REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 46 OF 2016

KYALO MULWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 418of 2015 in the Senior Principal Magistrate's Court at Wundanyi delivered by Hon N.N. Njagi (SPM) on 16th August 2016)

JUDGMENT

1. The Appellant herein, Kyalo Mulwa, was partly tried by Hon G.M. Gitonga, Resident Magistrate and Hon N. N. Njagi, Senior Principal Magistrate (hereinafter referred to as the Learned Trial Magistrate) 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. The Learned Trial Magistrate explained to the Appellant the provisions of Section 200(1) of the Criminal Procedure Code Cap 75 (Laws of Kenya) whereupon the Appellant informed him that he could proceed with the case from where Hon G.M Gitonga had reached.

2. The Appellant had also been charged with the alternative offence of committing indecent act with a child contrary to Section 11(1) of the said Act. Upon hearing the matter, Hon N. N. Njagi convicted and sentenced the Appellant to life imprisonment for the offence of defilement. He did not therefore make any finding in respect of the alternative charge.

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

> **"On the 25th day of August 2015 at around 1.00pm at** [particulars withheld] **within Taita Taveta County, intentionally caused his penis to penetrate the vagina of L W a child aged 8 years."**

ALTERNATIVE CHARGE

"On the 25th day of August 2015 at around 1.00pm at [particulars withheld] **within Taita Taveta County, intentionally and unlawfully touched the vagina of L W a child aged 8 years with his penis."**

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

1. THAT the learned trial magistrate erred in law and fact by convicting and sentencing him to life imprisonment without considering that the charges of defilement were not proved beyond any reasonable doubt.

2. THAT the learned trial magistrate erred in law and fact by convicting him to life imprisonment without considering that section 36(10 of the sexual offence act (sic) **was violated as there was no DNA test conducted to prove this allegation**(sic)**.**

3. THAT the learned trial magistrate erred in law and fact by convicting and sentencing him to life imprisonment without considering that the prosecution did not establish their case to the required standard of law.

4. THAT the learned trial magistrate erred in law and fact by convicting and sentencing him to life imprisonment without considering his reasonable defence statement which was not challenged by the prosecution's case.

5. On 20th December 2016, this court directed him to file his Written Submissions. He filed his Amended Grounds of Appeal on 15th December 2016 and his Written Submissions, on 7th February 2017. His response to the State's Written Submissions dated 6th March 2017 and filed on 7thMarch 2017 was filed on 21st March 2017.

6. His Amended Grounds of Appeal were as follows:-

1. THAT the learned trial magistrate erred in law and fact by relying on the evidence of PW 1 which was not proved to stand for the sentence(sic).

2. THAT the learned trial magistrate erred in law and fact by believing the evidence of the medical report relating to the broken hymen and hence penetration.

3. THAT the learned trial magistrate erred in law and fact by not considering the importance of the first offender as per the sentence.

4. THAT the learned trial magistrate erred in law and fact in believing that the prosecution had established its case beyond reasonable doubt.

5. THAT the honourable trial magistrate erred in law and fact by not considering the importance of his arresters to prove their case (sic).

7. When the matter came up on 26thApril 2017, both the Appellant and counsel for the State asked this court to rely on their respective Written Submissions in their entirety, which submissions 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 appeared from the respective parties' Written Submissions that the issue that had been placed before this court for determination was really whether or not the Prosecution had proved its case beyond

reasonable doubt. However, this court deemed it fit to address the Appeal under the separate headings shown herein below.

I. <u>PROOF OF PW 1'S AGE</u>

10. Although the Appellant's assertions that the age of the Complainant, L W (hereinafter referred to as "PW 2") was not proved was not a ground of appeal herein, this court nonetheless deemed it prudent to determine the same as he had raised the same in his Written Submissions.

11. He argued that PW 1's mother, B M M (hereinafter referred to as "PW 1") contradicted herself when she stated that PW 1 was aged seven (7) years while the Charge Sheet clearly stated that PW 1 was aged eight (8) years. He contended that since PW 1's age was not proven, it was difficult to know under which law he ought to have been convicted. He urged this court not to accept the State's argument that the same was an error in the Charge Sheet that could be cured under Section 382 of the Criminal Procedure Code for the reason that the same would be prejudicial to him.

12. On its part, the State had contended that PW 1 produced a Birth Certificate that showed that PW 1 was born on 19th November 2007 and that at the time she testified she was still seven (7) years old. It had argued that the error could be corrected under the provisions of Section 382 of the Criminal Procedure Code, which as can be seen hereinabove, the Appellant urged this court not to accept.

13. It added that in any event, the discrepancy in PW 2's age did not affect the Appellant's sentencing as Section 8(2) of the Sexual Offences Act gives an age bracket of eleven (11) years and below. The said Section provides as follows:-

> **"A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."**

14. The State was therefore correct in stating that the sentence for any person who defiles a child below eleven (11) years is only one, that of life imprisonment. It was irrespective that PW 2's was shown as eight (8) years in the Charge Sheet because the sentence of defiling a seven (7) or an eight (8) year child is the same.

15. In addition, Section 382 of the Criminal Procedure Code is clear that no finding shall be reversed on appeal on account of an irregularity in the Charge, unless such error or irregularity has occasioned injustice to the accused. The said Section provides as follows:-

> **"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:**
>
> **Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."**

16. A perusal of the Birth Certificate showed that PW 2 was born on 19th November 2007 as was pointed out by the State. This court noted that she was aged seven (7) years and nine (9) months at the time she was defiled and seven (7) years and ten (10) months of ageat the time she testified on 30th September 2015. There was therefore no error by the Prosecution in indicating that PW 2 was eight (8) years in the Charge Sheet as it had merely rounded up the figure of her age.

17. It was therefore not necessary for the Prosecution to amend the Chargeas the penalty for defiling seven (7) or eight (8) year oldsfallsunder the bracket of children below eleven (11) years which is set out

in Section 8(2) of the Sexual Offences Act. It was the opinion of this court that the Appellant herein did not therefore suffer any prejudice that would warrant this court to reverse the finding of the Learned Trial Magistrate in respect of PW 2's age.

18. It was therefore the view of this court that the Appellant did not demonstrate that he had suffered any prejudice and in the premises, his argument that his Appeal should be allowed because PW 2's age was not proved found no favour with this court.

II. *VOIRE DIRE* EXAMINATION

19. This issue was also not a Ground of Appeal. However, the Appellant raised it in his Response to the State's Written Submissions. He was emphatic that it was the responsibility of the Learned Trial Magistrate to conduct the *voire dire* examination for PW 2 and not the Prosecution.

20. The State had submitted that the Learned Trial Magistrate conducted the *voire dire* examination and observed that PW 2 appeared intelligent but she did not understand the meaning of an oath as a result of which he directed that she adduce unsworn evidence.

21. A careful perusal of the proceedings showed that it was the Learned Trial Magistrate who conducted the *voire dir*e examination of PW 2 and stated as follows:-

> **"I have observed the intended witness (PW 2)** (sic) **demeanour and the way she has answered questions I put to her. Although she is intelligible and appears clear in her mind as to the happenings around her environment, she does not seem to appreciate the importance of swearing and the solemnity of the exercise. She will give unsworn evidence."**

22. As there was no indication that the *voire dire* examination was conducted by the Prosecution as the Appellant had contended, this court found no merit in his argument whatsoever.

III. EVIDENCE OF THE PROSECUTION WITNESSES

23. This court will now turn to Amended Grounds of Appeal Nos (1), (2), (4) and (5) which were the substantive issues the Appellant had raised in his Appeal. The same were dealt with under this head as they were related.

24. The Appellant contended that PW 1 contradicted herself when at one point she said that she knew him and at another time, she said that she did not know him. He therefore urged this court not to consider her evidence as she was not a credible witness. He also stated that PW 2 had a behaviour **(sic)**of keeping quiet for some time **(sic)**in court which he said was evident that the case had been fabricated against him by PW 2's parents.

25. He further averred that the medical evidence failed to state when and how PW 2's hymen was broken. He contended that the Clinical Officer Lucy Kadzo Tuva (hereinafter referred to as "PW 4") did not even know when she did the analysis and that no evidence was adduced to show who treated PW 2. He also pointed out that the blood stained clothes were not adduced as evidence in court. He stated that girls' hymens could be broken when riding bicycles and it was not necessarily by penetration.

26. It was also his contention that the members of public who arrested him were not called as witnesses in the case herein and that it was improper for the Learned Trial Magistrate to have ignored his defence that created doubt in the Prosecution's case. He therefore submitted that it was clear from his aforesaid arguments that the Prosecution did not prove its case beyond reasonable doubt to warrant his conviction.

27. On its part, the State submitted that PW 2's evidence was corroborated by PW 1who found the Appellant in the act of defiling her. It said that PW 1 screamed attracting members of public who came and arrested the Appellant herein. Further, it stated that PW 2's evidence was also corroborated by the medical evidence that showed that she was defiled on 25th August 2015 when the incident occurred.

28. It asked this court to note that the Appellant's defence that he was found standing with PW 2 and that he failed to demonstrate that there was any existing grudge between him and the Prosecution witnesses. It was categorical that if the Appellant did not know PW 2, it was not clear under what circumstances he was then going to PW 2's house yet he had stated that PW 2 did not speak to him.

29. It said that the Appellant admitted to having been found with PW 2 but only denied having defiled her and that he was arrested after the commission of the offence. It therefore argued that calling the members of public as witnesses in this case would not have had much bearing as they did not witness the act of defilement.

30. It urged this court to consider the provisions of Section 7 of the Evidence Act Cap 80 (Laws of Kenya) which provide that:-

> **"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."**

31. A perusal of the evidence on record shows that on the material date at about 1.00pm, PW 1 was at her mother's home in [particulars withheld] when a boy called D ran towards her and told her that the Appellant was with PW 2. She left immediately with the said D who showed her where the Appellant and PW 2 had gone to. Upon reaching the bush, she saw the Appellant having sex with PW 2 who was crying, with her panty hang on a tree. She screamed and neighbours came and arrested the Appellant as he attempted to run away from the scene of crime.

32. The Appellant was beaten by members of public who arrested and took him to Mwatate Police Station. She then took PW 2 to Kambi la Punda Mwatate Sub-County Hospital for treatment. Although she had said that the Appellant was employed as a farm hand at her neighbour's house, she also stated that she did not know him prior to the incident. During her Cross-examination, she stated that she saw the Appellant for the first time at the time of the incident as she had only come to [particulars withheld] three (3) days before.

33. PW 2 testified that the Appellant, who she had not known prior to the incident herein, took her to the bush after giving the said David Kshs 10/= to go to the shop. She said that the Appellant removed her panty and placed it on a tree and that he also removed his trouser and boxer shorts. She added that he smeared saliva on her vagina and then inserted his penis in her vagina, an act she demonstrated to the Trial Court. She said she felt a lot of pain and cried whereafter PW 1 came to her rescue. She identified the panty and blood stained flowery dress that she was wearing on the material date.

34. No 92586 IP Christine Masaru (hereinafter referred to as "PW 3") testified that she interrogated PW 1 and PW 2 when they came to report the incident at Mwatate Police Station on the material date. She issued them with a P3 Form that was filled at Mwatate Hospital. She also identified the blood stained flowery dress and the panty that PW 2 had worn on that date.

35. During her Cross-examination, she confirmed that the Appellant was taken to Mwatate Police Station by members of public. She said that she did not find it necessary to conduct an Identification Parade as he was arrested by members of public.

36. PW 4 adduced in evidence the P3 Form that she signed after examining PW 2 on the material date. She observed that PW 2's dress was blood stained and soiled with sand. She noted that there was a brownish substance in PW 2's vulva, her labia majora was inflamed and hymen broken. Her evidence was that the lab tests revealed that there were spermatozoa and red blood cells. She also said that she noted that the lab test on the Appellant showed that he had sperms oozing and that he also had injuries on his chest and face.

37. In his sworn defence, the Appellant denied having defiled PW 2 or knowing her. During his Cross-examination, he admitted that he was standing with the child who was crying. He stated that he did not

talk to her at any time **(sic)** and that he was going to her home. He added that if he found a child crying, he would not just stand and do nothing. He further stated that he did nothing because he knew the child.

38. It was not clear to this court if PW 1, PW 2 and the Appellant knew each other. Their evidence on this issue was very confusing to this court as it had several contradictions. At one point during her Examination-in- chief, PW 1 said that she knew the Appellant. Later in her evidence, she said that she did not know him. In her Examination-in-chief, PW 2 said that she knew the Appellant herein but then said that her perpetrator was not in court. The Learned Trial Magistrate noted PW 2's demeanour that when she was asked whether she could remember the person who defiled her, she remained silent and then pointed at the Appellant herein.

39. In his Examination-in-chief, the Appellant referred to PW 1 by her name, M suggesting some familiarity between them. During his Cross-examination, he said that he did nothing to PW 2 as he knew her.

40. Despite the confusion on this issue, this court did not find the same to have been material as there was evidence indicating that indeed an offence was actually committed and it was immaterial if PW 1, PW 2 and the Appellant knew each other before. It was also immaterial as the Appellant contended that PW 4 could not remember the day she examined PW 2 because in her evidence, she had indicated that she examined PW 2 on 25th August 2015 which was the same date PW 2 was said to have been defiled.

41. This court perused the P3 Form and noted the observations by PW 4. PW 2's dress was said to have been blood stained and soiled with sand. The approximate age of the injuries was three and a half (3 ½) hours and probable cause of injury was penile organ. She said that an examination of the Appellant's urine showed spermatozoa were present. She referred to the Hospital Attendance Notes in respect of the Appellant were also dated 25th August 2015, the very same day PW 2 was examined which confirmed the spermatozoa.

42. Notably, it does not always automatically follow that a person found at the scene of a crime is a perpetrator of a crime. However, in this particular case, it was evident that the Appellant was the perpetrator of the offence against PW 2. He confirmed having been with PW 2 by the time of his arrest and thus squarely placed himself at the scene of crime.

43. Indeed, PW 1 caught him red handed defiling PW 2. It was day time hence the question of him not being properly identified did not arise. The prevailing lighting conditions at the time were conducive for a positive identification. There was no need for an identification parade to have been conducted because he was arrested immediately and taken to hospital where examination was conducted and spermatozoa were seen.

44. His assertions that the oozing could have been as a result of sickness was a desperate attempt to remove himself as the perpetrator of the offence. Indeed, PW 2 was also examined three and a half (3 ½) hours after the incident and spermatozoa was also seen. The Appellant's assertions that the person who treated PW 1 was not indicated were immaterial in view of the foregoing.

45. There could not therefore have any other better proof than what was adduced by the Prosecution to demonstrate that the Appellant did in fact commit the offence he had been charged with. This court therefore came to the firm conclusion that the Learned Trial Magistrate made the correct determination when he held that the evidence that had been adduced by the Prosecution was overwhelming against the Appellant herein. Indeed, this court also agreed with the Learned Trial Magistrate in finding that the Appellant's defence was a mere denial and did not displace the Prosecution's case.

46. Accordingly, having analysed the evidence that was adduced in the Trial Court, the Written Submissions by both the Appellant and the State, this court was also satisfied that the Prosecution proved its case against the Appellant herein to the required standard, the standard being proof beyond reasonable doubt. This could not be said to have been a case of evidence having been adduced by a single witness or existence of a grudge between the Appellant and the Prosecution witnesses as he had contended. PW 2's

evidence was corroborated by PW 1, PW 4 and the documentary evidence that was adduced in her respect and that of the Appellant.

47. In the premises foregoing, Amended Grounds of Appeal Nos (1), (2), (4) and (5) were not merited and the same are hereby dismissed.

IV. SENTENCING

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

49. The Appellant had contended that the sentence that was meted upon him was harsh and excessive in the circumstances of the case as it was the maximum one and thus unfair to him.

50. On its part, the State submitted that PW 2 was aged seven (7) years and although the Appellant was a first offender, Section 8(2) of the Sexual Offences Act provided for only one (1) sentence.

51. This court agreed with the State that Section 8(2) of the Sexual Offences Act under which the Appellant was convicted as PW 1 was aged seven (7) years going on to eight (8) years provides for only one (1) mandatory sentence and that is, life imprisonment. It does not give room for any sort of mitigation such as a person being a first offender because it is the minimum sentence.

52. In the circumstances foregoing, this court found Amended Ground of Appeal No (3) not to have been merited and the same is hereby dismissed.

DISPOSITION

53. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 6thSeptember 2016was not merited and same is hereby dismissed. This court hereby affirms the conviction and sentence that was meted upon the Appellant by the Trial Court as the same was lawful and warranted.

54. It is so ordered.

DATED and **DELIVERED** at **VOI** this **29TH** day of **JUNE** 2017

J. KAMAU

JUDGE

In the presence of:-

Kyalo Mulwa-Appellant

Miss Karani-for State

Josephat Mavu– Court Clerk