REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 19 OF 2015

NICODEMUS WAMBUA MUSAU..……...…….... APPELLANT

VERSUS

REPUBLIC……...…… RESPONDENT

(From original conviction and sentence in Criminal Case Number 623of 2014 in the Senior Principal Magistrate's Court at Voi delivered by Hon E. M. Kadima (RM) on 26th January 2015)

JUDGMENT

INTRODUCTION

1. The Appellant, Nicodemus Wambua Musau, was tried and convicted by Hon E.M. Kadima, Resident Magistrate for the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(3)of the Sexual Offences Act No 3 of 2006. He was sentenced to serve thirteen (13) years imprisonment.

2. The particulars of the charge were that :-

> **On the 6th day of August 2014 in Voi within Taita Taveta County, unlawfully and intentionally caused his penis to penetrate the vagina of RM a child aged 14 years.**

3. The alternative charge was for indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No 3 of 2006. The particulars were as follows:-

> **On the 6th day of August 2014 in Voi town within Taita Taveta County, unlawfully and intentionally touched the vagina of RM a child of 14 years old.**

4. Being dissatisfied with the said judgment, on 13th February 2015, the Appellant filed a Memorandum of Grounds Appeal seeking a Re-Trial. The grounds were:-

> **1. THAT he had not pleaded guilty to the offence.**
>
> **2. THAT he was not contented with the way the trial was conducted.**
>
> **3. THAT he was not given enough time to exhaust his questions with the Prosecution witnesses in the case.**
>
> **4. THAT although he had wanted his witness to adduce evidence in his favour, the same failed**(sic)**.**

5. THAT he was sure that if the case was re-tried, he was assured of true justice (sic)**.**

6. THAT he would seek legal representation in the case herein.

5. His Amended Grounds of Appeal dated 22nd October 2015 and filed on 13th February 2015 were as follows:-

1. THAT he did not plead guilty to the charges.

2. THAT the trial magistrate erred in law and fact by relying on uncorroborated evidence with a lot of assumptions(sic)**.**

3. THAT the trial magistrate erred in law and fact by not taking into account the fact that the principal witnessin this case, PW 1,never mentioned that it was him who defiled her.

4. THAT the trial magistrate erred in law and fact in failing to consider the Complainant's testimony that she had been in sexual relations prior to the material day and that her presence in Voi raised eye brows as she talked of being given a lift and being brought by other youth who may have committed the offence on her(sic)**.**

5. THAT the trial magistrate erred in law and fact by harshly sentencing him based on distorted evidence that was full of assumptions that was not supported by any evidence to show that it was him who had committed the alleged offence.

6. On 31st May 2016, the Appellant filed Further Amended Grounds of Appeal and his Written Submissions. The fresh grounds of appeal were as follows:-

1. THAT the Learned Trial Magistrate erred in law and fact by failing to consider no genuine certified copy of a birth certificate or an age assessment report was prepared and produced in court to prove the actual age of the girl(sic)**.**

2. THAT the Learned Trial Magistrate erred in law and fact by failing to consider the trial proceedings were a nullity and mistrial as he was not present when PW 1 testified as per the Coram of 22nd September 2014.

3. THAT the Learned Trial Magistrate erred in law and fact by failing to consider none (sic)**- disclosure of all the evidentiary materials and exhibits and to have reasonable access to that evidence.**

4. THAT the Learned Trial Magistrate erred in law and fact by failing to consider no names or physical descriptions of the attacker was given to police in the OB by the Complainant, PW 1.

5. THAT the Learned Trial Magistrate erred in law and fact by failing to consider the conduct misdemeanor (sic) and promiscuousness by (sic) **the Complainant, PW 1.**

6. THAT the Learned Trial Magistrate erred in law and fact in failing to consider allowing a P.S.R (sic) **by the Probation Officer and Defence there as presented upon request by the trial magistrate**(sic)**.**

7. The State did not file its Written Submissions as had been ordered by the court. Instead, when the matter came up in court on 15th June 2016, its counsel informed the court that it was conceding to the Appeal and made oral submissions to support its position.

LEGAL ANALYSIS

8. While this court would have simply accepting the State's conceding of the Appeal herein without much ado, it nonetheless found it prudent to address the several issues that it had raised under the separate heads shown hereinbelow with a view to establishing ifindeed, this was a suitable case for the Appeal to be allowed as the State had opined.

9. In this regard, this being a first appeal, this court analysed and re-evaluated the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held 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".**

I. VOIRE DIRE ENQUIRY

10. Although the Appellant and the State did not address their minds to the question as to whether or not the Learned Trial Magistrate conducted a proper *voire dire* enquiry, this court found it necessary to look into the same.

11. According to the Birth Certificate, one RM was said to have been aged fourteen (14) years. From the circumstances of the case herein, in the absence of any evidence to the contrary by the Appellant, the Learned Trial Magistrate was correct in holding that that was the correct age of the said RM. If the said RM was indeed the actual complainant herein, it was not necessary for the Prosecution to have produced an Age Assessment Report as the Appellant had contended in his Written Submissions.

12. Be that as it may, having ascertained that the said RM was a minor, the Learned Trial Magistrate ought to have conducted a proper *voire dire* enquiry. Courts have held several times that a trial court is the one who is mandated to conduct the same and not the prosecution, at least that is the situation that obtains in our jurisdiction.

13. This is a position that this very court held in the case of **Muthama Munguti vs Republic [2016] eKLR** when it rendered itself as follows:-

> **"… the *voire dire* enquiry ought to be conducted by a trial magistrate to satisfy himself or herself that a child witness is sufficiently intelligent to testify in court and for his direction as to whether the evidence to be adduced will be under oath or unsworn."**

14. The mere fact that the *voire dire* enquiry was not properly conducted was sufficient ground for this court to have ordered a Re-trial of the case against the Appellant herein in respect of the said RM (hereinafter referred to as "PW 1"). However, as it was apparent from the Re-Amended Grounds of Appeal that the Appellant herein had abandoned his contention that the case that faced him be re-tried, it was necessary to consider the issues that were raised by the State.

15. Notably, this court's finding on the issue of *voire dire* enquiry was based on the fact that the Appellant's accuser was in fact PW 1. The issue has been addressed in greater detail later on in this Judgment.

II. INCONSISTENCIES IN PW 1'S NAMES

16. In his Written Submissions, the Appellant argued that the Prosecution unlawfully and irregularly endeavoured to rely on a Birth Certificate of a different person to prove the Complainant's age. He stated that the said Birth Certificate belonged to RJ yet the person who testified during trial was PW 1.

17. The State pointed out that the said Birth Certificate showed that PW 1's mother was known as EWM. It suggested that this could reconcile the discrepancy of PW 1's name as given in the Birth Certificate as

both her father and mother bore the name “M”.

18. That may very well have been so. However, the Prosecution laid no basis to demonstrate that RJ and RM referred to one and the same person. In a case where a person’s liberty is at stake due to the long imprisonment terms, it was incumbent upon the Learned Trial Magistrate to have ascertained himself of this fact before holding that the Prosecution had proved its case to the required standard. The importance of this ascertainment will be clearer hereinbelow.

19. In this regard, the court was more persuaded by the Appellant’s arguments to find that it was unsafe to allow his conviction to stand undisturbed as the Learned Trial Magistrate relied on the Birth Certificate of RJ whereas the person who testified in this case told the Trial Court that her name was RM.

III. INCONSITENCIES IN PW 2’S NAME

20. The Appellant also pointed out the inconsistencies in PW 1’s mother’s name, as did the State. Notably, in the Birth Certificate, EWM indicated as the mother of RJ. However, in the proceedings, PW 1’s mother was said to have been EWN (hereinafter referred to as “PW 2”).

21. If this court were to assume that PW 2 was PW 1’s mother, she never told the Trial Court that her husband was MOE who was indicated as the biological father of RJ. If indeed that was the position, once again, the Prosecution failed to lead evidence to demonstrate that EWM and EWN referred to one and the same person.

22. This court was thus in agreement with the State’s submissions that it was unclear whether or not PW 1 and PW 2 were related biologically for the reason that names of the child and mother in the said Birth Certificate differed from those of the purported mother and daughter who testified in the Trial Court.

23. In this regard, this court found itself in agreement with the Appellant that the Learned Trial Magistrate misdirected himself by making an assumption that both PW 1 and PW 2 were the mother and child referred to in the said Birth Certificate and relying on the said Birth Certificate to convict him.

24. Without considering any other ground herein, the Appeal herein was successful on this ground alone.

IV. CONCLUSION

25. The issues of whether or not the Appellant was physically identified by PW 1 as her attacker, her promiscuity, the non-disclosure of evidentiary evidence or nullity of the proceedings in the trial court were rendered irrelevant once this court was satisfied that the ground the State had conceded to the appeal was sufficient to hold that it was unsafe to allow the conviction and the sentence that was meted upon the Appellant to stand.

26. Having said so, this court was compelled to address its mind to the question of the extent of the sentence that had been meted upon the Appellant by the Learned Trial Magistrate. Notably, the sentence that was purportedly meted upon the Appellant by the Learned Trial Magistrate was illegal, improper and unlawful.

27 It was not clear to this court the basis under which the Learned Trial Magistrate ordered that a Probation Report be prepared and produced as the offence the Appellant faced had a minimum prescribed sentence. If indeed the Appellant had been guilty of the said offence, he ought to have been sentenced to fifteen (15) years imprisonment and not thirteen (13) years as had been ordered by the Learned Trial Magistrate, a position that as correctly articulated by the State.

28. Finally, this court wishes to reiterate its holding in the case of **Chrispine Waweru vs Republic[2015] eKLR** when it stated as follows:-

> **…as an obiter, the court wishes to point out that the duty of an appellate court is to uphold**

the rule of law and not cause miscarriage of justice irrespective of whether or not a particular offence is prevalent in a particular area.In this regard, the court wishes to emphasise that the Prosecution ought to present cases on Sexual Offences Act after thorough investigations and present water tight evidence. Indeed, perpetrators of defilement ought not to be allowed to get away with serious crimes if they are guilty merely because the Prosecution has not conducted its case diligently."

29. On its part, a trial court must pore through and interrogate the evidence that has been adduced before it by the prosecution to ascertain itself that no inconsistencies exist before it can convict an accused person. It must also sentence convicted persons to the prescribed terms of imprisonment and note its lack of exercise of discretion where there are minimum prescribed sentences. Indeed, justice must not only be done to the victims but it must be seen to have been done.

DISPOSITION

30. For the foregoing reasons, in view of the fact that the State conceded to the Appellant's Appeal, this court was persuaded to quash the conviction and set 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.

31. It is so ordered.

DATED and **DELIVERED** at **VOI** this **21ST** day of **JUNE** 2016

J. KAMAU

JUDGE

In the presence of:-

…… …….. Appellant

……. …….. for State

Simon Tsehlo– Court Clerk