged incident immediately they were allegedly released from the Appellant's house, their purchase of food the following morning with the money he had allegedly given them to conceal the offence, and their going to school directly from his house were was not consistent with the conduct of a person who had been sexually assaulted throughout the night.

31. It is for that reason that this court concluded it had found that the Prosecution failed to place evidence before the Trial Court to demonstrate that despite PW 1's and PW 2's screams, no one could have come to their rescue. In fact, this court found that PW 1 and PW 2 both failed to prove that the Appellant pulled them into his house and defiled them until 4.00 am as they had both contended.

32. Turning to PW 3's evidence, this court found that there was a gap in the evidence that would have

explained why she went directly to school the following morning to check on PW 2. If indeed, PW 2 was missing, she ought to have laid basis that would have explained why she went to check on PW 2 at the school first. She made it appear as though there were times that PW 2 failed to sleep at home where after she would go directly to school without first going home.

33. This court therefore agreed with the State that it was questionable why PW 3 did not report the fact of PW 2's missing on the night of 28th May 2015 raising doubt in the mind of this court as to where PW 2 really slept on the material night.

34. The evidence of S N M (hereinafter referred to as "PW 4") who was the headmaster of [particulars withheld] Primary School where PW 1 and PW 2 went to school was not of much value to this court as he relied on their evidence, which evidence this court was hesitant to accept in its entirety for the reason that it found PW 1 and PW 2 not to have been very forthright in their testimony.

35. Although this court noted the evidence of the Clinical Officer at Mwatate Sub-County Hospital Charity Mwambota (hereinafter referred to as "PW 6") that both PW 1 and PW 2 had tears in their anuses, it found that there was no evidence on record that linked the Appellant as their only assailant. Indeed, PW 3 and PW 4 did admit in their Cross-examination that there was a possibility that both PW 1 and PW 2 may have been sexually active despite them having been minors.

36. In his sworn evidence, the Appellant testified that he was at home on the material date. He stated that he had previously been in a relationship with PW 3 who he had been planning to marry her which ended after she procured an abortion. Notably, PW 1's and PW 2's testimony that the incident happened at the Appellant's home where they stayed the whole night until 4.00 am was rebutted by DW 2's sworn evidence that she never saw them in her house on the material night.

37. Although the Learned Trial Magistrate opined that DW 2 was not with the Appellant the whole day as she had gone to her shop, it was evident from PW 1's and PW 2's evidence that the sexual assault and confinement in his house was between the time they left school in the afternoon and 4.00 am when they said he released them.

38. This court was certain that the period PW 1 and PW 2 said they had spent with the Appellant was in the morning because PW 1 said that she went to school and when she was asked where she slept and she said that she had slept at the Appellant's house, a fact that PW 2 reiterated.

39. After weighing the Appellant's and DW 2's evidence that they slept in their house on the material night vis-à-vis that of PW 1 and PW 2, this court formed the opinion that there were more questions than answers that were raised from PW 1's, PW 2's and PW 3's general conduct in the matter herein. Although DW 1 was the Appellant's wife and would not have been expected to have adduced evidence that was adverse to the Appellant's interests, this court nonetheless came to the conclusion that as the Appellant's and DW 2's evidence was not rebutted, the Appellant had provided a water tight alibi.

40. Accordingly, having considered and weighed the evidence on record and the reasons the State relied upon to concede to the Appeal, this court formed the opinion that there were certain inconsistencies between PW 1's, PW 2's and PW 3's evidence that persuaded it to find that the Prosecution had not proved its case against the Appellant beyond reasonable doubt and that the Learned Trial Magistrate erred when he convicted and sentenced the Appellant based on the evidence that was adduced before him.

41. For the reason that this court also found that there were a lot of gaps in the Prosecution's case, it did not find this case to have been a suitable case to refer for a re-trial because it would be giving the Prosecution a second bite at the cherry to panel beat its case and fill in the gaps which could in turn cause great prejudice and injustice to the Appellant herein.

DISPOSITION

42. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was

lodged on 13th January 2017 was successful and there was merit in the State conceding to the said Appeal. The same is hereby allowed.

43. This court hereby quashes the conviction and sets aside the sentence that was meted upon the Appellant 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.

44. It is so ordered.

DATED and **DELIVERED** at **VOI** this **13th** day of **April** 2017

J. KAMAU

JUDGE

In the presence of:-

Joseph Macharia Njoroge - Appellant

Miss Anyumba - for State

Josephat Mavu– Court Clerk