REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 17 OF 2018

JESSEY FAZAN JACKSON.....APPELANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against both conviction and sentence in Malindi Chief

Magistrate' Court Criminal Case No. 22 of 2016 delivered by Hon. Oseko (CM)).

Coram: Hon. Justice R. Nyakundi

Mr. Alenga for the state

The Appellant in person

J U D G M E N T

The appellant was charged with sexual assault contrary to Section 5 (1) (a) (1) as read with Sub-Section (2) of the Sexual Offences Act, and upon fair trial he was convicted and sentenced to 20 years' imprisonment.

The present appeal is really against both conviction and sentence. The appellant filed a total of six grounds of appeal and these were that:

> ***(1). That the Learned trial Magistrate erred in Law and facts failing to consider that (PW1) (the complainant) was pressed and pestered by the prosecution witnesses specifically (PW2), (PW3) and (PW4) in this matter.***
>
> ***(2). That the Learned trial Magistrate erred in Law and fact by failing to consider she failed to re-analyze and re-make inquiry the entire evidence exhaustively.***
>
> ***(3). That the Learned trial Magistrate erred in Law and fact by failing to consider that the investigation done by (PW5) (the investigating officer) did not reflect anything to link him with the alleged offence.***
>
> ***(4). That the Learned trial Magistrate erred in Law and in fact by failing to consider that the arrest had no any connection with the allegation of sexual assault.***
>
> ***(5). That the Learned Magistrate erred in Law and in fact by failing to consider that she admitted the (PW3) report without giving any reasons to justify the admission within Section 33 (b), 77 (1) of the Evidence Act.***
>
> ***(6). That the Learned Magistrate erred in Law and fact by failing to consider that the legal provision providing a mandatory minimum sentence under Section 2 as read with 5 (1) (a) (i) of the Sexual Offences Act fetters discretion of Magistrate in resentencing this matter.***

On appeal, the appellant relied on his written submissions. The substance of his arguments are that the evidence by the six prosecution witnesses never discharged the standard of proof of beyond reasonable doubt. In addition, relying on that contradicting evidence the Learned trial Magistrate arrived at erroneous findings of fact in convicting the appellant.

With regard to sexual assault, the appellant contention was that none of the elements were proved by the prosecution witnesses. According to the appellant's submissions, a number of issues which stood out from the Learned trial Magistrate's Judgment pronouncement were never supported with cogent or reliable evidence. The appellant referred to the following cases; **Joseph Ndung'u Kagithi v R, Paul Giberi v R, Paul Giberi v R, Oketh Okalo v R (1965) EA 555, Michael Mugo v R (2015) eKLR, John Mutua v R (CA No. 11 of 2016). Fuad Mohamed v R EA 201 of 2003, Edward s/o Msenga v R (1942) EACA 553** to buttress his arguments and contestation seeking this Court's jurisdiction to set aside the Judgment.

On sentence the appellant argued that the minimum sentence denied the Court a chance to exercise judicial discretion as provided for in the cases of **Eliud Waweru v R (102 of 2016), Jared Kiota Injiri v R (CA Appeal No. 93 of 2014).** That being so, the appellant submitted to the Court to consider setting aside the conviction and sentence for not meeting the required standard of proof in criminal cases.

The respondent's counsel at the time of preparing this Judgment did not seem to have filed his submissions. However, notwithstanding that I will proceed to consider the appeal.

Being a first appeal Court, is under an obligation to the appellate Court to evaluate and reconsider the evidence and draw its own conclusions in deciding whether the Judgment of the trial Court should be set aside or upheld. **(See Okeno v R (1972) EA 32).**

In order to discharge this duty, it is necessary for the Court to set out the evidence upon which the prosecution's case was founded against the charge which faced the appellant. This was a case of sexual assault allegedly committed by the appellant against the victim **(PW1) (AH)** aged eight (8) years old as its evident from the birth certificate produced as exhibit 1. It was the testimony of **(PW1)** that on 26.11.2008 she was travelling in a motor vehicle in which the appellant also happened to be a passenger. In the course of the journey, **(PW1)** told the Court that the appellant asked to touch her vagina in which she resisted. In a little while according to **(PW1),** appellant offered some ten shillings and simultaneously asked for leave to answer the call of nature. As the appellant was in her company he offered to escort her to the toilet.

That is how appellant pulled aside her leg and touched the vagina. According to **(PW1)** she suffered pain and distress occasioning her to cry out which attracted the vehicle conductor and other members of the public. She was later to report the matter to the police who made arrangements for her to be seen by a doctor at Malindi General Hospital.

Next witness was **(PW2) PC Nicholus Njeru** a police officer attached to Malindi Police Station testified that while at the bus stage on patrol he found **(PW1)** crying. On inquiry, it emerged that the appellant had taken her to the toilet only to insert his finger to her vagina.

The third witness **(PW3) Elizabeth Joshua** who works as an orderly at Malindi Bus Park told the Court that in one of the vehicles there was a child crying. On interrogation of the child **(PW3)** confirmed that she allegedly showed that the appellant had sexually inserted his finger to her vagina. The witness then took **(PW1)** to Malindi Police Station for further action.

Further evidence was according to **(PW4) Kenga** who worked with the appellant in one of the public service vehicles at Malindi Bus Park. (PW4) recalled that on 14.12.2016, he sat with (PW1) in the same vehicle. However, in the course of discharging his duties, he went to assist another passenger leaving the child with the appellant. On return, he told the Court that he found the child crying. What followed, the child **(PW1)** was handed over to **(PW2)** and later action was taken by the police. The next action taken by the police is as stated in the evidence of **(PW5) Cpl. Hussein** of Malindi Police Station. In the evidence of **(PW5),** investigations initiated and completed showed that the appellant had inserted his finger into the vagina of **(PW1).**

From the record of the evidence **(PW5)** issued the victim with the P3 Form which was filled by **(PW6) Joseph Khwimbe** who testified that on examination of the victim of sexual assault, it was found that the hymen was broken, vagina was infected and swollen. In support of medical evidence, **(PW6)** produced the treatment notes, birth certificate and P3 form as exhibits.

What did the appellant say to all these allegations? In the sworn evidence of the appellant, he denied the evidence by **(PW1)** according to him inserting a finger to her private parts. The appellant gave a detailed account on how he spent his time on the material day when the prosecution alleged he committed the offence.

He continued and acknowledged to have escorted **(PW1)** to the toilet which he paid for as a requirement in most public toilets. On her finishing to answer the call of nature, the appellant explained that they both came back to the vehicle. Further, the appellant told the trial Court that before long **(PW1)** started crying while seated at the back of the vehicle. He decided to get involved and calm her down but she declined and continued crying. That is the incident according to the appellant which triggered his arrest and subsequent indictment. Put simply, the appellant's defence was that he did not commit the offence.

Determination

Did the prosecution prove beyond any reasonable doubt that the appellant sexually assaulted the victim **(PW1)** on 14.12.2016 at Malindi Bus Stage? On this aspect of the offence the prosecution was vested with the duty to proof that the victim's vagina was penetrated by that other person by manipulating any object or any part of the body by inserting it into the said genitals.

The issue of proof is a matter of evidence as stated in the case **of R & Semifikub v Republic {1976 – 1985} EA 536, Kiyengo v Uganda {2002} 2 EA 106, Gupla v R {1983} 1 KLR**. The key principles illustrative of the cited cases are that the prosecution bears the burden to proof in all criminal cases against the backdrop of the right to presumption of innocence under Article 50 (2) (a) of the Constitution. Therefore, the burden of proof never shifts to the accused person unless in exceptional circumstances captured with the provisions of Section (111) of the Evidence Act on facts especially within the knowledge of the accused.

The critical inquiry on review of the sufficiency of the evidence to support a conviction is reasonably found in the testimony of the victim **(PW1).** In her evidence, the victim stated that the appellant was with her at the vehicle when she sought permission to go to the toilet. After a

while the conversation was started by the appellant whether he could touch her vagina even stretched it further by offering to give our Kshs.10/= as an inducement. She beseeched him not to do something like that but apparently when an opportunity arose for her to go to the toilet, appellant was there to assist. According to the victim, the appellant went with her upto the toilet when he pulled aside her leg only to insert his finger into the vagina. There was nobody there at the scene except the appellant. In the victim's evidence as she stepped out of the toilet, she experienced pain which prompted her to cry in the presence of other members of the public. This incident caught the attention of **(PW2), (PW3)** and the vehicle conductor **(PW4)** on the victim's state of distress on the material day of the offence.

The complaint was later to be investigated by **(PW5)** of Malindi Police Station. Her evidence was there **(PW1)** happened to have been sexually assaulted. On physical examination of the genitals **(PW6)** a clinical officer at Malindi Hospital confirmed that the vagina was swollen and the hymen was found broken but not bleeding. The P3 form was completed and produced in evidence.

I must now consider circumstantial evidence upon which the appellant was convicted. In the instant case, the appellant was seen with the victim on the material day on 14.12.2016 and she told the Court graphically how it all happened for the sex act to take place. The victim had given an explanation as to what the appellant did to qualify as an offender under Section 5 of the Sexual Offences Act. That evidence of consistency is also supported with corroboration to be found in the medical evidence of **(PW6),** on her findings when she examined the victim, as already observed it was the appellant who was last seen with the victim before the alleged offence took place. It's at that time an opportunity arose for the offence to be committed and no evidence is found that a third person emerged to commit the offence.

As it was stated in **R v Tylor Weaver & Donoran {1928} 21 CR Appeal R – 20:**

> ***"Circumstantial evidence is very often the best evidence which is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics, but we must always remember the warning in Teper v R (1952) in which Lord Norrland said, "circumstantial evidence must always be normally examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of the accused's guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which could weaken or destroy the inference."***

A careful attention to the general import of the Judgment of the trial Court readily renders it for this Court to conclude that the appellant was convicted purely on direct evidence of the victim **(PW1)** and circumstantial evidence from **(PW2), (PW3), (PW5)** and **(PW6).** In addition, he was seen with the victim in the hours of 14.12.2016. The appellant however, gave no evidence to controvert the fact of finger insertion to **(PW1's)** vagina.

One could imagine that this was a victim who comfortably was set to travel. In the course of the events of the day, circumstances are such that the appellant and the conductor were enlisted to ensure her safe arrival to the next destination. On the contrary, the appellant did not see it that way apart from acknowledging that he escorted the victim to the toilet. There is no evidence to disapprove the assertion on sexual assault. In my view the appellant defence did not negative the evidence of the victim **(PW1)** and I find no basis upon which I can disbelieve that defence to cast a doubt to the prosecution case to prove existence of a fact under Section 107 (1) of the Evidence Act to secure a conviction.

It is undoubtedly clear that onus was on the appellant to show how he came to escort the victim aged eight years old upto inside the toilet where the misfortune of fingering her vagina occurred. It is not really correct to say that the raising of the cries by an eight-year old child essentially a fabrication to frame up the appellant with a trumped charge.

In view of the evidence on record, there was sufficient evidence to meet the requirements on standard of proof that a fact in issue must be proved or disapproved beyond reasonable doubt in order for the prosecution to secure a safe conviction against an accused person. In other words, in the context of this appeal, the obligation to adduce evidence to proof the elements of the offence in sexual assault, age of the victim and positive identification of the appellant in the indictment as pleaded was discharged beyond reasonable doubt by the prosecution.

As **Dennis I. H. Dennis 2002 the Law on Evidence 2nd Edition (Repealed) 2004** observed on the burden of proof and the would be responsibility of the accused, in this case the appellant.

> ***"When a party has discharged an evidential burden and raised an issue for the Court to consider, there arises a tactical onus on the other part to respond with some rebutting evidence. There is no legal obligation to adduce (further) evidence on the issue, but the party against whom the evidence has been adduced increases the risk of losing on the issue if nothing is done to challenge the evidence."***

If suffices here to state that proof of beyond reasonable doubt as required of the prosecution was discharged which minimized the risk of mistaken conviction against the appellant.

Returning to the issue of identification, the basic principles in **R v Turnbull & Others {1976} 3 ALL ER 549 and Maitanyi v R {1986} KLR 198** shows that when the test is applied to the evidence of **(PW1),** it's not difficulty to see how the appellant was squarely placed at the scene. The evidence measured against the explanation by the appellant on a balance remains watertight to satisfy the hallmark of the classic formulation of the concept of beyond reasonable doubt that the appellant was positively recognized by **(PW1).**

That being my view, there is nothing to impugn the Judgment of the trial Court on conviction, as the grounds of appeal did not reduce or limit the velacity and probative value of the evidence of proof of all ingredients of the offence to sustain a conviction.

I now move to consider the ground on sentence. It would be natural to support that there must be intimate connections between the penalty prescribed by parliament and the gravity of the offence. The connecting thread which runs throughout the quest for application of minimum

sentences and the question of judicial discretion of the trial Courts was considered in Godfrey **Mutiso v R Court of Appeal at Mombasa CR. Appeal No. 17 of 2008:**

> ***"The process of sentencing a person is part of the trial. This is because, the Court will take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence. This is clearly evident where the Law provides for a maximum sentence. The Court will truly have exercised its function as an impartial tribunal in trying and sentencing a person. But the Court is denied the exercise of the function, where the sentence has already been pre-ordered by the legislative." ……. However the Godfrey Mutiso case is no longer good law given the Supreme Court decision in Francis K. Muruatetu v R (2017) eKLR in that the Court mandatory sentences of death under Section 204 of the Penal Code was declared unconstitutional."***

The same principle has been a subject on the other hand in permitting Courts to derogate from the set mandatory sentences in other offences like robbery with violence contrary to Section 296 (2) of the Penal Code and life imprisonment for the offence of defilement contrary to Section 8 (1) & (2) of the Sexual Offences Act.

This scope to displace the statutory mandatory or minimum sentences as prescribed under the various provisions of the Sexual Offences Act and Section 296 (2) of the Penal Code on robbery with violence emanated from the rationale and predominant principle in **Francis K. Muruatetu vs Republic {2017} eKLR.** In that case, the Supreme Court held that the mandatory death sentence presented under Section 204 for the offence of murder was unconstitutional. The Court of Appeal bearing in mind appreciated those principles in **Muruatetu case** and equally ruled in **Christopher Ochieng v Republic {2018} eKLR** that the reasoning in **Muruatetu case** does apply **Mutatis Mutandis** to impugn the mandatory life sentence imposed against the appellant for the offence of defilement under Section 8 (1) of the Sexual Offences Act. Therefore, the Court substituted the sentence of life with thirty (30) years' imprisonment.

The Courts have therefore proclaimed that despite the mandatory minimum sentences retaining their legality such sentences shall be subjected to judicial discretion to consider various factors as stated in **Muruatetu case** to ameliorate culpability to entitle the offender a lesser sentence.

The frame work outlined by the Supreme Court includes, the offence gravity, the age of the offender, the possibility of re-offending hence the deterrence, the magnitude of the violence, the weight to be given to the victim impact statement to the crime, the disproportionate of the sentence running contrary to the principle of proportionality and fairness, reduction of pretrial detention from the final period of imprisonment.

In my view as such as the Courts have to take tougher stand against sexual offenders, mandatory minimum sentences re-occurred for these harmful offences are yet to transform society and deter suspects with propensity to defile juveniles of tender years and those aged below eighteen (18) years old.

In the instant case, the offence demonstrates culpability and vehemently the victim targeted by the appellant. From the sequence of events, the appellant abused his position of trust, where he exploited that position of trust to commit the offence against the victim. The victim here was a child of tender years as deduced in the birth certificate that the appellant committed the act at that age of eight (8) year old. On full consideration, the appellant had no previous conviction relevant to the current charge in which he was convicted by the trial Court.

Having identified the mitigation and aggravating factors, its trite that an offence of this nature attracts a minimum sentence of ten (10) years. All in all, I consider that there are no extenuating circumstances or reasons advanced by the Learned trial Magistrate to enhance the sentence to twenty (20) years of imprisonment. I accordingly vary the sentence of twenty (20) years by substituting it with a period of ten (10) years' imprisonment with a commencement date of his conviction.

The upshot is that save to the extent on variation of sentence, the substantial grounds on appeal fails for want of merit. That is the order of the Court.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 12TH DAY OF APRIL 2021

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R NYAKUNDI

JUDGE

In the presence of:

1. Mr. Alenga for the state

2. The Appellant