A REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 60 OF 2015

DARIUS NYANGE MBOGA ALIAS

LAURENT KELVIN MBOGA……..... APPELLANT

VERSUS

REPUBLIC…… RESPONDENT

(From original conviction and sentence in Criminal Case Number 184 of 2014 in the Senior Principal Magistrate's Court at Voi delivered by Hon E. M. Kadima (RM) on 20th November 2014)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Darius Nyange Mboga alias Laurent Kelvin Mboga, was convicted by Hon E.M. Kadima, Resident Magistrate to serve twenty (20) years imprisonment in respect of Count I and Count II. These offences related to the offence of attempted defilement contrary to Section 9 (1) as read with Section 9 (2) of the Sexual Offences Act No 3 of 2006.

2. The Learned Trial Magistrate, however, acquitted him on Count III which also related to the offence of attempted defilement contrary to Section 9 (1) as read with Section 9 (2) of the Sexual Offences Act and Count IV which related the offence of attempted rape contrary to Section 4 of the Sexual Offences Act. He had also been charged for the alternative offences of committing indecent acts with children and adults contrary to Section 11(1) and 11 (A) **(sic)**of the Sexual Offences Act. The Learned Trial Magistrate did make any reference to Count V herein.

3. The particulars of theCounts and the alternative charges were as follows :-

COUNT I

"On the 2nd day of March 2014 within Taita Taveta County, intentionally and unlawfully attempted to cause his penis to penetrate the anus of J M M a child aged 17 years."

ALTERNATIVE CHARGE

"On the 2nd day of March 2014 within Taita Taveta County, intentionally touched the anus of J M M a child aged 17 years with his penis."

COUNT II

"On the 2nd day of March 2014 within Taita Taveta County, intentionally and unlawfully attempted to cause his penis to penetrate the anus of K M a boy aged 16 years."

ALTERNATIVE CHARGE

COUNT III

"On the 2nd day of March 2014 within Taita Taveta County, intentionally and unlawfully attempted to cause his penis to penetrate the anus of K J J a boy aged 16 years."

ALTERNATIVE CHARGE

"On the 2nd day of March 2014 within Taita Taveta County, intentionally touched the anus of K J J a boy aged 16 years of age."

COUNT IV

"On the 2nd day of March 2014 within Taita Taveta County, intentionally and unlawfully attempted to cause his penis to penetrate the anus of A K M without his consent."

ALTERNATIVE CHARGE

"On the 2nd day of March 2014 within Taita Taveta County, intentionally touched the anus of A K M with his penis against his will."

COUNT IV

"On the 2nd day of March 2014 within Taita Taveta County, intentionally and unlawfully attempted to cause his penis to penetrate the anus of G M N without his consent."

ALTERNATIVE CHARGE

"On the 2nd day of March 2014 within Taita Taveta County, intentionally touched the anus of G M N."

4. Being dissatisfied with the judgment therein, on 9th September 2015, 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.

5. The Grounds of Appeal were as follows:-

1. THAT the magistrate erred both in law and fact in holding that he had committed the offence to the support the offence at all (sic)**.**

2. THAT the magistrate erred both in law and fact in holding that there was overwhelming evidence adduced in court to support the case yet the entire evidence was contradictory.

3. THAT the magistrate erred in law and fact in sentencing him to serve 20 years imprisonment on a charge sheet that was defective.

4. THAT the magistrate erred in law and fact in giving an excessive sentence to him (sic)**.**

5. THAT the magistrate erred in law and fact by failing to consider adequately the defence of the appeallant(sic)**.**

6. On 1st December 2016, the court directed him to file his Written Submissions. On 7thFebruary 2017, he filed his Written Submissions together with Amended Grounds of Appeal. The same were as follows:-

> **1. THAT the learned hon trial magistrate erred in law and fact in basing his conviction and sentence on the drafted charge against him which was not proper hence defective.**
>
> **2. THAT the learned hon trial magistrate erred in law and fact in convicting and sentencing him while relying on the evidence of the alleged boys who were minors and failed to apply the *voire dire* examination before giving evidence on oath.**
>
> **3. THAT the learned hon trial magistrate erred in law and fact failed to weigh the adduced evidence by the prosecution witnesses before giving him a sentence of twenty years imprisonment which was harsh to him** (sic)**.**
>
> **4. THAT the learned hon trial magistrate erred in law and fact failed to consider that it was not proper for the trial to be conducted by two magistrates without adhering to Section 200(1)(b) and (3) of the CPC.**
>
> **5. THAT the learned hon trial magistrate erred in law and fact in convicting and sentencing him without considering that the prosecution witnesses were not truthful.**
>
> **6. THAT the learned hon trial magistrate erred in law and fact in not considering his defence which had created a** (sic) **reasonable doubt to the prosecution case whereby the benefit ought to have been given to him.**

7. His Written Submissions in response to the State's Written Submissions dated 14th March 2017 and filed on 15th March 2017 were filed on 20th April 2017.

8. When the matter came up on 20th April 2017, both the Appellant and the counsel for the State requested this court to render its Judgment based on their respective Written Submissions which they would not highlight but would rely on the same in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

9. 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".**

10. It appeared from the respective parties' Written Submissions that the issues that had been placed before this court for determination were as follows:-

> **a. Whether or not the Charge Sheet was defective;**
>
> **b. Whether or not the *voire dire* examination herein was properly conducted;**
>
> **c. Whether or not the Prosecution had proved its case beyond reasonable doubt.**

11. The court therefore dealt with the said issues under the separate headings shown hereinbelow.

I. CHARGE SHEET

12. Amended Grounds of Appeal No (1) was dealt with under this head.

13. The Appellant submitted that the evidence that was adduced by the witnesses did not support the charges that had been preferred against him. His argument was that the charge indicated that he had attempted to defile the Complainants, K J, J K M, J M, J M (hereinafter referred to as "PW 1", "PW 2" and "PW 3" respectively) but the evidence that was adduced in court showed that they had been defiled. He therefore argued that the evidence on record was at variance with the evidence that was adduced by the Prosecution witnesses.

14. He further submitted that the Charge Sheet had two (2) names to wit Darius Nyange Mboga alias Laurent Mboga and Laurent Kelvin Mboga. He said that the Prosecution had an opportunity to amend the Charge Sheet but failed to do so thus rendering the trial a nullity.

15. On its part, the State stated that the Charge Sheet was clear that the names used therein showed that the Appellant was known as Darius Nyange Mboga alias Laurent Kelvin Mboga and there was thus no prejudice that was occasioned to him. It also pointed out that the Charge did not indicate that the offences occurred at the same time as it would not have been logical.

16. This court carefully analysed the evidence by the Prosecution witnesses that has been set out in detail herein below and noted that there was no evidence that PW 1, PW 2 and PW 3 were defiled. The fact that a charge is not proven by the evidence that is presented during trial does not in itself make the charge defective. In such a case, an acquittal would normally follow.

17. In the premises foregoing, this court did not see any merit in the Appellant's Amended Ground of Appeal No (1) and the same is hereby dismissed.

II. RIGHT TO START CASE *DE NOVO*

18. Amended Ground of Appeal No (4) was dealt with under this head.

19. The Appellant argued that the youth who were alleged to have arrested him were not called as witnesses in this case and urged this court to find that he had been framed for the offences.

20. As was rightly submitted by the State, Section 200 of the Criminal Procedure Code Cap 75 (Laws of Kenya) applies where evidence has been adduced before one trial magistrate and a new magistrate takes over conduct of the said matter. The Appellant's submissions in this regard were therefore misplaced.

21. In the premises foregoing, Amended Ground of Appeal No (4) was not merited and the same is hereby dismissed.

III. *VOIRE DIRE* EXAMINATION

22. Amended Ground of Appeal No (2) was dealt with under this head.

23. The Appellant argued that the Learned Trial Magistrate erred in accepting the evidence of PW 1, PW 2 and PW 3without having conducted a *voire dire* examination. He therefore urged this court not to rely on their evidence.

24. On its part, the State submitted that PW 1, PW 2 and PW 3 were aged seventeen (17), sixteen (16) and sixteen (16) years respectively and that since the Children Act provided that children of tender years were those who were aged ten (10) years and below, it was not necessary for the Learned Trial Magistrate to have conducted a *voire* d*ire* examination. It placed reliance on the case of **Patrick Kathurima vs Republic [2015] eKLR**in this regard**.**

25. It also relied on Section 19 of the Oaths and Statutory Declarations Act Cap 15 (Laws of Kenya) which stipulates as follows:-

> **"Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section."**

26. In addressing what age would be appropriate for a trial court to conduct a *voire dire* examination, this court had due regard to the case of **Maripett Loonkomok v Republic [2016] eKLR** where the Court of Appeal sitting in Mombasa found and held that children under the age of fourteen (14) ought to be taken through a *voire dire* examination. It rendered itself as follows:-

> **"…that the definition in the Children Act is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for *voir dire* examination. It follows from a long line of decisions that *voir dire* examination on children of tender years must be conducted and that failure to do so does not *per se* vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that;**
>
> ***"In appropriate case where voir dire is not conducted, but there is sufficient independent evidence to support the charge… the court may still be able to uphold the conviction.""***

27. Notably, the age at which a *voire dire* examination should be conducted depends on the circumstances of a particular case and is not cast in stone. Indeed, a child could be aged seventeen (17) years yet be of such mental incapacity that would require that a trial court to conduct a *voire dire* examination to determine if he or she should adduce sworn or unsworn evidence. The ascertainment of whether such a witness understands the meaning of taking an oath cannot be taken lightly as an accused person can be convicted on the basis of sworn evidence of such a witness.

28. Bearing the aforesaid holding in mind, this court was of the considered view that since there was no evidence that was placed before the Trial Court to demonstrate that PW 1, PW 2 and PW 3 who were above fourteen (14) years did not understand the meaning of adducing evidence on oath, the Learned Trial Magistrate did not err when he did not conduct the *voire dire* examination as the Appellant had contended. The case of **Samuel Warui vs Republic CA No 16 of 2014** that he relied upon was irrelevant in the circumstances of the case herein.

29. In this respect, this court did not find merit in Amended Ground of Appeal No (2) and the same is hereby dismissed.

IV. PROOF OF THE PROSECUTION CASE

30. Amended Grounds of Appeal Nos (5) and (6) were dealt with under this head.

31. In his evidence, PW 1 testified that on a date he could not remember but in the month of February, he left Kinango Kwale County in the company of PW 2, PW 3 and other boys and went to Voi to look for work. When they got to Voi, they met the Appellant who took them to Kaloleni to sleep. He shared the mattress with PW 2, a boy called "Kifo" and the Appellant. He said that at about 3.00 am, the Appellant

attempted to “open” his belt, evidence he reiterated in his Cross-examination.

32. His evidence was that a “Kevoli” with whom he was sharing a bed started removing his belt. He got angry and moved to the wall. He said that “Kevoli” then asked PW 2 to take his place. After PW 2 took his place, he heard him ask the Appellant why he had cut his shorts with scissors, which he said he saw him returning in a bag.

33. Notably, PW 1 did not mention the Appellant having touched his anus with his penis as had been indicated in the Charge Sheet. In fact, there was nothing in his evidence that showed that the Appellant attempted to penetrate his anus using his penis. It was also not clear how he saw the Appellant returning scissors in a bag. The question of favourable lighting conditions was critical because he said that the incident occurred at 3.00am. This court therefore took his evidence with a pinch of salt.

34. PW 2 said that they met “Kevoli” at the Bus Stage and they told him that they wanted to sell their phones so as to get accommodation. “Kevoli” dissuaded them from selling the phone. They boarded his motor cycle and went to his house where PW 1, a boy called Kifo and the Appellant shared a mattress. He said that he heard PW 1 tell the Appellant to grow up as he was removing his trousers.

35. He said “Kevoli” asked him to take PW 1’s place on the mattress. As he was sleeping, he heard “Kevoli” cut his shorts with scissors and when he asked him what he was doing, he asked him to engage in sex with him. His evidence was that in the morning, PW 1 told a “Duruma” lady what had happened and she told her landlord who in turn told a Village elder of what had transpired.

36. He said that on the second night, “Kevoli” slept with PW 3, G and “Kifo”. As he was sleeping, “Kevoli”started touching him and tried to unbuckle his trouser but he escaped and called the “Duruma” lady who called some youth who surrounded the house and beat him. He stated that they spent four (4) days at “Kevoli’s” house.

37. Although an assumption could be made on what the said “Kevoli” wanted to do, there was nothing in his evidence that showed that the Appellant attempted to penetrate PW 2 with his penis. The evidence seemed to relate more to the offence of committing an indecent act, if at all.

38. All in all, there was no plausible explanation why a sixteen (16) old boy would continue living with a potential defiler for four (4) days without escaping from the jaws of such an evil man. This court also took his evidence with a pinch of salt.

39. PW 3 testified that he met the Appellant at Equity Bank when he offered to accommodate him in his house. He said that they reached the Appellant’s house at 7.00pm aboard his motor cycle and he found other boys. One of them was called G and he was the Appellant’s brother. The other boy was the Appellant’s cousin and he told him that he had been evicted from his house due to non-payment of rent.

40. He said that the Appellant went back to town and came back at midnight. The Appellant’s cousin moved from a mattress to another mattress. The Appellant then slept on the mattress his cousin had moved from. He said he was between the Appellant and his cousin and that when he woke up, he found the buckle of his trouser had been opened and his trouser and inner wear removed. He said that he woke up and went outside. The time in the proceedings was indicated as having been 3.00pm.

41. He said that he reported the matter to the landlord/caretaker who told her to wait. He waited until 8.00pm when the Appellant came with two (2) other boys with whom he shared a bed with. He said that one of the boys moved out from the mattress and when he (PW 3) asked him what had happened, he said that the Appellant had tried to sodomise him. He (PW 3) also told him that the Appellant had also tried to do the same and requested him to report to the “Duruma lady”. The other boy told him that he had reported the matter.

42. He stated that the Village elder was told what had happened whereupon the Appellant was arrested and taken to Voi Police Station. It was his evidence that at the time of the arrested, he was with the

Appellant, his cousin, brother and two (2) boys.

43. Notably, the Learned Trial Magistrate did not appear to have been impressed with PW 3's evidence as he did not convict the Appellant on Count III which related to him. This court was also not impressed by the said evidence as it was difficult to comprehend how a sixteen (16) year old would meet a stranger in a bank and agree to go with such stranger to his house and actually live with the stranger for a week.

44. George Mwarengu (hereinafter referred to as "PW 4") stated that he used to share rent and a motorcycle with Kelvin. He stated that he started living with Kelvin in a room after his house became flooded. He said that on 5th March 2014 at around 4.00am, he was sleeping when he heard a whistle and the door being latched from outside. He said that the mob pulled him outside and asked him if he was the one and that when they asked him who was crying, he said it was Kelvin. He added that his belt was removed by Kelvin on 27th February 2014.

45. During his Cross-examination, he stated that he had lived with the Appellant for about three (3) months. He said that he was beaten together with the Appellant, A, PW 1, PW 2 and PW 3.

46. PW 4's evidence was so disjointed that it was not possible for this court to reconstruct exactly what happened. If the Appellant had tried to sodomise him on 27th February 2014, then the same did not match the Charge Sheet that had indicated that the Appellant tried to rape him on 27th February 2014. This court was therefore not surprised that the Learned Trial Magistrate did not convict the Appellant on the charge of having attempted to rape PW 4. He, however, did not give reasons why he did not convict the Appellant on that charge.

47. Jackline Kichoi (hereinafter referred to as "PW 5") stated that she was a caretaker where "Kelvin" lived as a tenant. She stated that he started bringing boys to the room from the month of March and that on 5th May 2014, one of the boys complained to her that Kelvin had snatched his phone, a fact that Zuhura Kajuma Ali (hereinafter referred to as "PW 6") alluded to in her evidence,

48. PW 5 said that the boys also told her that Kelvin had wanted to sodomise them and that she believed them. She stated that the boys slept at his house the second night as it was a trap that was hatched by PW 6. She was not a direct witness to the alleged attempted defilement as she only relied on what the boys told her.

49. In her evidence, PW 6 repeated what the boys, who had stayed at the Appellant's house for a week, told her. She was emphatic that they told her that the Appellant had sodomised them. During her Cross-examination, she clarified that he had defiled one boy whose name she could not remember.

50. Dolphine Mwazo (hereinafter referred to as "PW 7") was the Assistant Chief and merely stated that he was informed that sodomy had taken place at Mwangiwi Village. The evidence of No 51209 CPL Patrick Mwangi(hereinafter referred to as "PW 8") also reiterated the evidence of the Prosecution witnesses.

51. A careful perusal of the evidence that was adduced by the Prosecution had several gaps. PW 1, PW 2 and PW 3 did not appear to have been forthright in how they came to find themselves in the Appellant's house for over a week. It was also strange how PW 5 would have stayed with the Appellant for about three (3) months yet he had attempted to rape him.

52. Notably, their evidence lacked precise details of the dates when the alleged attempted defilement or rape occurred. This was strange as PW 1, PW 2, PW 3 and PW 4 were not children of tender years. Failure to adduce these dates led this court to infer a negative inference of their evidence and suspect that the incidents never happened at all.

53. In fact, this court was at a loss how one (1) person, the Appellant herein, had tried to sexually molest six (6) young men who were aged over sixteen (16) years on a single night without them objecting to

what he was doing. Although the State seemed to suggest that it was not logical for him to have attempted to sexually molest them on one (1) night, this court could only look for such evidence as that it was what had been contended in the Charge Sheets.

54. This court also found that the Learned Trial Magistrate misdirected himself when he relied on PW 6's testimony that the Appellant used to drug his victims and then sodomise them. This is because PW 1, PW 2, PW 3 and PW 4 never alluded in their evidence of the Appellant having drugged and sodomised them. In fact, it was consistent in all their evidence that the Appellant allegedly unbuckled their belts while they were sleeping.

55. This court was also concerned that the ages of PW 1, PW 2 and PW 3 were not proven. They merely made assertions of their ages but the no documentary evidence was adduced to prove the same. Proof of age in defilement matters is or paramount importance as the Appellant was convicted for having attempted to defile PW 1 and PW 2 who were said to have been aged seventeen (17) and sixteen (16) years respectively. Indeed, the length of a sentence is determined by the age of the victim.

56. Section 11(1) of the Sexual Offences Act provides as follows:-

> **"Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."**

57. Section 11 A of the Sexual Offences Act stipulates as follows:-

> **"Any person who commits an indecent act with an adult is guilty of an offence and liable to imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand shillings or to both."**

58. Having looked at the evidence that was adduced in the Trial Court, this court was not satisfied that the Proviso of Section 124 of the Evidence Act Cap 80 (Laws of Kenya) was applicable in the circumstances of the case as the State had contended. The said Section stipulates as follows:-

> **"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."**

59. On the other hand, this court found and held that the Prosecution did not displace the Appellant's sworn evidence that PW 1, PW 2, PW 3 and PW 4 stayed at his house as they were looking for work. Notably, he was under no obligation to fill the gaps to the Prosecution's case as he had a constitutional right to remain silent and let the Prosecution prove its case.

60. Indeed, as was stated hereinabove, the said witnesses did not proffer a plausible explanation of how they found themselves in the Appellant's house or why they could not leave the moment he started acting like he wanted to defile and/or rape them. Staying with him for a week in the case of PW 1, PW 2 and PW 3 as was stated by PW 6 and three (3) months as PW 4 testified did not make sense if the Appellant was a potential sex offender.

61. Accordingly, having analysed the evidence on record, the Written Submissions by both the Appellant and counsel for the State, this court came to the firm conclusion that in view of the fact that the evidence by the Prosecution witnesses had glaring inconsistencies and gaps and the fact that PW 1's and PW 2's ages were not proven, this court came to the conclusion that the Prosecution did not prove its case beyond reasonable doubt.

62. Indeed, in the absence of proof of PW 1's and PW 2's ages, this court could not conclusively determine under which Section of the Sexual Offences Act the Appellant would have been charged and

convicted, if it had found his guilty of the charges that had been preferred against him.

63. In addition, in the absence of any specific dates, this court also found and held that the Prosecution did not adduce evidence to proof that the Appellant attempted to defile PW 1, PW 2, PW 3 and PW 4 on 2nd March 2014. It was not realistic that the Appellant could have tried to commit the offences on six (6) victims who were above sixteen (16) years on one (1) night without any of them raising an alarm.

64. The evidence that they reported to PW 6 also piqued this court's curiosity as there was no explanation why they did not report the matter to the police. Setting up a trap as PW 6 averred did not yield any concrete evidence as there was no actual penetration.

DISPOSITION

65. The Learned Trial Magistrate did not address his mind to the alternative charges, an issue that he ought not to have left hanging with no determination. It is important that trial courts pronounce themselves on pending charges for completeness of record and to avoid ambiguity to accused persons on what the fate of such charges against them are.

66. From the evidence that was adduced during the Trial, there was no indication of the Appellant having attempted to defile PW 1 and PW 2 with his penis. What was alleged to have occurred, if at all, was the unbuckling of belts which this court nonetheless found to have been far- fetched. There also seemed to have been some sort of blood relationship between the Appellant and the boys who were living in the house according to PW 3's evidence and they seemed to stay in the Appellant's house as they did not have accommodation, a fact that PW 1 and PW 2 did not allude to.

67. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 9th September 2015 was successful. In view of the doubt that was created in its mind, 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.

68. It is so ordered.

DATED and **DELIVERED** at **VOI** this **22ND** day of **JUNE** 2017

J. KAMAU

JUDGE

In the presence of:-

Darius Nyange Mboga alias Laurent Kelvin Mboga - Appellant

Miss Karani - for State

Josephat Mavu – Court Clerk