REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 18 OF 2016

ADAM KHAMISI.....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. D. K. Kemei Chief Magistrate in Migori Chief Magistrate's Criminal Case No. 770 of 2015 delivered on 29/03/2016)

JUDGMENT

Background:

1. The Appellant herein, **ADAM KHAMISI**, was first arraigned before the trial court on 02/10/2015 and was charged with the offence of Defilement contrary to Section 8(1)(2) of the Sexual Offences Act No. 3 of 2006. He denied the offence.

2. Three days later, that is on 05/10/2015, the court allowed the prosecution to substitute the charge with the appellant's concurrence. The appellant was then charged with offence of **Defilement** contrary to **Section 8(1)(2)** of the **Sexual Offences Act** No. 3 of 2006. The particulars of that offence were that on the 28th day of September 2015 at about 1900 hours at ***[particulars withheld]*** village, Uriri Sub-Location, Migori County, intentionally caused his penis to penetrate the vagina of *D.M.* a child aged 9 years.

3. The appellant was also charged with an alternative count of committing an indecent act with a child contrary to ***Section 11(1)*** of the Sexual Offence Act No. 3 of 2006. He denied both counts.

4. The prosecution called four witnesses in a bid to prove the charges against the appellant. **D.M.** was the complainant who testified as **PW1**. She took the court through her ordeal in the hands of the appellant until when she was rescued by her mother **PW2**. **PW3** was a Clinical Officer and the investigating officer testified as **PW4.**

5. At the close of the prosecution's case the trial court placed the appellant on his defence. The appellant opted to give sworn defence and called one witnesses and thereafter the court rendered its judgment on 29/03/2016 where it found the appellant guilty as charged and sentenced him to life imprisonment.

6. Visibly dissatisfied with the conviction and sentence, the appellant preferred an appeal through the firm of Messrs Omonde Kisera & Company Advocates. The said firm filed a Petition of Appeal dated and evenly filed on 12/04/2016. The appellant preferred the following five grounds:

1. ***THAT the Learned Trial Magistrate erred in law and fact in failing to state which charge***

the conviction and sentence related in light of the main charge and /or the alternative charge thereby rendering the said Derangement as vague and unlawful.

2. THAT Learned Trial Magistrate erred in law and fact in failing to appreciate that the prosecution's case in its entirety was riddled with gaps and inconsistencies hence not watertight and safe for a conviction.

3. The learned Trial Magistrate erred in law and fact in failing to appreciate that there was no evidence of penetration as the medical exhibit only contained results of external genitalia as opposed to internal that would have been a kin a penetration.

4. The learned Trial Magistrate erred in law and fact in failing to fairly appreciate the defence raised by the Appellant.

5. The learned Trial Magistrate erred in law and fact in failing to appreciate that the sentence was uncalled for and excessive in the circumstances.

7. At the hearing of the appeal Mr. Kisera Counsel appeared for the appellant and argued the appeal on three main grounds. The principal one was that the judgment of the trial court was defective as it did not state which offence the appellant was found guilty of and convicted. The second ground related to failure by the prosecution to prove penetration and lastly Counsel submitted that the appellant was not properly identified as the assailant.

8. The State opposed the appeal in arguing that the judgment was not defective as it was clear that the appellant was convicted of the offence of defilement, that penetration was proved and that the appellant was properly recognized as the assailant. That is the background of this judgment.

Analysis and Determinations:

9. This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

10. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offence of defilement, or alternatively those of the offence of committing an indecent act with a child, were proved and as so required in law; beyond any reasonable doubt. However since the appellant submitted strenuously that the entire judgment upon which the conviction and sentence rests is unlawfully then reason prevails for the determination of that ground first since if the appellant's submissions hold then that will have a significant effect on the entire matter.

Whether the trial court's judgment is defective in law:

11. Counsel for the appellant submitted that the trial court erred in law by not indicating in its judgment whether it found the appellant guilty of the principal or alternative offence and entered a conviction thereon. As such the appellant is serving an unlawful and irregular sentence and that even on that ground alone the appeal ought to succeed.

12. The State on its part was of the contrary position. It was submitted that the judgment is clear that the offence it dealt with was defilement and that the trial court considered all its ingredients prior to reaching a finding of guilt.

13. I have carefully considered the foregone arguments in light of the impugned judgment. The judgment is a short and precise four-page one. The judgment opens with the offences the appellant faced being the

principal one of defilement contrary to section 8(1)(2) of the Sexual Offences Act No. 3 of 2006 and the alternative one of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The trial court then summed up both the prosecution and defence cases and ventured into a legal discourse on whether any offence in law had been disclosed. In that endeavour the court made the following finding:

> ***"...The Age Assessment and the P3 Form placed that girl's age at 9 years old which is in line with the provisions of Section 8(1)(2) of the Sexual Offences Act which confirms the girl to be a minor...***
>
> ***I find the charges proved against accused beyond any reasonable doubt. He is thus found guilty as charged and convicted accordingly under Section 215 of the Criminal Procedure Code."***

14. Although Counsel for the appellant did not refer to any law in support of his argument it seems that he was relying on **Section 169(2)** of the **Criminal Procedure Code**, Chapter 75 of the Laws of Kenya (hereinafter referred to as **'the Code'**). The said section states as follows:

> ***"In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced."***

15. The rationale behind the said Section 169(2) is to have clarity and certainty of the offence an accused person is found guilty of and ultimately convicted. That equally has all the bearing in sentencing.

16. A look at the trial court's judgment reveals that the same fell short of compliance with that legal requirement. However on a wholistic look at that judgment it can be seen that the trial court's mind was clear in finding that the ingredients of the offence of defilement under the provisions of **Section 8(1)(2) of the Sexual Offences Act** were proved as required in law.

17. Although in strict sense there is no such provision as Section 8(1)(2) of the Sexual Offences Act, many a times the drafters of charges seem to instead have in mind an offence under Section 8(1) as read with Section 8(2) of the Sexual Offences Act. That irregularity was however settled by the Court of Appeal in the case of **Nyamai Musyoki vs Republic (2014) eKLR** where the Court held thus:

> ***'In this case as was rightly pointed out by the Learned Judge, the Appellant was charged under Section 8(1)(3) of the Sexual Offences Act. This was evidently a misdirection of the section creating the offence and it is apparent to us that the police intended to charge the appellant under Section 8(1) as read with Section 8(3) of the Sexual Offences Act. The prevailing question however is whether this prejudiced him in any way. It is our finding that this was a minor technical defect and it is clear from the record that all other procedures were followed to the letter and the appellant was accorded a fair hearing and he understood the charge that was facing him. His full participation in the trial process vindicated that position. If a defective charge is followed by a series of other procedural or substantive mistakes and which in particular affect the rights of the accused person, or the defect goes to the root of the charge distorting it in a way that the accused cannot understand the charge, then the Court ought to be reluctant to apply Section 382 CPC to cure the defect. In this case, we agree with the Learned Judge that the defect did not prejudice the appellant in any manner and the invocation of Section 382 CPC was proper in the circumstances.'***

18. Section 8(1) and **(2)** of the Sexual Offences Act provides as follows:

> ***"8. Defilement***
>
> ***(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement***

(2) 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.

19. It is therefore clear that **Section 8(1)** of the Sexual Offences Act creates the offence of defilement whereas **Section 8(2)** of the Sexual Offences Act is the sentencing section which places a mandatory life imprisonment on such conviction when the age of the victim is 11 years and below.

20. The question that now begs to be answered is the effect of the said irregularity in the trial court's judgment. The starting point is **Section 382** of the Code which states as follows:

"Subject to the provisions hereinabefore 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."

21. It is now upon this Court to find out if the said irregularity occasioned failure of justice to the appellant. The appellant fully took part in the trial and did not raise any issue on the same. As I pointed out earlier on, the trial court was clear in its mind that it was dealing with an offence under Section 8(1) (2) of the Sexual Offences Act, that is the principal offence of defilement. The court so stated that legal provision in its judgment. Based on a conviction on Section 8(1) of the Sexual offences Act the trial court then went further to render the life sentence being the only one under Section 8(2) of the Sexual Offences Act.

22. In the unique circumstances of this matter and in view of the contents of the trial court's judgment, I find that the irregularity in that judgment was one of a minor technical nature on the part of the trial court which did not prejudice or occasion any injustice to the now appellant. The appellant is now serving a life sentence based on a conviction of the offence of defilement contrary to Section 8(1) of the Sexual offences Act. Respectfully that ground is for rejection and hereby fails.

Whether the offence of defilement was proved in law:

23. Having dealt with the appellant's principal ground of appeal I will now relook at the evidence so as to satisfy myself whether any of the alleged offences were proved as required in law. The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the appellant was the perpetrator of the offence. On looking at those aspects in this judgment, this Court shall consider each of them singly.

(a) On the age of PW1:

24. The issue of PW1's age is indeed not in dispute. The Age Assessment Report as well as the P3 Form which were produced as exhibits places PW1 at 9 years old at the time the alleged offence was committed. That being so I rest the issue at that.

(b) On the issue of penetration:

25. Section 2 of the Sexual Offences Act defines penetration as:

'the partial or complete insertion of the genital organs of a person into the genital organ of another person.'

This position was fortified in the case of **Mark Oiruri Mose vs R (2013)eKLR** when the Court of Appeal stated thus:

> ***'…Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ….'*** (emphasis added).

26. This therefore means that it is not necessarily a must that medical evidence be availed to prove penetration, but as long there is evidence that there was even partial penetration, only on the surface, the ingredient of the offence is demonstrated.

27. Counsel for the appellant submitted that there was no sufficient evidence to prove penetration since the only evidence leading to that was contained in the P3 Form and in the following brief words: ***'There was light bruise on external genitalia***' and ***'There was presence of whitish discharge on external genitalia.***' It was further submitted that there was no evidence that the whitish discharge was the appellant's. Lastly Counsel submitted that when the Clinical Officer (PW3) testified he stated that PW1's hymen was missing but that finding was not contained in the P3 form and as such ought to be expunged from the record.

28. This Court fully agrees with the further submission by the Counsel for the appellant that the ingredient of penetration is so crucial in defilement cases such that without its proof no such offence is disclosed. In an attempt to demonstrate this ingredient, PW1 stated as follows:-

> ***"...I do recall on 28.9.2015 I had arrived from the posho mill and at 7pm I went to the toilets. That man (pointing to the accused in the dock) grabbed me and held my mouth and dragged me to a nearby nappier grass and did bad things on me. He removed my underpants. He also removed his clothes and inserted his penis into my private part."***

29. PW2 who was the mother to PW1 had the following to say:

> ***"...my daughter was crying. I realized she had been sexually assaulted. She could not even walk properly. She had no underpant....."***

30. When PW1 was taken the Uriri Health Centre in the company of her mother, PW2, she was examined by an officer by the name of one **Charles Wambura** (not a witness). That was in the morning of 29/09/2015. The said officer noted that PW1's hymen was not intact and made such an entry into the Post Rape Care Form which was produced as **prosecution exhibit 2** by PW3. The production of that Post Rape Care Form was not challenged by the appellant. PW3 then filled in the P3 Form on 30/09/2015 and which he personally produced it together with the Post Rape Care Form as exhibits. Looking at the contents of the Post Rape Care Form, I find that the submission by the Counsel for the appellant that PW3 did not have any basis of asserting that PW1's hymen was not intact to be erroneous. I say so because there was such a medical basis for PW3 to confirm that indeed PW1's hymen was missing and that was contained in the Post Rape Care Form.

31. The Post Rape Care Form contain further evidence on the state of PW1's private parts; the vagina. It confirmed that the vagina was slightly bruised and that there was a whitish discharge oozing out. These observations are similar to those made by PW3 when he examined PW1 so as to fill in the P3 form.

32. Going by the evidence of PW1, PW2 and PW3 as well as the contents of the Post Rape Care Form and the P3 Form, this Court is satisfied that indeed penetration was proved in the circumstances of this case.

c) On whether the appellant was the perpetrator:

33. The appellant vehemently denied any involvement in the alleged offence and wondered why he was

charged. He availed one witness, DW2, to corroborate that position. Counsel for the appellant submitted that given the circumstances that prevailed that night, the same did not favour positive identification or recognition of the assailant. Moreso Counsel stated that the offence took place at night and the only light came from a torch which was held by the assailant hence could not have aided PW1 to recognize the assailant.

34. I have carefully gone through the evidence on record. It is true the incident took place at around 7:00pm and that it was dark. PW1 stated so candidly how she was grabbed on her way to the toilets and dragged into a nearby nappier bush and later sexually assaulted while her mouth had been covered. She also stated that she managed to recognize the assailant who was her neighbour with the help of the torch which the appellant had.

35. When PW2 realized that PW1 was taking too long to return from the toilets, PW2 went to the toilets and called out PW1's name. It was that time when PW2 saw the appellant, who was her neighbour, run away from the nearby nappier bush as her daughter, PW1, was crying therefrom and mentioning the name of the appellant**.** (See the Court of Appeal case of **Simiyu & Another vs. Republic (2005) 1 KLR 192).** PW2 further pursued the appellant upto his house, raised alarm and confronted him. It was then that PW2 was informed by the appellant's mother that the appellant was HIV positive and advised to rush PW1 to hospital.

36. Evidence on identification must always be treated so cautiously especially if there are some prevailing circumstances that may vitiate proper and accurate identification or recognition. The principles to guide Courts when faced with that issue are well settled. The Court of Appeal in the case of **Wamunga Vs Republic (1989) KLR 426** stated as under;-

> ***"It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."***
>
> It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction.
>
> 25. In **R –vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

"... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?.... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

26. The foregone does not mean that there cannot be safe recognition even at night. The Court of Appeal in **Douglas Muthanwa Ntoribi vs Republic (2014) eKLR** in upholding the evidence of recognition at night held as follows:-

"On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified:-

"I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."

The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error..."

27. Again the Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs Republic (unreported)** had this to say on the evidence of recognition at night:-

> ***"We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants."***

28. The trial court in evaluating the evidence on this issue expressed itself as follows:-

> ***".....The complainant was quite categorical that the perpetrator was none other than the accused herein whom she had known to be their neighbour and that the accused had shone a torch which enabled her to recognize him and she even mentioned his names to her mother when she came looking for her.....***
>
> ***.....The accused confirmed on cross-examination that the victim knew him as her neighbour and that.....he did not see any reason as to why the girl would frame him up....."***

37. By therefore taking into account the foregone settled principles and the evidence of PW1 and PW2 and the totality of the evidence on one hand and the appellant's defence and his Counsel's submissions on the other hand, this Court finds that the circumstances that prevailed favored a positive recognition of the assailant and that the recognition of the appellant as the assailant was free from error.

Conclusion:

38. As I come to the end of this judgment I wish to state that the contention by the appellant that the prosecution's evidence was riddled with unreconciled gaps that resulted into glaring doubts cannot hold. I have gone through the evidence and fail to see the said gaps as alleged in the evidence.

39. The upshot is that the appellant is unsuccessful in his bid to secure his freedom. He was rightly convicted and sentenced to the only sentence in law.

40. The appeal is hereby dismissed.

DELIVERED, DATED and **SIGNED** and at **MIGORI** this **29th** day of **November 2016.**

A. C. MRIMA

JUDGE