REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 11 OF 2015

E M M..…….....APPELLANT

VERSUS

REPUBLIC……..... RESPONDENT

(From original conviction and sentence in Criminal Case Number 237 of 2013

in the Senior Resident Magistrate's Court at Wundanyi delivered by

Hon G.M. Gitonga (RM) on 14th November 2014)

JUDGMENT

INTRODUCTION

1. The Appellant herein, E M M, was charged with the offence of committing defilement contrary to Section 20(1) of the Sexual Offences Act No 3 of 2006. He had also been charged with the alternative charge of committing an indecent act with a child contrary to Sections 11(1) of the said Act. Hon G.M. Gitonga (RM) (hereinafter referred to as "the Learned Trial Magistrate") took over the matter from Hon K.I. Orenge (Ag PM) at the defence stage. He convicted the Appellant and sentenced him to serve imprisonment for life.

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

> **"On the 23rd day of June 2013 at [particulars withheld] Werugha location within Taita Taveta County being a male person caused his penis to penetrate the vagina of I M a female person who was to his knowledge his daughter.**

ALTERNATIVE CHARGE

> **"On the 23rd day of June 2013 at [particulars withheld] Werugha location within Taita Taveta County intentionally and unlawfully touched the vagina of I M M a child aged 7½ years with his penis."**

3. Being dissatisfied with the said judgment, on 26th January 2014, 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 as having been filed and served.

4. The Grounds of Appeal were as follows:-

1. THAT the trial magistrate erred in law and fact in finding his conviction and sentence without having assessed to the age of pw 1 by an independent authorized person (sic)**.**

2. THAT the trial magistrate erred in law and fact by not considering that he was not subjected to a DNA tests (sic) **which was contrary to section 36(1) of the sexual offence act No 3 of 2006.**

3. THAT the trial magistrate erred in law and fact by not considering section 109 of the evidence act (sic)**.**

4. The trial magistrate erred in law and fact by not considering that most of the witnesses were from one family.

5. On 29th November 2016, the Appellant filed his Written Submissions. His Written Submissions in response to the State's Written Submissions dated and filed on 20th December 2016 were filed on 15th February 2017. He also filed his Amended Grounds of Appeal on the said date.

6. The said Amended Grounds of Appeal were as follows:-

1. THAT the learned hon. trial magistrate erred in law and fact in basing his conviction by the prosecution without humbly considering that it was full of contradictions hence making it not credible to be relied upon.

2. THAT the learned hon. trial magistrate erred in law and fact in convicting and sentencing him without considering that the medical evidence given in court failed to prove the prosecution case.

3. THAT the learned hon. trial magistrate erred in law and fact in convicting him while relying on the age evidence by the prosecution which was not proved beyond reasonable doubt.

4. THAT the learned hon. trial magistrate erred in law and fact in convicting and sentencing him while relying on the evidence of pw 1 who appeared not to be truthful.

5. THAT the learned hon. trial magistrate erred in law and fact in convicting and sentencing him without considering that the whole trial was a mistrial since Section 200(1)(6)(3) (sic) **of the CPC was not adhered to hence a total nullity.**

6. THAT the learned hon. trial magistrate erred in law and fact in convicting and sentencing him despite the fact that there was an existing grudge between him and his wife.

7. THAT the learned hon. trial magistrate when sentencing him failed to pronounce number of years that he was supposed to serve, he never gave him a chance of mitigation and he also never gave him a chance of advising him to appeal within 14 days(sic)**.**

7. When the matter came up on 15th February 2017, the Appellant and counsel for the State informed the court that they would rely entirely on their respective Written Submissions, which were not highlighted. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

8. Being the first appellate court, this court is under a duty to re-examine the evidence that was adduced in the lower court as was held by the Court of Appeal in the case of **Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR** where it was stated 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. It did appear from the respective parties' Written Submissions that the following issues were really what had been placed before the court for its determination :-

a. Whether or not the Prosecution proved its case beyond reasonable doubt;

b. Whether or not the age of the Complainant, I M (hereinafter referred to as "PW 2) was proven;

c. Whether or not the Appellant was given an opportunity to give his mitigation;

d. Whether or not the Learned Trial Magistrate pronounced the sentence the Appellant was to serve;

e. Whether or not the Learned Trial Magistrate informed the Appellant of his right of appeal within fourteen (14) days; and

f. Whether or not the Appellant was informed of his right under the provisions of Section 200 (3) of the Criminal Procedure Code and if not, what were the consequences thereof.

10. The said issues were therefore dealt with under the following heads.

I. <u>PROOF OF PW 2's AGE</u>

11. Amended Ground of Appeal No (3) was dealt with under this head.

12. The Appellant stated that the Prosecution had not proved PW 2's age. It was his contention that the Birth Certificate showed her age as seven and a half (7 ½) years at the time of the incident while the P3 Form had indicated that she was aged seven (7) years at the said time. The State did not address itself to this argument.

13. A perusal of the proceedings showed that PW 1 adduced in evidence a Birth Certificate that showed that PW 2 was aged seven and a half (7½) years. His argument that the P3 Form indicated that she was aged seven (7) years was immaterial and irrelevant as the sentence of a person who had been convicted for the offence of defilement of a child aged upto age of eight (8) years was life imprisonment.

14. This court found no merit in the Amended Ground of Appeal No (3) and the same is hereby dismissed.

II. <u>MITIGATION, SENTENCE AND RIGHT OF APPEAL</u>

15. Amended Ground of Appeal No (7) was dealt with under this head.

16. The Appellant argued that the Learned Trial Magistrate did not disclose the number of years he was to serve and that he was not allowed to mitigate. On its part, the State submitted that although the Appellant was a first offender and the penalty for committing incest was not mandatory, it stated that the Appellant was still deserving of a retributive sentence.

17. It referred this court to Section 20(1) of the Sexual Offences Act that provides as follows:-

"Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece,

aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."

18. The Trial Magistrate found that the Appellant to have been guilty of the charge of incest by male contrary to Section 20(1) of the Sexual Offences Act and sentenced him to life imprisonment. The Appellant's arguments that the Learned Trial Magistrate did not pronounce the number of years was not clear to this court as the said Learned Trial Magistrate stated that he was to serve life imprisonment.

19. In Kenya, until the law is changed, a sentence of life imprisonment means exactly that; that a convicted person is expected to serve his sentence until he dies in prison. The said Learned Trial Magistrate did not therefore err when he sentenced the Appellant to life imprisonment without specifying the number of years he as to serve.

20. His submission that he was not allowed to mitigate was also not correct as he was given an opportunity to do so. He stated as follows:-

"I have 3 children who are being taken care of by their uncle now that I am here. Previously they depended on me."

21. While sentencing the Appellant herein, the Learned Trial Magistrate considered that the Appellant was a first offender and further explained to him that he had a right of appeal within fourteen (14) days. The Appellant's submissions that he was not explained his right of appeal or his right to mitigate were misleading to this court.

22. However, as was rightly submitted by the State, the phrase **"shall be liable to imprisonment for life"** does not, however, connote a mandatory sentence but rather a maximum sentence. This was an observation that was made by the Court of Appeal in the case of **Daniel Kyalo Muema vs Republic [2009] eKLR,** when it rendered itself as follows:-

"The last observation we want to make is that the phrase as used in Penal statutes was judicially construed by the predecessor of this Court in Opoya vs. Uganda [1967] EA 752 where the Court said at page 754 paragraph B:

"It seems to us beyond argument the words "shall be liable to" do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it".

23. The Learned Trial Magistrate thus erred when he stated that the penalty prescribed did not give him latitude to exercise mercy or that it was couched in mandatory terms or that life imprisonment was the only available sentence he could meted out on the Appellant. He had the discretion on the sentence he would have meted upon the Appellant herein.

24. The above notwithstanding, Amended Ground of Appeal No (7) was not merited and the same is hereby dismissed.

III. RIGHT TO START CASE *DE NOVO*

25. Amended Ground of Appeal No (5) was dealt with under this head.

26. It was the Appellant's submission that he was not informed of his right under the provisions of Section 200 (3) of the Criminal Procedure CodeCap 75 (Laws of Kenya). As has been stated hereinabove, this matter was heard by Hon K.I. Orenge but the Learned Trial Magistrate herein only took over to write the Judgment herein.

27. As was rightly pointed out by the Appellant, the said Learned Trial Magistrate did not comply with the provisions of Section 200(3) of the Criminal Procedure Code. If he did, then the same was not indicated in the proceedings. The said Section provides as follows:-

> **"1. Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—**
>
> > **a. deliver a judgment that has been written and signed but not delivered by his predecessor; or**
> >
> > **b. where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.**
>
> **2. Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.**
>
> **3. Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.**
>
> **4. Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."**

28. It was clear that there was a mistrial and this court ought to have ordered this matter for a re-trial. Be that as it may, it does not always follow a re-trial will be ordered merely because a trial court has not complied with the provisions of Section 200 of the Criminal Procedure Code. *e dire* examination has not been conducted or properly conducted.

29. 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.

30. 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."

31. The issue of whether or not this matter can be referred for a re-trial has been dealt with later on in the Judgment herein. All in all, this court found that there was merit in Amended Ground of Appeal No (5).

IV .PROOF OF THE PROSECUTION'S CASE

32. Having found that this court could refer this matter for a re-trial, this court ought not to have gone into the merits of the case herein. However, it deemed it fit to consider the evidence that was adduced in the Trial Court to determine if there was merit in having this matter start afresh as it had noted certain inconsistencies as will be seen hereinbelow. Amended Grounds of Appeal Nos (1), (2), (4) and (6) were dealt with together as they were all related.

33. The Appellant contended that the case herein related to a marital case between him and M M (hereinafter referred to as "PW 1") and that her evidence was that she was in Church was the beginning of her fabrication of the charges against him. He was categorical that she was not an honest and truthful witness. He questioned why she never took any action against him if indeed he had defiled PW 2 on several occasions as she had alleged. He stated that he was the one who took the issue of PW 1's accusations against him to the Village Elders.

34. He also averred that the fact that the treatment notes were made twenty five (25) days after the date of the alleged offence raised doubt as Dr Mbarak Abeid (hereinafter referred to as "PW 6") had stated that there were "parcels" of blood but the type of weapon used was not indicated in the P3 Form.

35. It was his contention that if defilement of PW 2 had gone on for a long time, then PW 1 ought to have noticed that she was in pain. He argued that even if he had threatened PW 2, the issue would still have come out. He questioned why if PW 2 had been defiled, she would go to her neighbours' place and happily play with other children.

36. He stated that the P3 Form had indicated that the incident occurred on 12th July 2013 while the OB showed that the same occurred on 14th July 2013. He also pointed out that the Treatment Notes showed that PW 2 received treatment on 10th July 2013.

37. It was his argument that the breaking of hymen was not necessarily caused by penetration but that it could also have been caused by cycling and since PW 2 had taken a shower before being taken to hospital, it rendered her evidence not credible. He also averred that the Prosecution failed to adduce in evidence PW 2's underpants and mattress which PW 1 had said were soiled.

38. On its part, the State submitted that a proper *voire dire* examination of PW 2 was conducted in line with the provisions of Section 19 of the Oaths and Statutory Declarations Act Cap 15 (Laws of Kenya) and consequently, the Learned Trial Magistrate arrived at the correct conclusion that she ought to give unsworn evidence because she did not understand the meaning of taking an oath.

39. It argued that although she was the only witness, the said Learned Trial Magistrate could rely in her evidence as a sole witness as provided for in the Proviso to Section 124 of the Evidence Act Cap 80 (Laws of Kenya). The same provides 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."

40. It was categorical that PW 2 was clear of what the Appellant had done to her as and pointed at her private parts where she said she was feeling a lot of pain. It said her evidence was corroborated by PW 1 who testified that she came from Church and when she asked PW 2 to bath, PW 2 informed her that the Appellant had already asked her to bath.

41. It added that S M M (hereinafter referred to as "PW 3") testified that on 1st July 2013, the Appellant reported to her that PW 1 was alleging that he had slept with PW 2 and that when she interrogated PW 2 on 7th July 2013, PW 2 confirmed as much.

42. It was its submission that the Appellant ought to have reported the matter of his being framed immediately and that in fact, PW 1 only reported this matter after her meeting with PW 3 otherwise she would have let it pass as she had already fled her matrimonial home to start her life afresh.

43. It also stated that PW 2's evidence was corroborated by the evidence of PW 6 who confirmed that the external genitalia and vaginal canal were inflamed and hymen perforated. However, he did not find any spermatozoa as he examined PW 2 after about nineteen (19) days from the date of the alleged incident.

44. The State relied on the provisions of Section 7 of the Evidence Act Cap 80 (Laws of Kenya) that provides as follows:-

"Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts or facts in issue, or which constitute the state of things under which they happened or which afforded an opportunity for their occurrence or transaction are relevant."

45. It was its argument that in his sworn evidence, the Appellant failed to establish any ill-motive on the part of PW 1 and PW 2 and that further he had been placed at the scene of the offence and positively identified by PW 2. It therefore urged this court to dismiss his appeal as the Prosecution had proved its case beyond reasonable doubt.

46. This court carefully perused the evidence that was adduced in the Trial Court and noted that although the PW 2 was said to have been defiled on 23rd June 2013, she was only taken to hospital on 10th July 2013. According to PW 3, as at 7th July 2013, PW 2 appeared to have been staying with PW 1. This was about fifteen (15) days after the alleged incident on 23rd June 2013. She was taken to hospital after about eighteen (18) days from the date of the alleged incident.

47. No plausible explanation was given to justify why PW 2 was not taken to hospital on the material date. Clearly, there was a huge gap in the period between when the incident was said to have occurred and when PW 2 was taken to hospital sufficient for doubt to be raised in the mind of a reasonable and prudent person as to whether or not the Appellant was the only person who would have had the opportunity to defile PW 2.

48. In his Cross-examination, PW 6 stated that he had established that PW 2 had been continuously defiled by a person known to her and that the defilement had been on- going for a long time. This court was not able to establish how he arrived at his said conclusion.

49. If indeed he noted some blood, it was not clear from his evidence whether that blood could have been present since 23rd June 2013 or it was fresh blood. This court was not therefore able to make a definite conclusion that the same was as a result of the Appellant's actions as PW 2 was said to have been staying with PW 1 as at the time of her examination.

50. Whereas PW 2 was emphatic what the Appellant did to her, her evidence was unsworn and had to be corroborated. The underpants and the bed sheets PW 1 had contended were soiled were never tendered in evidence before this court or subjected to DNA analysis to link the Appellant to the alleged act of PW 2's

defilement.

51. Indeed matters of defilement are very serious and ought not to be treated casually. The long term effects and trauma to victims and the long sentences that offenders are to serve make it imperative that proper investigations are conducted and conclusive evidence adduced in court.

52. From the aforegoing analysis, the chain of events could not be said to have been unbroken as envisaged in Section 6 of the Evidence Act was broken. The said Section provides as follows:-

> **"Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant whether they occurred at the same time and place or at different times and places."**

53. As there was unexplained delay by PW 1 in reporting the incident and that save for the perforated hymen, there were no other injuries or lacerations in PW 2's genitalia, this court was very hesitant in concluding that the Appellant actually defiled PW 2.

54. Accordingly, having considered the Appellant's Petition of Appeal and the Written Submissions the parties relied upon, this court found that there were several gaps in the Prosecution's case making a re-trial herein unsuitable as it would give the Prosecution a second bite at the cherry. In addition, it is now four (4) years since the incident occurred. It is unlikely that PW 2 would remember her evidence with clarity without being coached and that a re-trial would prejudice the interests of the Appellant.

55. Be that as it may, this court came to the conclusion that the question of referring the matter for a re-trial had already been rendered obsolete as the Appeal herein was merited in its own right. This court found and held that the Prosecution did not prove its case beyond reasonable doubt.

56. In the premises foregoing, this court found Amended Grounds of Appeal Nos (1), (2), (4) and (6) to have been merited.

DISPOSITION

57. For the foregoing reasons, the upshot of its decision was that the Appellant's Petition of Appeal that was lodged on 26th January 2014 was merited and the same is hereby upheld. 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.

58. It is so ordered.

DATED and **DELIVERED** at **VOI** this 11th day of April 2017

J. KAMAU

JUDGE

In the presence of:-

E M M - Appellant

Miss Anyumba - for State

Josephat Mavu– Court Clerk