REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 19 OF 2016

MWALIMU KARISA CHANZERA…….APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(Being an appeal from the judgement of C. M. Nzibe, RM dated 15th January, 2016 in Malindi C. M. Criminal Case No. 15 of 2014)

JUDGEMENT

1. The Appellant, Mwalimu Karisa Chanzera, was convicted for the offence of defilement contrary to Section 8 (1) as read with sub-section (2) of the Sexual Offences Act, 2006 (SOA) and sentenced to life imprisonment. He appeals against both conviction and sentence. His amended grounds of appeal reveals that he faults the trial Court for placing weight on the evidence of the government analyst which in his view served no purpose hence making the conviction unsafe. His case is that the trial Magistrate failed to consider that a family feud led to his being framed. He also faults the Court for failing to consider his defence. According to him his conviction was based on circumstantial evidence which did not meet the legal standards for basing a conviction on such evidence. The Appellant concludes that the prosecution failed to prove its case beyond reasonable doubt.

2. At the hearing both parties elected to rely on their written submissions. The Appellant submitted that the only expert evidence which was relied upon was the report on the DNA analysis, which, according to him, was conducted unprocedurally. The Appellant stated that either himself, his friend or his advocate ought to have been present during the DNA analysis to make the evidence credible. The prosecution, he asserted, therefore did not discharge the onus placed on it to prove the facts. The Appellant further submitted that he had been framed and the Court ought to have cautioned itself when taking the evidence of the witnesses. Finally, the Appellant submitted that the offence for which he was convicted carried a mandatory sentence which was unconstitutional as it did not allow the trial Court to exercise discretion when passing sentence.

3. Mr. Fedha for the State opposed the appeal and submitted that there is no allegation that the samples taken for DNA analysis were tampered with and that there is no legal requirement to have the Appellant or his representative present during DNA analysis. His view was that the case was proved to the required standard via circumstantial evidence. In support of the Respondent's submissions, reliance was placed on the decisions in Republic v Kipkering Arap Koske & another [1949] 16 EACA 135, Simon *Musoke v R [1958] EA 715* and Kariuki Karanja v R [1986] KLR 190.

4. It was emphasized for the Respondent that there was cogent and credible evidence. Mr. Fedha pointed

out that the doctor confirmed defilement and the mother testified that she found her child in the Appellant's house and made observations confirming defilement. Further, that the evidence of the government analyst had linked the Appellant to the offence. To buttress the Respondent's position the Court of Appeal decision in Mabel Kavati & another v Republic [2014] eKLR was cited. The State's position is that the trial Court found that the witnesses' account was corroborated by the medical evidence.

5. Mr. Fedha concluded his submissions by asserting that the sentence meted out was not harsh nor excessive and that the duty of the courts is to give effect to the legislative intent. He submits that it cannot be said that the discretion of the court has been limited where the court is applying the law.

6. As was stated in Okeno v Republic [1972] EA 32, the duty of this court as a first appellate court is to evaluate the evidence afresh and draw its own conclusions keeping in mind that the trial court had the opportunity of seeing and hearing the witnesses. Secondly, the court must be guided by the principle that a finding of fact made by the trial court should not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or the trial court acted on the wrong principles-see *Chemagong v Republic [1984] KLR 611 and Gunga Baya & another v Republic [2015] eKLR.*

7. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with sub-section (2) of the SOA and an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the same Act. The particulars of the main charge being that on 1st April, 2014, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of E. C. a girl aged three years. The particulars of the alternative charge were that he intentionally and unlawfully touched the vagina of E. C. a girl aged three years.

8. The Appellant pleaded not guilty to the charges. At the trial the prosecution made an application to adduce the evidence of the victim through an intermediary basing the same on the age of the victim. The court found that the victim was a vulnerable witness and allowed the application. The prosecution called five witnesses.

9. F. N., the mother of E. C. testified as the intermediary witness. Her testimony was that on the material day at about 4pm she was heading for a meeting. Before leaving she sent E. C. to her father after bathing and dressing her in a red dress and a green pair of panties. Upon returning home after some twenty minutes she found E. C. in the Appellant's house which was within the same homestead. The Appellant was like a father to her children and they had lived like family with no disputes between them. She made an observation that the child walked with some difficulty and her dress appeared soiled at the back. She examined E. C.'s private parts and noticed swelling and discharge. Upon enquiry, the child informed her that the Appellant had done 'bad manners' to her and gave her one shilling. She called the child's father who advised them to head to hospital. She also informed J. K., the child's grandmother, who similarly examined the child and advised that the child be taken to a doctor. E. C. was examined at a dispensary and referred to Malindi District Hospital for further management.

10. It was the evidence of F. N. that she filed a report with the police and was issued with a P3 form. The Appellant was then arrested. E. C.'s statement was not recorded by the police as she could not express herself due to her age.

11. Subsequently, the blood samples of the child and the Appellant were drawn for purposes of DNA analysis. She later saw the DNA report which indicated that the Appellant's discharge was on E. C.'s clothes. F. N. identified the Appellant in the dock.

12. The account of J. K., the grandmother of the child, was that on the material day F. N. came to her house holding the hand of a seemingly disturbed E. C. The child was clad in a red dress and walked with some effort. F. N. then shared with her the story behind the child's posture. J. K. examined the child and found the private parts swollen with a watery discharge. The child had a green pair of panties. The child informed her that the Appellant had done 'bad things' to her. She advised them to go to hospital.

13. J. K.'s evidence was that she knew the Appellant who was an uncle to the child and resided in the same compound with them. She told the Court that she bore no grudges against him. She recorded a police statement over the incident and identified the Appellant in the dock. Upon cross-examination she stated that she did not witness the incident nor did she take the child to hospital but that the child had identified her perpetrator by name.

14. On 2nd April, 2014 the investigating police officer, Corporal Nancy Ayuma received E. C. who was escorted to the police station by her mother, F. N. The investigating officer who testified as PW3 told the Court that a report had been filed on the previous day and that the child had already been taken to hospital. Upon a failed attempt to interrogate a fearful looking and withdrawn E. C., she turned to F. N. who briefed her on the incident. She then recorded the statement of F. N. and that of J. K. who had examined the child. PW3 paid a visit to the complainant's home and observed that it neighboured that of the Appellant. She is also the one who arrested the Appellant.

15. PW3's testimony was that blood samples were later drawn from the Appellant and the child at the hospital. She escorted the said samples and the clothes E. C. wore on the material day, accompanied by an exhibit memo, to the government chemist for analysis. The report revealed that the stains on the clothes matched the DNA samples of the Appellant. She also issued a P3 form to the child and the same was filled in hospital. The clinic card of E. C. indicated that she was born on 5th May, 2011. PW3 closed her testimony by stating that there was no grudge between her and the Appellant as they had not met prior to the incident.

16. George Lawrence Oguda, a government chemist based in Mombasa testified as PW4. His testimony was that on 3rd April, 2014 he received an exhibit memo and exhibits from PW3. The marked exhibits were a pink blouse, a pair of panties and blood samples of E.C. and the Appellant. A DNA analysis he performed on the said exhibits and samples revealed that the stains on the blouse and pair of panties matched the blood sample of E. C. and the stains on the blouse matched the samples of the Appellant. He prepared a report dated 11th May, 2015 which he produced in Court. During cross-examination PW4 indicated that the Appellant was not present at the analysis and that he did not know him. He also stated that he was not a medical doctor and did not examine the complainant.

17. The last prosecution witness was PW5 Ibrahim Abdullahi. He testified that on 9th April, 2014 he physically examined E. C., a child aged three years, and concluded that she had been defiled. His examination revealed a broken hymen with lacerations on the vagina and orifice. PW5 produced the treatment notes, the clinic booklet and the P3 form as evidence. In reply to questions put to him by the Appellant he stated that he did not know the perpetrator and that it was possible for a child who is injured in the vagina to have difficulty in walking.

18. In his testimony the Appellant denied committing the act. It was his evidence that on 30th March, 2014 F. N. who is a relative had summoned him to her house and told him to give her money to buy food for her guests. When he told her he did not have any money she complained that he gave their other relatives money but always refused to give her any whenever she requested. She then threaten to put him in trouble. On the material day he left for work, came back home, prepared food, ate and went to sleep only to be awoken at about 11pm by two police officers. He was arrested and later charged in court for the said offence.

19. The trial Court found that under Section 31(4) of the SOA an intermediary can give evidence on behalf of a vulnerable witness. The Court also found that the evidence of the experts corroborated the accounts by the other witnesses. The Magistrate entered a verdict of guilty and sentenced the Appellant to life imprisonment.

20. The burden of proof in a criminal case lies on the prosecution at all times as was held in the *locus classicus* case of DPP v Woolmington (1935) UKHL 1 which has been adopted by our courts such as the decision of the Court of Appeal in David Muturi Kamau v Republic [2015] eKLR. The standard of proof being beyond reasonable doubt as was held by Lord Denning in *Miller v Ministry of Pensions, [1947] 2*

ALL ER 372 also followed in David Muturi Kamau (supra).

21. Section 8(1) of the SOA defines the offence of defilement as penetration of a child by a person. Section 2 of the same Act defines penetration as the partial or complete insertion of the genital organs of a person into the genital organs of another person. The Children Act, 2001 provides that a child is any human being under the age of eighteen years. Therefore to establish defilement penetration must be demonstrated and the complainant must have been a minor at the time. For a conviction to occur the defilement must be linked to the accused person.

22. Although no issue was raised about the use of the mother of the complainant as an intermediary, it must be noted that the trial Magistrate in her judgement correctly captured the law in regard to the use of intermediaries in criminal trials. The trial Court observed that the complainant was of a very young age and reached the conclusion that she was a vulnerable person as defined under Section 2 of the SOA which provides that such a person means a child, a person with mental disabilities or an elderly person and that the term vulnerable witness shall be construed accordingly. The Court also took into cognizance the provisions of Section 31 of SOA in declaring the child a vulnerable witness.

23. The clinic card (Mother & Child Health Booklet) which is issued by the Ministry of Health was issued on 28th February, 2011 and indicates that E. C. was born on 5th May, 2011. It gave proof of the exact age of the child which was three years and eleven months at the time of the offence. The trial Court also noted that she was of such young age and could not testify.

24. The use of an intermediary to testify on behalf of the child was well within the law as provided by Section 31(4) of the SOA. The Court of Appeal in M. M. v Republic [2014] eKLR held that:

> "The use of an intermediary in evidence is a unique and novel phenomenon in our jurisprudence, introduced upon the enactment of the Sexual Offences Act, 2006 and few years later reproduced in Article 50 (7) of Constitution of Kenya, 2010."

The Court further stated that:

> "The role of an intermediary is provided for in subsection 7 of section 31 namely, to convey the substance of any question to the vulnerable witness, inform the court at any time that the witness is fatigued or stressed; and to request the court for a recess.

It is difficult for a child or indeed a victim of a sexual attack to publicly relive the most traumatic and humiliating experience of their lives in order to get justice, more so, if they have to be subjected to the rigors of daunting and intimidating cross-examination. The thinking behind the enactment of section 31 was, in our view, to moderate these traumatic effects in criminal proceedings."

As the mother of the complainant, F. N. fell into the category of persons identified by Section 2 of the SOA as capable of being intermediaries.

25. The intermediary testified that the child had informed her that the Appellant had done bad manners to her. The words 'bad manners' were used by the child to explain the act that the Appellant had apparently done to her that had caused her vagina to swell and have a discharge. F. N. also physically examined the child and saw the swelling and discharge. The medical examination concluded that the hymen was perforated, with lacerations at the vagina and orifice, a telling sign of defilement and the medical conclusion reached was that the breach was due to penetration. Therefore penetration was proved.

26. Indeed the evidence of F. N. who testified as PW1 was not only that of an intermediary. She was also a witness in her own right. She told the Court that when she came back home she found the child inside the house of the Appellant who was her brother-in-law. When the child emerged from the house she had a discharge on the back of her dress and has difficulty in walking. It is also important to note that although PW1 was allowed to act as an intermediary for the child, the record does not show that the child actually gave evidence in Court through PW1. Nevertheless the evidence of F. N. was clear on what she

saw and what the child told her.

27. The testimony of PW2 J. K. is that she inspected the child and noted a bruise on her vagina and a watery discharge. She told the Court that the child identified the Appellant by name as the person who defiled her.

28. The evidence of PW1 and PW2 therefore confirm interference with the child's sexual organ and the identity of the Appellant as the perpetrator.

29. The Appellant has questioned the probative value of the DNA analysis report that was produced by PW4. DNA testing may be ordered by court. This is, however, discretionary-see Evans Wamalwa Simiyu v Republic [2016] eKLR. The DNA test that was carried out was not ordered by the court but was within the investigatory powers of the police. Some of the functions of the Directorate of Criminal Investigations under Section 35 of the National Police Act include investigating serious crimes and conducting forensic investigations. The police were therefore within their mandate to obtain the blood samples for DNA testing. The chain of custody of the samples was clear and so was its handling which was well documented. The weight to be placed on DNA test results depends on the circumstances of each case. In the case at hand the forensic evidence established a nexus between the victim and the Appellant.

30. Absence of a DNA test in a sexual offence case does not automatically lead to an acquittal. In the already cited case of Evans Wamalwa Simiyu it was stated that:

> "In AML v Republic 2012 eKLR (Mombasa), this Court upheld the view that:
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> *"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."*
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> [20] This was further affirmed in Kassim Ali v Republic Cr Appeal No. 84 of 2005 (Mombasa) (unreported) where this Court stated that:
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> *"The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."*

31. It must therefore be appreciated that even without the presentation of the DNA report the trial Court was still entitled to find the Appellant guilty on the evidence of the other witnesses. In my view, that evidence was strong enough and the logical conclusion to be arrived at in light of that evidence was that the Appellant was guilty as charged. As already stated, the directive to carry out DNA analysis by the trial Court is a discretionary one. Neither the SOA nor the National Police Act provide for the physical presence of the accused or his representative during the DNA analysis. The ground that the DNA test was done unprocedurally therefore fails.

32. The DNA report was clear that the DNA profile generated from the blouse matched the DNA profile generated from the blood sample of the Appellant. There may be an issue as to whether there was an error in labeling the exhibits taken to the government chemist. I point this out as F. N. referred to the items of clothing as a red dress and green panty. PW2 also talked of a dress. The government chemist referred to a pink blouse and panties. The dress was produced as an exhibit but PW4 was not asked to identify it in court to clarify his use of the term blouse over dress and pink over red for colour. PW3 referred to the clothes as a pink blouse and a green pant in the exhibit memo form. On the question of colours it could all boil down to how an individual perceives colours. As for the identity of the clothes, the good thing is that PW1 and PW3 identified the same items of clothing in Court. It was however important to point this out.

33. The trial Court did not address the Appellant's claim that his arrest and prosecution was precipitated by a family dispute. It was necessary for the Court to consider the defence offered against the prosecution evidence. Upon review of the defence case, I note that the issue of the alleged dispute between F. N. and the Appellant was not raised by way of cross-examination when the prosecution witnesses, and in particular F. N., testified. It is also unbelieveable that F.N. would put her child through a court process in

order to teach the Appellant a lesson for allegedly refusing to give her money to entertain her guests. In my view, the evidence adduced by the prosecution was overwhelming. It is therefore safe to conclude that the Appellant's defence was an afterthought. Had the trial Magistrate considered the defence case the same would have been rejected.

34. There remains the issue of the constitutionality of the sentence. Parliament in its wisdom passed the law on sexual offences and in particular offences falling under Section 8 of the Act and limited the discretion of the court in passing sentence. The Court of Appeal in Stephen Nguli Mulili v Republic [2014] eKLR held that:

> "The Sexual Offences Act removed discretion in sentences particularly where the victims are minors. The sentence provided for is therefore, mandatory and not discretionary. "

Section 8(2) of the SOA provides life imprisonment as the only sentence for a person who defiles a child aged under eleven years. The trial Court has not been given room on the sentence to be imposed once an accused is found guilty. I find nothing unconstitutional in the sentences provided by the SOA.

35. It is also noted that Section 7 of the Criminal Procedure Code, Cap. 75 allows a resident magistrate, like the one who heard the matter giving rise to this appeal, to pass any sentence authorized by the SOA. There is nothing unconstitutional in giving effect to the intent of the legislature.

36. The conclusion is that this appeal has no merit. The same fails and is dismissed in its entirety. For avoidance of doubt, the conviction and sentence are affirmed.

Dated, signed and delivered at Malindi this 28th day of September, 2017

W. KORIR,

JUDGE OF THE HIGH COURT