REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 49 OF 2015

JULIUS MCHARO……..…..……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(From original conviction and sentence in Criminal Case Number 35 of 2009 in the Senior Resident Magistrate's Court at Wundanyi delivered by Hon F. K. Munyi (RM) on 8th April 2010)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Julius Mcharo, was tried and convicted by Hon F. K. Munyi Resident Magistrate for the offence of defilement of a girl contrary to Section 8 (3) of the Sexual Offences Act No 3 of 2006. He was sentenced to twenty (20) years imprisonment. He had also been charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the said Act.

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

> **"On the 21st day of January 2009 at [Particulars Withheld] Location in Taita Taveta District within Coast Province, had unlawful carnal knowledge of G M a girl aged 14 years."**
>
> **ALTERNATIVE CHARGE**
>
> **"On the 21st day of December 2008 at [Particulars Withheld] Location in Taita Taveta District within Coast Province, had unlawful and indecently assaulted G M by touching her private parts namely vagina."**

3. Being dissatisfied with the said judgment, on 4th November 2013, the Appellant filed a Notice of Motion application seeking leave to be allowed to file an appeal out of time at the High Court of Kenya, Mombasa. The said application was allowed by Muya J on 29th July 2013. The Memorandum Grounds of Appeal were as follows:-

> **1. THAT the learned trial magistrate erred in law and fact by convicting him to 20 years imprisonment without finding that he had not been taken for a medical check up.**
>
> **2. THAT the learned trial magistrate erred in law and fact by convicting and sentencing him**

without proper finding that the prosecution evidence was fabricated.

3. THAT the learned trial magistrate erred in law and fact by convicting him to 20 years imprisonment by overlooking his defence evidence (sic)**.**

4. His Appeal was subsequently transferred to the High Court of Kenya, Voi. On 18th July 2016, this court directed him to file his Written Submissions. Instead of doing so, he filed the said Written Submissions along with Amended Grounds of Appeal. The said Grounds of Appeal were as follows:-

1. THAT the learned hon trial magistrate erred in law and fact while relying on the Charge Sheet to convict and sentence him which was not properly drafted as required by the law hence defective (sic)**.**

2. THAT the learned hon trial magistrate erred in law and facts in convicting and sentencing him while relying on the age of the victim which was not proved beyond reasonable doubt.

3. THAT the learned hon trial magistrate erred in law and fact in sentencing him while relying on the medical evidence which totally failed to prove their case beyond reasonable doubt (sic)**.**

4. THAT the learned hon trial magistrate erred in law and fact in not kindly considering that he proceeded to hear his case (sic) **without the witness statements and exhibits.**

5. THAT he had already served the sentence almost half way.

6. THAT the learned hon trial magistrate erred in law and fact in not considering his defence.

5. The State filed its Written Submissions dated 27th September 2016 on 28th November 2016 while the Appellant filed his Further Written Submissions on 8th November 2016.

6. When the matter came up on 8th November 2016, both the Appellant and counsel for the State requested this court to render its decision based on the said Written Submissions, which they did not highlight. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

7. 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".**

8. From the respective parties' Written Submissions, it did appear to this court that the following were the issues that had been placed before it for determination:-

a. Whether or not the Charge Sheet was defective;

b. Whether or not the Appellant was accorded a fair trial;

c. Whether or not the Prosecution had proved its case beyond reasonable doubt;

d. Whether or not the Appellant's defence had displaced the prosecution evidence.

9. Notably, Amended Ground of Appeal no 5 was irrelevant as the length of time he had served in prison was not a legal issue that could be considered on appeal. The court therefore dealt with the remaining grounds of appeal as shown hereunder.

I. <u>DEFECTIVENESS OF THE CHARGE</u>

10. Amended Ground of Appeal No 1 was a preliminary point of law. This court therefore deemed it necessary to deal with it first under this head.

11. The Appellant submitted that the Charge Sheet was the fundamental base of any criminal matter but that in his case, the same had not been properly drafted as per the law contrary to Section 163(1)(c) of the Evidence Act. He pointed out that the date, time and year of the incident in Count I which had initially been indicated as 21st December 2008 had been cancelled and changed to 21st January 2009 but despite the Prosecution having been granted leave to amend the same, the details remained unchanged in Count II and III.

12. He added that there was confusion in the Charge Sheet as to what he had actually done. He wondered whether the truth lay in him touching the Complainant, G M (hereinafter referred to as "PW 1") or having sex with her. He therefore urged this court to come up with a new finding in view of the said contradictions.

13. On its part, the State submitted that the Charge Sheet was not defective because the same contained the date of the offence, the location where it occurred, the name of the minor and her age. It added that the Charge was read to the Appellant in Kiswahili and he responded in the same language meaning that he had understood the charges that faced him.

14. It pointed out that on 19th March 2009 the Prosecution made an application to amend the Charge Sheet which was allowed whereupon the Charge read to the Appellant again and he pleaded not guilty. It referred this court to Section 322 of the Criminal Procedure Code Cap 75(Laws of Kenya) which provides as follows:-

> **"… no finding sentence or order passed by 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 trial or in any inquiry or other proceedings under this code unless the error mission or irregularity has occasioned failure of justice."**

15. It was its argument that throughout the proceedings, the Appellant was aware that the same related to the Charge of his alleged defilement on 21st January 2009 of PW 1 and he did not therefore suffer any prejudice. It referred this court to the case of **<u>Fappyton Mutuku Ngui vs Republic [2014] eKLR</u>** where it stated that the court dealt with the issue of a defective charge in sexual matters. It did not elaborate on what the holding of the court therein was in this regard.

16. It was evident from the proceedings of the Trial Court that on 19th March 2009, the Prosecution applied to substitute the Charge Sheet as there was an error in respect of the date of the incident. The Appellant indicated that he had no objection as a result of which the Learned Trial Magistrate allowed the application as prayed.

17. Appreciably, the Appellant cannot therefore raise the issue of amendment of the dates in the Charge at this appellate stage as he had no objection to the amendment of the Charge Sheet at the material time. His arguments that there was no amendment to Counts II and III, which latter Count this court did not see on record, was irrelevant as Count II was an alternative Charge and he was convicted and sentenced on the min charge of defilement contrary to Section 8(3) of the Sexual Offences Act.

18. In any event, he could have defiled PW 1 on 21st January 2009 and indecently touched her on 21st

December 2008. It is not in doubt that an alternative charge is normally preferred as a safety net just in case the prosecution is not able to prove the main charge.

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

II. FAIR TRIAL

20. Amended Ground of Appeal No 4 was dealt with under this head.

21. Neither the State nor the Appellant submitted on this issue. However, this court deemed it necessary to address the question of whether or not the Appellant had been accorded a fair trial as he had raised it as a ground of appeal. In this ground, he had contended that the matter proceeded without him having been furnished with the Witness Statements and Exhibits.

22. Article 50 (2)(j) of the Constitution of Kenya, 2010 provides that an accused person has a right:-

> **"to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;"**

23. It is important to point out that although the case herein was determined before the Promulgation of the Constitution of Kenya in 2010, the right of an accused person to be furnished with Witness Statements and the evidence the prosecution intended to rely upon still existed in Section 77 of the repealed Constitution of Kenya.

24. In addressing this right of an accused person being furnished with the relevant evidence, in the case of ***Thomas Patrick Gilbert Cholmondeley v Republic*** **[2008] eKLR,** the Court of Appeal rendered itself as follows:-

> ***"We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under Section 77 of our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items. If for any reason the prosecution thinks it ought not to disclose any piece of evidence in its possession, for example, on the basis of public interest immunity, they must put their case before the trial judge or magistrate who will then decide whether the claim by the prosecution not to disclose is or is not justified."***

25. Notably, if a trial court grants an order that an accused person should be furnished with the evidence the prosecution intends to rely upon and he fails to follow up the same from the prosecution, the blame would lie squarely on him. He would be expected and/or required to inform such trial court that he has not been supplied with the same before he proceeds with the trial. Indeed, such accused person has the right to refuse to commence participation in the proceedings until such time he is furnished with the said evidence.

26. In this particular case, it was evident that after the Appellant took plea on 23rd January 2009, the Trial Court did not order that he be furnished with Witness Statements and other documentary evidence. In this regard, the Prosecution tendered a P3 Form as the documentary evidence. Thereafter, when the Prosecution indicated that it was ready to proceed with the hearing on 19th March 2009, he equally stated that he was ready to proceed and the trial commenced. The hearing subsequently proceeded on 2nd July 2009 and 15th October 2009 after he had also indicated that he was ready to proceed with the trial.

27. In all the aforesaid instances, there was no indication that the Appellant was ever furnished with the Witness Statements of the Prosecution witnesses and the documentary evidence that was relied upon. It was also evident that he never asked to be furnished with the Witness Statements at any time during the

trial.

28. Appreciably, the Appellant was not represented by counsel during the trial and may not have been aware of his right to be furnished with the said documentary evidence. In the absence of such counsel, it was the responsibility of the Trial Court to have ordered that he be furnished with the said documentary evidence and for the Prosecution to have furnished him with the same.

29. One may well argue that the evidence that was adduced by the Prosecution witnesses showed that he committed the offence he had been charged with. However, failure by the Trial Magistrate to have ordered that he be furnished with the said documentary evidence was a gross violation of his fundamental right to a fair trial guaranteed under the repealed Constitution of Kenya and occasioned him great injustice and prejudice.

30. Often times, there are differences in what witnesses record immediately after an incident and during trial. Sometimes, there are material contradictions while at other times, the contradictions are inconsequential. It is not uncommon for defence to argue that an accused person ought to be acquitted due to contradictions in such recorded and oral evidence. Whichever way one looks at it, an accused person retains the right to peruse the Witness Statements and documentary evidence that is to be adduced during trial and refer to it same during cross-examination of Prosecution witnesses in arguing his case.

31. In the absence of the Appellant having had no access to the said documentary evidence before and during trial, there is no doubt that the whole trial was a nullity and a mistrial. As the mistake was occasioned by the Trial Court and the Prosecution, it may be argued that the best option would be for the matter to be referred to a Re-trial.

32. However, a re-trial is not ordered as a matter of course. It is not to be ordered to give an applying party a second bite of the cherry or to fill gaps or lacuna in a case. Rather, it is intended to ensure that a fair trial is accorded to a party without causing prejudice to the party against whom such an ordered is sought to be made.

33. **As was stated in the case of Ahmed Ali Dharmsi Sumar vs Republic 1964 E.A 481** and restated in **Fatehali Manji vs The Republic 1966 E.A. 343**:-

> **"In general a re-trial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the Prosecution to 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 its particular facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to the accused person."**

34. In addressing the question of prejudice to be suffered by an appellant when a matter is to be referred for a re-trial, in the case of **Joseph Ndungu Kagiri v Republic [2016] eKLR**, Mativo J had the following to say:-

> **"As held above under no circumstances should prejudice be caused to an accused person. I therefore find that the entire trial was conducted in total breach of the jealously safe guarded constitutional provisions which guarantee a fair trial, and therefore the entire proceedings in criminal case number Nyeri Criminal Case Number 254 of 2011, *Republic vs. Simon Murage Mutahi & Another* are hereby declared to be a nullity and are hereby quashed. I therefore find that this appeal is successful. Accordingly, I hereby allow the appeal, quash the entire proceedings and set aside the orders made in the said case."**

35. In the case of **Erick Ochieng v Republic [2015] eKLR**, Sitati J also quashed a sentence of twenty (20) years that the appellant therein had been handed down in a case of defilement where he had not been

supplied with witness statements.

36. Notably as was stated in the case of **Ahmed Ali Dharmsi Sumar vs Republic (Supra)** and restated in **Fatehali Manji vs The Republic (Supra)**, in deciding whether a case is suitable for re-trial, each case depends on the particular circumstances. In the present case, the Appellant herein has been incarcerated since 8th April 2010. He has already served seven (7) years of his sentence. PW 1 has since become an adult.

37. There is a chance that witnesses may not be traced or be readily available which could cause delays in a fresh trial is ordered thus infringing on the Appellant's right of liberty. Indeed, Article 29 (a) of the Constitution of Kenya, 2010 stipulates as follows:-

> **"Every person has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause;"**

38. It was therefore the considered opinion of the court that a re-trial would not be the best option due to the passage of time as it would cause the Appellant great injustice and prejudice.

39. The other reason this court felt apprehensive about referring the matter for a re-trial was that it was cautious about accepting PW 1's evidence without interrogating the same. It was concerned that examination of PW 1 was done three (3) hours after the alleged defilement. During Cross-examination, PW 5 stated that no sperms were noted and there was no indication that there was any discharge. She opined that if PW 1 had taken a shower, the discharge would not have been seen. This court also takes judicial notice that if the Appellant had used a condom, no discharge or spermatozoa would have been present despite there having been sexual intercourse.

40. However, the fact that PW 1's hymen had been broken did not necessarily mean that the same was caused by the Appellant herein. It was a matter of evidence. It was important for her to have adduced evidence that would have explained why there was no spermatozoa or any form of discharge within the three (3) hours of her examination. If she had showered or used a condom, then the same ought to have come out clearly in her evidence.

41. It must be understood that this court was not for one moment contending that the Appellant did not defile PW 1. In fact, the rage of her mother, Margaret Wughangha (hereinafter referred to as "PW 3") was indicative that PW 1 could have been defiled by the Appellant herein. However, a court of law must be led by evidence on record and many a times, many guilty persons are acquitted for lack of evidence.

42. This court felt that there were lacunae or gaps in the Prosecution's case which could be filled during a re-trial. However, as can be seen hereinabove, that would not be the objective of a re-trial. The prosecution has one chance to prove its case unless of course its case has failed due to a technicality that can be remedied without prejudicing an accused person.

43. Notably, although this court addressed the gaps in the Prosecution's case, the main reason for it having found that Amended Ground of Appeal No 4 of the Appellant's Petition of Appeal was merited was because it had found and held that the Appellant herein had not been accorded a fair trial.

CONCLUSION

44. Accordingly, having considered the Appellant's Appeal, his Written Submissions and those of the State and the case law that was relied upon, this court came to the firm conclusion that the Appellant's right to fair trial had been so greatly violated and compromised that that sole ground of appeal was sufficient for it to quash the proceedings in the Trial Court rendering it unnecessary to interrogate the evidence that was adduced by the Prosecution witnesses.

45. Suffice it to state that it was the considered opinion of this court that the Investigating Officer No 40390 Sergeant Duncan Waweru Murage (hereinafter referred to as "PW 4") ought to have presented to

the Trial Court the findings of the said pregnancy test to tie the loose ends and for the completeness of record.

46. As could be seen from the evidence of Janelisa Mwakina (hereinafter referred to as "PW 5") of Wundanyi Health Clinic who tendered in evidence the P3 Form, she had stated that PW 1 had **claimed** (emphasis court) that she had missed her menses for a period of two (2) months. A pregnancy test was done but it turned negative.

47. Although PW 5 had stated that the pregnancy test was to be repeated after two (2) months, there was no indication whether the same was ever done. The test had presumably being done to confirm the cause of PW 1 having missed menses. It is, however, important to point out absence of a positive pregnancy test would not have dealt a fatal blow to the Prosecution's case because as pregnancy is not the only proof that defilement has actually occurred.

48. It would, however, having been good if the said piece of evidence was adduced as PW 1 had claimed that she had missed her menses and PW 5 testified almost nine (9) months after the alleged incident.

DISPOSITION

49. For the foregoing reasons, the upshot of its decision was that the Appellant's Petition of Appeal that was lodged on 4th November 2013 was merited and the same is hereby upheld. 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 he be held or detained for any other lawful reason.

50. It is so ordered.

DATED and DELIVERED at VOI this 20TH day of DECEMBER 2016

J. KAMAU

JUDGE

In the presence of:-

……..……..……..Appellant

……..……for State

Josephat Mavu– Court Clerk