REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO 92 OF 2019

MESHACK MUTISYA MUASYA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an Appeal from the judgment and sentence of Honourable M Opanga - SRM dated 22nd July, 2019 in Kangundo Senior Principal Magistrate's Court SO Criminal Case No. 69 of 2018)

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

MESHACK MUTISYA MUASYA.....ACCUSED

JUDGEMENT

1. The appellant, **Meshack Mutisya Muasya**, was charged in the **Kangundo Senior Principal Magistrate's Court SO Criminal Case No. 69 of 2018** with the offence of Attempted Defilement Contrary to Section 9(1) and (2) of the ***Sexual Offences Act. No. 3 of 2006***. The particulars were that the appellant, on the 27th December, 2018 at [particulars withheld] Area of Matungulu Subcounty, the Appellant intentionally attempted to cause his penis to penetrate the vagina of **EN**, a child aged six (6) years.

2. He, in the alternative, faced a charge of Committing an Indecent Act with a child contrary to section 11(1), the facts being that on the said date at the same place, he intentionally touched the vagina of **EN**, a child aged six (6) years with his hand.

3. In support of its case the prosecution called 4 witnesses.

4. After *voir dire* examination, the complainant gave an unsworn statement in which she stated that though she did not know the appellant and had never seen him before, his mother told her that the appellant's name was **Meshack**. She however stated that in December, 2018, the appellant did bad manners to her when the Appellant went and found her taking an afternoon nap at 5.00 pm. According to her, on that day she was putting on a black trouser and white blouse and that the Appellant removed her trouser and pant, took off his jeans trouser and inner wear and when her mother, who was in the kitchen came, she found the appellant, who was behind her, touching her private parts using his penis. The said mother then called the police who advised them to go to the Hospital where she was examined and treated before retuning back to the police station where she recorded her statement.

5. According to PW1, the complainant, they used to the Appellant's home at Mutituni with her mother but the Appellant only visited them at their home the day of the incident when her siblings were in school and her friends were in their home.

6. In cross-examination, the complainant insisted that the appellant did bad manners to her at the appellant's grandmother's home when he went to the place where she was sleeping. According to her, she saw blood oozing from her vagina and it was her evidence that she was calling the appellant, "father" as she had been told by her mother to call him.

7. In re-examination, the complainant insisted that the appellant did bad manners to her while she was on the bed at her grandmother's home in Mutituni while her mother was in the kitchen.

8. PW2, the complainant's mother testified that the appellant was her husband from 2018 through after the incident they separated. At the time of the offence, the complainant was 6 years and she exhibited her notification of birth.

9. On 27th December, 2018, they returned from celebrating mass at the appellant's grandmother at about 1.00pm and the complainant informed her that she wanted to rest. After she had finished folding the clothes, she also fell asleep till 5pm when she woke up. Her grandmother ten sought from her what they were going to take for supper since she had overslept. PW2 then woke up the appellant who was sleeping in the same room to assist her in doing some work. However, when she uncovered him, she found him half naked with his jeans trouser and his inner wear lowered. The complainant who was also on the same bed sleeping facing the appellant informed her that the appellant had removed her clothes and started doing bad manners to her. Alarmed, PW2 took the complainant to Hospital and when she returned, the appellant, who slipped away when she was speaking to the complainant, was not around. She reported the matter to the police at Tala Post the proceeded to Machakos. In her evidence, the appellant was arrested at Mutituni when the police from Kangundo went for him. According to PW2 that was the first attempt by the appellant to do that. She identified the P3 form, treatment notes and lab request and report form.

10. In cross-examination, she stated that she found the appellant on bed having taken off his clothes while the complainant's clothes had been taken off. The time was 5pm on 27th and by then they had been married for four months. As a result she returned to her former husband. It was her evidence, that by then the appellant did not have a phone so it was untrue that he went out to make a phone call.

11. In re-examination, she stated that they all slept on the same bed and that the appellant went for an afternoon nap as she was folding clothes while the complainant was outside and later joined the appellant on bed. 30 minutes later, she joined them in bed at about 4pm and slept till 5pm. She however did not discover anything. The complainant slept at the far end, followed by the appellant then PW2. According to her, she woke up and went to the kitchen for a few minutes before going back to wake up the appellant to give her money for food which he informed her that she did not have. By then the appellant had covered himself with the blanket. She however forced him to wake up because the children used to sleep early ad it was when she uncovered him that she discovered that he had taken off his trouser and boxed and the complainant's black trouser and pants were also off and she only had her blouse on.

12. She testified that she shouted until all the children gathered around and also called the appellant's grandmother who went and left. She also called his uncle and sister. In the meantime, the complainant had gone out where children were.

13. PW3, **Dominic Mbindyo**, a clinical officer from Kangundo Level 4 Hospital testified that the complainant was taken to the Hospital following a history of attempted defilement on 27th December, 2018 at 5pm. On examination, there were no tears or laceration and though the external genitalia were reddish, HIV, VDRL and Hepatitis B tests were negative. However, the urine had numerous pus cells and leucocytes. He concluded that the complainant was sexually assaulted but there was no penetration. He exhibited the P3 form, treatment notes and lab request and report form.

14. PW4, PC Caren Umazi from Tala Police Post, the investigating officer, was at the Post on 28th December, 2028 when a report of attempted defilement was allocated to her. She found the complainant and her mother outside the station and the mother informed her that the perpetrator who was well known to them had escaped to Mutituni. On 30th December, 2018, PW2 called her on phone and informed her that the perpetrator had been spotted and explained that she found the appellant in the act red handed. According to the report, the appellant had removed his trouser and that of the victim and was sleeping on the same bed as the victim. She called the police at Mutituni AP Post to arrest the appellant which they did after which she proceeded there and re-arrested him.

15. According to PW4, upon interrogation, the appellant stated that he had been possessed by demons because he found himself taking away the child's clothes and his as well and started fondling the child. The complainant was take to the Hospital and the doctor confirmed the incident. According to pw4, the accused was positively identified and the complainant's age was confirmed by the notification of birth to have been 6 years old.

16. Upon being placed on his defence, the appellant chose to make an unsworn statement in which he denied the allegations made against him. According to him, he married PW2 with children and they had stayed for four months. It was his evidence that the evidence of the complainant was false and she was couched by PW2. He averred that PW2 wanted money from him and fabricated the said charges after telling him that she would put him in a place he would not come out of. He lamented that he was suffering for an offence he did not commit.

17. In her judgement, the Learned Trial Magistrate found that the offence was committed in broad daylight. While the three went to take an afternoon nap, unknown to PW2, the appellant was fondling the complainant and got to know of the same when she woke up and pulled the covering away from the appellant when she found both the appellant and the complainant half naked and the complainant informed her that the appellant had been doing bad manners to her. According to the learned trial magistrate the appellant did not explain why he had taken off PW1's trouser and pant as well as his own trouser and boxer. In the court's view, being the appellant's relatives, she did not expect his grandmother, uncle and sister to testify against the appellant given the gravity of the offence. Based on the evidence, she found that the appellant used his hands to caress PW1's external genitalia. She therefore found that there was proof that the appellant intentionally touched the vagina of EN, a girl aged 6 years using his hand and convicted him accordingly on the alternative charge of committing an indecent act with a child contrary to section 11(1) of the ***Sexual Offences Act***, No. 3 of 2006. She sentenced the appellant to 10 years imprisonment.

Determination

18. I have considered the grounds of appeal, the evidence, the submissions and authorities relied upon.

19. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and have

drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."**

20. Similarly in the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in **Pandya -vs- Republic [1957] EA 336** is as follows:-

> **"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."**

21. It was therefore appreciated by the Court of Appeal in **Kiilu & Another vs. Republic [2005]1 KLR 174,** that:

> **1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**
>
> **2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.**

22. The Appellant herein was charged under Section 9(1) and (2) of the ***Sexual Offences Act. No. 3 of 2006.*** The said provision provides as follows:

> **(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.**
>
> **(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.**

23. In cases such as this where the evidence of a minor requires corroboration and as was held by the Court of Appeal in **Bernard Kebiba vs. Republic [2000] eKLR**:

> **"The law on corroboration in sexual offenses is not in dispute any more in our courts. There is requirement for corroboration in all sexual offenses. It is however, a rule of practice only. Though a strong rule of practice, it has not acquired the force of law. In appropriate circumstances, where the trial court is satisfied that the complainant is speaking nothing but the whole truth, the court may convict without corroboration. In such a situation however, the court must warn itself of the danger of basing a conviction upon uncorroborated evidence of the complainant. Where, however, the court feels that there is need for corroboration, the court must say so expressly in the judgment. The court must then look for corroboration from the evidence led and recorded and if the court finds it, the court must mention it expressly in its judgment. Where the court finds no corroboration after forming the opinion that corroboration is necessary, the benefit of doubt must be given to the accused and acquittal must result."**

24. Similarly, in **Benjamin Mugo Mwangi & Another vs. Republic [1984] eKLR** the Court of Appeal was of the opinion that:

> **"The relevant law in Kenya is succinctly set out in Chila vs. The Republic (1967) EA 722 at page 723:**
>
> > **'The law of East Africa on corroboration in sexual cases is as follows: the judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that here evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice.'**
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> **The decision was applied in Margaret v the Republic (1967) Kenya LR 267. In view of Consolata's evidence, it was necessary for sexual intercourse to be proved by establishing penetration: Halisbury's Statutes of England, Third Edition, Volume 8**

page 440 para 44. Be that as it may, the trial magistrate did not warn himself as we have already held. That was a grave misdirection. In the absence of such a warning, the convictions for rape are not for sustaining unless we are satisfied that Consolata's evidence is true. We are not so satisfied and so the convictions cannot stand: Rv Cherap arap Kinei & Another (1936), 3 EACA 124."

25. In sexual offences, however, where the minor is the victim of the offence, the evidence of that minor, if believed by the trial court, can, without corroboration, found a conviction. Section 124 of the ***Evidence Act*** makes this quite clear:

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth." [Emphasis added]

26. Dealing with a similar issue in the case of **Mohamed vs. R, (2008) 1 KLR G&F 1175,** this Court held that:

"It is now well settled that the courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that he child is truthful."

27. The Court of Appeal sitting in Mombasa in **Sahali Omar vs. Republic [2017] eKLR** held that:

"On the first issue, the appellant took issue with lack of corroboration of the complainants' evidence, which he said ran afoul of section 124 of the Evidence Act…The import of that provision is that ideally, the evidence of a child of tender years in criminal proceedings should always be corroborated; notwithstanding the voir dire examination of the child under section 19 of the Oaths and Statutory Declarations Act. In short, that even though the court is satisfied that the child is competent to tell the truth, their testimony should nonetheless be corroborated by independent evidence. However, the section also allows for an exception. Under the proviso thereto, the court is allowed to solely rely on the evidence of a child of tender years if the child is the victim, provided the court first satisfies itself on reasons to be recorded, that the child is being truthful…It is a well established rule of law that the unsworn testimony of a child of tender years must be corroborated. However, where a child of tender years gives sworn testimony or is affirmed, corroboration is unnecessary. (See. Patrick Kathurima v. R (supra) and Johnson Muiruri v. Republic, (1983) KLR 445 and also John Otieno Oloo v. Republic [2009] eKLR)…In addition, the proviso to section 124 of the Evidence Act affords an exception to this general rule in cases of sexual assault where the child in question is not only the sole witness but also the alleged victim. So that as far as PW1 was concerned, even though neither PWs 2, 3, 4 or even 5 (the medical practitioner) could directly support her testimony, the court could nonetheless rely on it provided it recorded its reasons. In this case, the trial court is seen to have addressed itself thus:

"…The complainant did not mention anyone else. The offences were committed during the day. The accused was well known to PW1, PW2, PW3 and PW4."

The appellant has not taken any issue with the reasons recorded by the trial court. This, in addition to the fact that PW1 and PW2 gave evidence under affirmation, the ground on corroboration should fail."

28. Therefore, what is required of the trial court is to be satisfied that the victim is telling the truth. It was therefore held in **Omuroni vs. Republic (2002) 2 EA 508** that:

"Trial courts can decide cases one way or the other on the basis of demeanour of a witness or witnesses particularly where the issue of credibility of such witness is decisive. In such a case the trial judge must point out instances of demeanour which he noted and upon which he relies. The trial court must point out what constituted the demeanour which influenced the trial judge to make favourable or unfavourable impression about the credibility of a particular witness."

29. This decision was relied upon by **Warsame, J** (as he then was) in **Jon Cardon Wagner vs. Republic & 2 Others [2011] eKLR** when he stated that:

"It is required, which is of paramount of importance, that a trial court must indicate or point out instances of demeanour which he noted and which he relies upon as a basis of accepting the evidence of a particular witness. The trial court can only be influenced to make a favourable impression about the credibility of a particular witness after establishing the instances as to why and how he thinks that particular witness is a witness of truth. In this case the trial court did not pay any regard to this elementary principle of law in arriving at the decision as to whether the three complainants were witnesses of truth. In the absence of any basis for establishing whether the three witnesses were witnesses of truth, the trial court was wrong in its decision."

30. The meaning of corroboration as defined or stated in the Nigerian case of **Igbine vs. The State {1997} 9 NWLR (Pt.519) 101 (a), 108** is thus: -

"Corroboration means confirmation, ratification, verification or validation of existing evidence coming from another

independent witness or witnesses".

31. In **Mukungu vs. Republic [2002] 2 EA 482**, the Court of Appeal citing **Mutonyi vs. Republic [1982] KLR 2003**, held that:

> **"An important element in the definition of corroboration is that it affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it: See Republic vs. Manilal Ishwerlal Purohit [1942] 9 EACA 58, 61."**

32. In **R vs. Kilbourne [1973] 2 WLR 254, 267**, **Lord Hailsham** of St Marylebone LC stated:

> **"Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. If his evidence is not credible, a witness's testimony should be rejected and the accused acquitted, even if there could be found evidence capable of being corroborated in other testimony. Corroboration can only be afforded to or by a witness who is otherwise to be believed."**

33. In **Khalif Haret vs. The Republic [1979] KLR 308, Trevelyan** and **Hancox, JJ** pronounced themselves as hereunder:

> **"What then, is corroboration? As was put succinctly in R vs. Kilbourne (at page 263) it means "no more than evidence tending to confirm other evidence". It is not, as the judge-advocate correctly stated, confirmation of everything, so that it amounts to a duplication of the evidence needing corroboration."**

34. It is therefore clear that corroborative evidence or material ought to confirm, ratify, verify or validate the existing evidence and must emanate from another independent witness or witnesses. It must affect the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it.

35. In this case there was clearly no material corroborating the Complainant's evidence that it was the Appellant who defiled her. In her evidence, PW1 started by stating that she did not know the appellant and that it was in fact PW2 who informed her that the appellant was called **Meshack**. It was also PW2 who informed her to refer to the appellant as her father. In this case it was not only necessary that the evidence of the offence be corroborated but also the evidence of the identity of the perpetrator unless the court made a finding that the complainant was telling the truth. In her judgement, nowhere did the Learned Trial Magistrate make an express finding on the truthfulness of PW1's testimony as required in section 124 of the ***Evidence Act*** as well as the authorities. In my view, such a finding ought to be expressly made and cannot be by implication.

36. In his evidence, the appellant stated that PW2 couched PW1 because there was a grudge between the two arising from his refusal to give her money and as a result, PW2 threatened him with some unspecified action. In her testimony, PW2 testified that she had in fact requested for money from the appellant but the appellant declined to give her. The Learned Trial Magistrate did not deal with this issue. In **Ayub Muchele vs. The Republic [1980] KLR 44**, **Trevelyan and Sachdeva, JJ** held that:

> **"Just as animosity is a factor which is properly to be taken into account where required, so is lack of animosity. We see nothing wrong in an appropriate case for the court to ask "What reason had the witness to lie?"…The fact that people have no grudge against someone does not mean that they cannot, at the same time, be mistaken or, for that matter, deliberately untruthful…There are spiteful people about."**

37. In **Lukas Okinyi Soki vs. Republic Kisumu Criminal Appeal No. 26 of 2004,** the Court of Appeal noted that:

> **"The appellant also claimed that the complaint was made as a result of grudge between the complainant and the appellant's father over a piece of land that was in dispute between the two. The Learned Trial Magistrate did not consider this defence and never made any finding on it. The superior court dismissed it stating that the issue was introduced by the appellant late and was not afforded an opportunity to be tested and countered.**
>
> **…..**
>
> **The court ended its observation by saying that the Trial Magistrate must have seen the issue was of no probative value. It did not make any decision on the issue and in our humble opinion, abdicated its role of analysing that evidence (considering that the appellant was unrepresented, and that the appellant was facing a serious charge which carried death sentence) and making its own conclusion on the same. As it stands, all that the superior court did was to state that the matter was introduced late and as there was no opportunity to cross examine on it, the trial court found it was not of probative value. That evidence was on record and deserved to be fully considered and either dismissed or accepted."**

38. Had the Learned Trial Magistrate considered the Appellant's defence, this Court cannot state with certainty that she would have arrived at the same decision.

39. Apart from the said issue, Article 50(2) (g)(h) of the Constitution of Kenya 2010 on fair hearing, states that:

> **(2) Every accused person has the right to a fair trial, which includes the right--**

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly; (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

40. The Constitution makes it mandatory for an accused to be promptly informed of this right before the trial commences.

41. In addition, the ***Legal Aid Act 2016***, section 43 on duties of the court when interacting with an unrepresented person states that:

> **"A Court before which an unrepresented accused person is presented shall:**
>
> **a) Promptly inform the accused of his or her right to legal representation;**
>
> **b) If substantial injustice is likely to result, promptly inform the accused of the right to an advocate assigned to him or her; and**
>
> **c) Inform the service to provide legal aid to the accused person"**

42. In this case the said provisions were not complied with. In **Joseph Kiema Philip –vs- Republic [2019] eKLR** the court with regards to the said requirement stated that:

> **"The right to legal representation is founded upon well-known principles, doctrines and concepts which include access to justice, right to fair trial, the rule of law and equality before the law. This fundamental right is recognized in a myriad of states due to its importance in ensuring that the process is just, credible and transparent. Thus legal representation is a cardinal principle of fair trial. The criminal justice system in Kenya places the right to fair trial at a much higher pedestal, and in that respect and in the context of this matter; the accused is placed in somewhat advantageous position. Therefore, legal representation is a fundamental constitutional dictate envisaged under article 50 of the Constitution of Kenya 2010…it is paramount that the record of the trial court should demonstrate that the accused was informed of his right to legal representation…In this instance the appellant had been charged with defilement which attracts a serious sentence once convicted. From the record of the trial court, the appellant was not informed of his right to legal representation which rendered the trial unfair and led to a grave miscarriage of justice."**

43. Similarly, in *the case of* **Jared Onguti Nyantika vs. Republic [2019] eKLR**, it was stated that it is a fundamental issue in the trial process that an accused person be informed of his right to an advocate of his own choice, and the failure to facilitate it amounts to an injustice. It was emphasized that the accused person ought to be notified of that right at the earliest opportunity, and failure to inform of the right was a denial of a right to fair hearing. In the present case, the Appellant faced a long sentence in prison if convicted. In ***David Njoroge Macharia vs. Republic*** **[2011] eKLR** and ***Karisa Chengo & 2 others vs. Republic*** **[2015] eKLR**, it was emphasized that;

> **"one of the factors that makes it critical that the court must inform an accused person of the right to legal representation is the seriousness of the offence or the gravity of the sentence to be imposed upon conviction. The appellant herein faced a charge of defilement of a minor of fourteen, which attracted a penalty of minimum sentence of twenty years imprisonment. The charge was a very serious one, upon being found guilty the appellant faced a minimum of twenty years in jail, and he was indeed sentenced to that exact period. That being the case, the trail should have informed him of his right to legal representation and directed that he be provided with an advocate at state expense."**

44. I therefore, have no hesitation in finding, which I hereby do, that the Appellant's rights under the foregoing provisions were violated and contravened.

45. Having considered the foregoing, it is my finding that the conviction of the appellant was not safe and I find this appeal merit, which I hereby allow, set aside the appellant's conviction, quash his sentence and set him at liberty forthwith unless he is otherwise lawfully held.

46. It is so ordered.

JUDGEMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 12TH DAY OF APRIL, 2021

G. V. ODUNGA

JUDGE

In the presence of:

Appellant in person

Mr Ngetich for the Respondent

CA Geoffrey