REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 63 OF 2015

MJOMBA DAMAS……..……...APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

(From original conviction and sentence in Criminal Case Number 74 of 2014 in the Senior Resident's Magistrate's Court at Wundanyi delivered by Hon G. M. Gitonga (RM) on 13th March 2015)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Mjomba Damas, was tried and convicted by Hon G.M. Gitonga, Resident Magistrate for the offence of committing an indecent act contrary to Section 11(1) of the Sexual Offences Act No 3 of 2006. He was sentenced to serve ten (10) years' imprisonment.

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

> **"On the 16thday of February 2014 at around 4.00 pm at [Particulars Withheld] Village in [particulars withheld] Location within Taita Taveta County, intentionally and unlawfully touched the breasts of PMR a child aged 14 years with his hands."**

3. Being dissatisfied with the judgment therein, on 25th November 2015, the Appellant filed a Notice of Motion application seeking leave to file an appeal out of time. The said application was allowed and the Petition of Appeal was deemed to have been duly filed and served. His Grounds of Appeal were as follows:-

> **1. THAT he was too remorseful.**
>
> **2. THAT he was kindly begging for leniency despite the offence** (sic)**.**
>
> **3. THAT he was praying that the Hon. High Court consider his state of health and he suffered from gastro infection, ulcers and dilapidating (heart problem) comparison to 10 years sentenced**(sic)**.**

4. On 1st December 2016, this court directed him to file his Written Submissions. On 22nd February 2016, he filed Amended Grounds of Appeal along with his Written Submissions. The Amended Grounds of Appeal were as follows:-

1. THAT the trial magistrate erred in law and fact to consider (sic) **that no genuine certified copy of the Birth Certificate or a copy of the Age Assessment Report w produced as an Exhibit to prove the exact age of the Complainant (PW 1) at the time of the commission of the offence.**

2. THAT the trial magistrate erred in law and fact by failing to consider that no investigation was conducted by the police before presenting the case in court.

3. THAT the magistrate erred in law and fact in convicting by failing to consider that the confession made in evidence by (PW 2) (sic) **was inadmissible in evidence and for it being part of the adduced evidence it could not be exponged (sic) from these** (sic) **evidence.**

4. THAT the trial magistrate erred in law and fact in convicting by failing to consider that the conviction and sentence was founded on hearsay evidence by (PW 2) (sic) **in criminal proceedings.**

5. THAT the trial magistrate erred in law and fact by failing to consider his defence.

5. The State's Written Submissions were dated 14th March and filed on 15th March 2017. The Appellant's Further Submissions in response to the said State's Written Submissions were filed on 28th April 2017.

6. When the matter was mentioned on 20th April 2017, both the Appellant and counsel for the State informed this court that they would not highlight their respective Written Submissions but that they would rely on the same in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

7. As can be seen from the initial Mitigation Grounds of Appeal, the Appellant appeared to have admitted to having committed the offence that he was charged with as he was pleading for leniency from this court. Ordinarily, no value then would be added in analysing the evidence that was adduced during trial. However, in the interests of justice, this court deemed it prudent to consider the Appellant's Amended Grounds of Appeal because he did not have any legal representation at the time of trial and at the appeal stage.

8. Accordingly, 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 before this court for determination was really whether or not the Prosecution had proved its case beyond reasonable doubt.

10. However, this court deemed it fit to address the Amended Grounds of Appeal under the separate headings shown hereinbelow.

***I. VOIRE DIRE* EXAMINATION**

11. This was not a Ground of Appeal. However, the Appellant raised it in his Response to the State's Written Submissions. It pointed out that the State had conceded that the Learned Trial Magistrate erred when he failed to conduct a *voire dire* examination for PW 1 and PW 4. It placed reliance on the case of

Criminal Appeal No 16 of 2014 Samuel Warui Karimi vs Republic Nyeri where the Court of Appeal stated as follows:-

> **"The counsel for the State readily conceded that an essential step in taking evidence from a child witness was not followed in this matter as the complainant was not subjected to a voire dire examination."**

12. On its part, the State submitted that although the Learned Trial Magistrate erred by not conducting a *voire dire* examination in respect of PW 1 and PW 4, the same did not affect credibility of their evidence as the Appellant was allowed to Cross-examine them.

13. Section 19 of the Oaths and Statutory Declarations Act Cap 15 (Laws of Kenya) 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."**

14. 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.""***

15. 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.

16. Bearing the aforesaid holding in mind, this court was of the considered view that the Learned Trial Magistrate erred and ought to have conducted a *voire dire* examination in respect of PW 1 and PW 4 who were aged thirteen (13) and ten (10) years respectively.

17. Having said so, 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.

18. 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.

19. 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."**

20. It was on the basis of the above holding that this court deemed it prudent to analyse the evidence that was adduced in the Trial Court with a view to establishing whether or not this matter would be suitable for a Re-trial. The analysis of this evidence was also critical because there were other witnesses who testified and the Appellant's conviction was not merely based on the evidence of the said child witnesses.

II. PROOF OF PW 1'S AGE

21. Amended Ground of Appeal No (1) was dealt with under this head.

22. The Appellant contended that the Birth Certificate was not genuine as some information appeared to have been superimposed and other information was omitted. He pointed out that the words **"CERTIFICATE OF BIRTH"** should have been followed with [particulars withheld] of the same font. He also stated that the signature of the District Registrar of Births , Z. S. Mabita was different from two (2) other Appeal cases. It referred this court to the case of **Nicholas Wambua Musau vs Republic CA 19 of 2015 Voi** where he said that the court allowed the said appeal as the Birth Certificate was forged.

23. He placed reliance on the provisions of Section 83(1)(b) of the Evidence Act that any document presented to the court must be genuine. It was his submission that he did not raise the issue of the genuineness of the said Birth Certificate because he was a layman in law. It was thus his argument that PW 1's age was not proved.

24. The State submitted that the Appellant did not raise the issue of PW 1's Birth Certificate having been a forgery and that it could only have been through the authentication by the Registrar of Births and Deaths that it could be determined if the said Birth Certificate was genuine or not. It was its assertion that PW 1's age was proven the Birth Certificate that was adduced in evidence showed that she was thirteen (13) years at the time of the alleged defilement.

25. A perusal of the Birth Certificate showed that PW 1 was born on 20th April 2008. There was nothing to indicate that the said Birth Certificate was not genuine. The Appellant's assertions that information in the said Birth Certificate had been superimposed were neither here nor there as he had not provided evidence to the Trial Court to demonstrate that he was an expert or certified document examiner.

26. If indeed, the said Birth Certificate was forged, nothing would have been easier than for him to have adduced evidence to prove the fact. An assertion that is not proven remains a mere assertion. It was the considered view of this court that the same was a desperate attempt to divert the court's attention to the core issues herein.

27. Indeed, in the absence of any evidence to the contrary, this court was satisfied that PW 1's age had been proven. His reliance on the case of **Nicholas Wambua Musau vs Republic CA 19 of 2015 [2016] eKLR** did not assist his case as the said case related to inconsistencies of the complainant's mother's name during the trial and in the birth certificate.

28. In the circumstances foregoing, Amended Ground of Appeal No (1) was not merited and the same is hereby dismissed.

III. EVIDENCE OF THE PROSECUTION WITNESSES

29. Amended Grounds of Appeal Nos (2), (3), (4) and (5) were dealt with under this head as they were related.

30. The Appellant submitted that No 88391 PC David Masinde (hereinafter referred to as "PW 6") did not conduct his own investigations and relied on written statements that had already been written because he stated in his evidence that the OCS instructed him to take over the matter from PC Kerich who had been transferred.

31. He added that the assertions by Christine Kimbio (hereinafter referred to as "PW 2") that he admitted to having indecently assaulted PW 1 were inadmissible as it offended the provisions of Section 25 A of the Evidence Act. He urged this court to expunge that piece of evidence from the court record.

32. He also stated that the Learned Trial Magistrate relied on hearsay evidence to convict him and he indicated as much in his Judgment. He further argued that he had raised an alibi which the Trial Court was duty bound to consider and make a decision which he said was not done in the case herein.

33. On its part, the State argued that there was no one at the farm on the material date of the incident which accorded the Appellant an opportunity to commit the offence he had been charged with. It stated that PW 1's evidence was corroborated by John Mjomba and Ngala Paul Nyange (hereinafter referred to as "PW 4" and "PW 5" respectively) who saw the Appellant pull PW 1 in the bathroom.

34. According to PW 1, on 16th February 2014 at about 3.00pm, she had come from Church when the Appellant who was her neighbour pulled her towards a bathroom in the farm, touched and suckled her breasts. She said this went on for about an hour. She said that he tried to remove her skirt but he let her go after her sister called her.During her Cross-examination, she said that she was unable to scream because he had held her throat.

35. PW 2 said that on the material date at about 3.00pm, she was at home when someone told her someone had grabbed PW 1 as she came from Church. Her evidence was that a girl told her that the Appellant had grabbed PW 1, taken her to the bathroom and suckled her. She said that she then ran to the scene, called out PW 1's name and she came out of the maize plantation together with the Appellant. She stated that PW 1 then told her that the Appellant had grabbed and taken her to a bathroom, touched her breasts and suckled them. She averred that the Appellant admitted to having indecently assaulted PW 1.

36. During her Cross-examination, she stated that she was called to the scene by some children and that the Appellant had threatened to kill PW 2 if she screamed. She said that when she called**(sic),** he emerged to the road.

37. Michael Kimbichi (hereinafter referred to as "PW 3") testified that he went to the scene after being informed that the Appellant had defiled PW 1 and that he admitted to having committed the offence. During his Cross-examination, he admitted that he never saw the Appellant indecently assault PW 1.

38. PW 4 stated that on the material date, he had come from Church at 3.00pm when he found the Appellant with PW 1 and he took her to his house. He said that he saw them enter the bathroom whereafter he went to call the aunt. In his Cross-examination, he said that he was standing eight (8) metres away and he did not hear PW 1 scream which he attributed to the fact that the Appellant had held

her neck.

39. PW 5 testified that at about 3.00 pm on the material date, he was coming from Church with his three (3) friends when he saw the Appellant hold PW 1 and he took her to the bathroom of a neighbour, which was thirty (30) metres from the road. He said that PW 1 was ahead of them when she was taken by the Appellant. He stated that he did not know what the Appellant did to PW 1.

40. During his Cross-examination, he said that he was three (3) metres from the incident and that PW 1 was crying and demanding her shoe. He averred that he ran and informed PW 1's sister.

41. The Learned Trial Magistrate contended that PW 1's evidence would sufficient to found a conviction even without corroboration by dint of the proviso of Section 124 of the Evidence Act.

42. Notably, where there is no such material evidence, the proviso to Section 124 of the Evidence Act Cap 80 (Laws of Kenya) requires that the trial court records the reason why believed such a victim's evidence as it would ordinarily be the victim's word against that of his or her perpetrator.

43. The proviso to Section 124 of the Evidence Act provides 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."**

44. Evidently, the proviso to Section 124 of the Evidence Act is clear that where there are no eye witnesses other than a person who has been defiled, the trial court shall receive evidence of such alleged victim, if it is satisfied that such alleged victim is telling the truth. Such a trial court must record the reasons for believing that witness and not the alleged perpetrator.

45. On carefully analysing the evidence that was adduced by the Prosecution witnesses, this court came to a different conclusion that PW 1's evidence alone was not sufficient to sustain a charge against the Appellant herein. Indeed, there were several questions that arose in the mind of this court.

46. If as PW 1 alleged that the Appellant grabbed, took to the bathroom where he touched and suckled her breasts, it was not clear how the girl who informed PW 2 what had befallen PW 1 knew that the Appellant grabbed PW 1's breasts and suckled them. This is because PW 2 already appeared to have been informed by the girl what had befallen PW 1. PW 2's evidence on this issue created doubts in the mind of this court if she was rally being truthful about what transpired.

47. It was also not clear from the court record whether PW 2 was PW 1's sister as PW 1 stated that her sister called her and the Appellant let her go. Indeed, PW 2 stated in her evidence that she called PW 1 who came out of the maize plantation with the Appellant. This court was also not clear from PW 5's evidence who PW 1's sister was. It did, however, appear in the Judgment that PW 2 was indeed PW 1's sister.

48. However, if on the one hand PW 2 was PW 1's sister as the Learned Trial Magistrate had contended, then there was a contradiction in PW 2's evidence who testified that a **girl** (emphasis court) told her that the Appellant had grabbed her and taken her to the bathroom. This contradiction was critical because PW 4 was a **boy** (emphasis court). As the person who reported to PW 2 who had grabbed PW 1 was a critical piece of advice, it was unlikely that she would have forgotten this small but important detail. This was not an immaterial inconsistency but rather, a very material inconsistency that this court could not ignore.

49. If on the other hand PW 2 was not PW 1's sister, then the failure to call PW 1's sister to adduce evidence was fatal to the Prosecution's case. Whereas Section 143 of the Evidence Act Cap 80 (Laws of Kenya) gives the Prosecution discretion to decide which and how many witnesses it can call to prove a particular fact unless there is a law that requires a particular number, PW 1's sister was a crucial witness

as she would have corroborated both PW 1's and PW 2's evidence on how the Appellant was eventually found with PW 1.

50. This court was also cautious to accept PW 4's and PW 5's evidence as they contradicted each other. PW 4 said he found PW 1 with the Appellant and he took her to his house and he saw them entering his bathroom. On his part, PW 5 stated that he saw the Appellant holding PW 1's neck and then took her to the neighbour's bathroom.

51. If PW 4 and PW 5 were together, it was expected that their evidence would not have been so divergent. The fact that PW 4 said that he saw the Appellant entering his house with PW 1 and PW 5 saying they entered a neighbour's bathroom caused this court to treat their evidence with caution. Indeed, this court exercised this caution more so because PW 1 said that the Appellant grabbed and suckled her breasts for an hour.

52. If as PW 5 testified the bathroom was thirty (30) metres from the road and he was three (3) metres from the "incident", how is it then that it took an hour, going by PW 1's evidence, for PW 2 to call her name?If as PW 5 said he went to call his aunty after he saw PW 1 and the Appellant entering the bathroom, how is it that the aunty did not go to check on PW 1 immediately? If that aunt was PW 2, why did she take almost an hour to go to the farm and call out PW 1's name? Something did not add up from the way this evidence was tendered.

53. This court was also concerned by the fact that the Appellant continued grabbing and sucking PW 1's breasts for an hour but she did not scream or attempt to run away. In fact, when her sister called her, she was able to come out of the bathroom and met her sister. She did not attest to the fact that the Appellant was armed or that he had continued to hold her neck for the duration of one (1) hour as he was suckling her breasts.

54. Accordingly, having analysed the evidence that was adduced by the Prosecution witnesses, the Written Submissions and the case law the Appellant and the State relied upon, this court formed the opinion that the Appellant may very well have suckled PW 1's breasts as she alleged.

55. However, the doubt that was created in the mind of this court was because it found the accounts of PW 2, PW 3, PW 4 and PW 5 who could have corroborated PW 1's evidence not to have been convincing. As can be seen hereinabove, their evidence had inconsistencies, contradictions and gaps therein.Notably, PW 6 also contradicted PW 4's and PW 5's evidence that they saw the Appellant committing the act, which they did not testify having seen.

56. Appreciably, the Apellant's sworn evidence did not do much to assist his case as he did not produce any witness to corroborate his whereabouts on 15th and 16th February 2014. However, he was under no obligation to assist the Prosecution's case as he also had a constitutional right to remain silent and let the Prosecution prove its case.

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

58. From the way the evidence was adduced in court, this court came to the firm conclusion that the Prosecution did not prove its case to the required standard, that being, proof beyond reasonable doubt. There were too many inconsistencies, contradictions and gaps.

59. Appreciably, in cases where there is no eye witnesses, medical evidence or other material evidence to corroborate a single witness' evidenceand in particular where there is only an attempt of an offence, courts must be very cautious in accepting evidence of a single witness hook, line and sinker assuch cases are harder to prove being the victim's word against that of the perpetrator.

60. In the premises foregoing, Amended Grounds of Appeal Nos (2), (3), (4) and (5) were merited and the same are hereby allowed.

DISPOSITION

61. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 25th November 2015 was successful and same is hereby allowed. The doubts that were raised in the mind of this court led it give the Appellant benefit of doubt that led to hereby quash the conviction and set aside the sentence that was meted upon him by the Trial Court as it would be clearly unsafe to confirm the same. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

62. It is so ordered.

DATED and DELIVERED at VOI this 22NDday of JUNE 2017.

J. KAMAU

JUDGE

In the presence of:-

Mjomba Damas- Appellant

Miss Karani- for State

Josephat Mavu– Court Clerk