REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 62 OF 2019

CASSIAN SAFARI KATEMA.....APPELANT

-V/S-

REPUBLIC.....RESPONDENT

(Being an appeal from the decision of the Hon. J. A. Kassam

(RM) on 15th May 2019 in Mombasa Criminal Case No. 2196 of 2016).

JUDGMENT

Background

1. Cassian Safari Katema the appellant herein has appealed against the decision of Hon. J. A. Kassam (RM) delivered on 15th May 2019 in Mombasa Criminal Case No. 2196 of 2016 where he was convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve life imprisonment.

2. The particulars of the charge were that the accused on the 27th day of October 2016 at unknown time at [Particulars Withheld] Nursery School in Kilindini Division within Mombasa County intentionally and unlawfully caused his penis to penetrate the anus of KM a child aged 3 years.

3. The grounds of appeal were stated as follows:-

a) That the learned magistrate erred in convicting the appellant on the basis of contradictory evidence when the nature of the material contradictions was such as should have been resolved in the appellant's favour.

b) That the learned magistrate erred in convicting the appellant of the offence charged without having due regard to the contradiction between the alleged date of offence as stated on the charge sheet and the evidence relative to communication between the complainant's mother and the complainant's school teacher which bespoke a date well removed from the date charged.

c) That the learned magistrate erred in placing overwhelming emphasis on the evidence of identification by a 3 year old who had failed to conclusively identify the appellant in the dock.

d) That on the whole the learned magistrate erred in reaching the conclusion that she did given the material before her.

e) That the magistrate erred in failing to give due consideration to the appellant's defence and or to accord him sufficient latitude to call certain material witnesses.

f) That the trial magistrate erred in meting out a sentence that was in the circumstances manifestly excessive.

4. The complainant testified giving unsworn statement I suppose because of his age but was stood down when he was unable to continue talking to in cross examination.

5. The appellant prayed that the appeal be allowed and conviction set aside.

6. The evidence of the prosecution at trial was tendered by PW1 the mother of the complainant, PW2 P.C. Paul Opapa the investigating officer, PW3 Dr. Fatma Said from Coast General Hospital and produced P3 form filled in respect to injuries sustained by the complainant who had lacerations on the anus at the uppermost part. She said the complainant's anus was broken and that injuries were consistent with defilement. PW4, the complainant, underwent a *voir dire* examination which was conducted on the complainant and it was established that he was able to speak and he confirmed that he is in a position to tell the truth because he understands the nature of the case. PW4 testified and said that 'uncle wa maji' hurt him. He pointed at the accused and that he was hurt in the buttocks by pointing at his anus and that the accused used his Simba.

7. PW5, RMO, the teacher at [Particulars Withheld] Nursery School, testified that she saw the complainant's anus which was red and when PW5 asked the complainant who had done that to him, the complainant said it was 'uncle wa maji'. PW5 said the accused had worked in the school for a very long time as a toilet cleaner. PW6, Moses Munyi Muenywa, the officer who conducted the identification parade. He looked for other KPA workers of similar size, height and age totaling to 12. They were all dressed in workers' uniform. PW6 informed the accused the purpose of the parade and explained to him his legal rights of representation and the complainant was able to identify the accused 4 times.

8. Evidence of the defence at trial was tendered by DWI, Kasian Safari Katana, the accused, and DW2, Alexander Mutisya. DWI stated that the complainant pointed at him at the school before he was arrested and escorted to KPA Port Station then to Makadara Hospital where he was examined by three doctors and the results were negative. On 4.11.2016 an identification parade was conducted and the complainant still pointed at him. DW2, a colleague to the accused, stated that he was one of the people lined up at the identification parade and the complainant still pointed at the accused.

Appellant's Submissions

9. On conviction based on contradictory evidence, the appellant submitted that the contradiction as to whether there was in fact a physical identification on the 27th October 2016 or mere mention of 'uncle wa maji' is important, and disturbing, more so coming from what should be the investigating officer of the case. At all events, there is no mention that the witnesses on the day saw, or were shown, any assailant beyond the mere mention of a certain 'uncle wa maji'. Further, in any case, the child having at some point spoken of 'uncle wa maji', it is unclear how the conclusion was reached that the term exclusively referred to the appellant and there is certainly no evidence that was called to establish the nexus that 'uncle wa maji' commonly, generally or necessarily referred to the appellant. In ordinary terms, 'uncle wa maji' may connote a water dealer or vendor of which there is evidence of PW1 herself that there were occasions when she would call upon water vendors to supply her, a fairly common phenomenon within Mombasa County. The possibility cannot be wholly discounted that the child may have been exposed to other persons who were actual water vendors. Though PW2 sought to defend his assumption that the term 'uncle wa maji' referred to the appellant by saying that it was a common name used by other children in the school, that would be hearsay, and the only credible or acceptable source or evidence of such a profound or assertion could, in the circumstances, only have been that of any one of these children to whom he was referring to which none was called to testify.

10. On contradiction between dates, the appellant submitted that rather than the 27th October 2016, PW5 appears to speak of the date of the incidence as 24th October 2016 and it is necessary that pieces of her evidence are looked at alongside that of PW1 for consistency. Further there were varying accounts as to when the alleged offence occurred, on 24th October or 27th October, and where and in whose presence 'uncle wa maji' was first mentioned. The events of 1st November 2016 constitute the next critical phase of this affair. On this day, in the middle of preparation or a graduation ceremony, the complainant's father comes to school in the company of police officers.

11. On identification parade, the appellant submitted that the Kenya Police Standing Orders regarding the conduct of identification parades demonstrate that the orders were flouted as to render the parade nigh on worthless, even a nullity. The appellant quoted standing order 6(iv)(c) which stipulates that the witness or witnesses will not see the accused before the parade. The complainant minor had been exposed to the appellant three days before the identification parade when he was brought before the appellant and several other school workers on 1.11.2016. The effect of exposing the appellant to the witness in the circumstances that were likely to occasion prejudice to the subsequent identification process. The appellant further submitted by pointing out Standing order 6(iv)(d) which stipulates that an accused person will be placed among at least eight persons, as far as possible of similar age, height, general appearance…as himself. In his cross examination, PW6 stated that the accused was of a darker complexion than his participating co-worker, and that he was taller, another clear breach of the prescription that the height and general appearance of parade participants should be as proximal as possible, which deviation should further undermine the credibility of the identification parade.

12. On *locus in quo* the appellant submitted that PW5 did admit that the incident may have occurred elsewhere. By elsewhere, she was discounting PW2's quite unfounded suggestion that the incident occurred in the toilets. Yet, the minor, further examined in chief as to the locus in quo, says it was outside his house. So there do exist at least three versions on the very important matter of the locus in quo- was it in the toilets as per PW5's venturing, is it an unknown location as conveyed by the child on 1.11.2016, or according to the child still, is it outside the assailant's house. On the issue of contradictions, the appellant quoted the case of *Eric Onyango Ondeng' V R* [2014] eKLR which quoted the decision of the Uganda Court of Appeal in *Twehangane Alfred v Uganda* [2003] UGCA 6. The appellant further cited the decision in *MW v Republic* [2019] eKLR where Nyakundi J. cited the Court of Appeal of Nigeria in *David Ojeabuo v Federal Republic of Nigeria* [2014] LPELR 22555.

13. On sentencing under the 6th ground of appeal, the appellant in submitting acknowledged that the court relied on the evidence, the age of the complainant and on account of section 8(1) of the Sexual Offences Act in settling on the mandatory sentence of life imprisonment. However, the appellant quoted the case of *Francis Muruatetu & Others v R* [2017] eKLR in submitting that the matter of mandatory minimum sentence has evolved. The appellant further quoted the case of *Lucas Mberia v R* [2020] eKLR where life imprisonment on defilement of a 9 year old was set aside and the same was substituted with a 20-year jail sentence. Additionally, in *Christopher Ochieng v R* [2018] eKLR where life imprisonment on defilement of an 8 year old was set aside and substituted with a 30-year jail sentence. The appellant then urged the court to invoke the law and in the case of Muruatetu, exercise its discretion and vary the sentence as the court may deem appropriate.

Respondent's Submissions

14. On identification of the appellant as 'uncle wa maji' the Respondent through the prosecution submitted that the appellant had access to the child every school day. He was referred to in school by the students as 'uncle wa maji'. He was picked out first of all in a lineup of all the few casual workers in the school. He was then picked out multiple times by the child during the identification parade at the police station. This was within a week of the incident. His memory was still fresh. Even in court, the child would point at the appellant and eventually was able to name him as 'Safari'.

15. On the identification parade, the Respondent submitted that the rules do not forbid the presence of an investigating officer. They simply require that another officer conduct the parade who is not in charge of the case. Further, there was nothing irregular in having more than 12 persons in the lineup. The rules only require a minimum of 8 people. The rule is qualified with the words 'at least 8 persons'. The Respondent further submitted that there is nothing irregular in an identifying witness seeing the accused days prior to the parade. This is normal in the course of investigations and even forms the basis for choosing persons of similar age, height and general appearance as the suspect to participate in the parade. All workers of the organization wearing the same uniform voluntarily participated in the identification parade and the child was still able to pick out the appellant.

16. On the issue of the *locus in quo* of the incident, the Respondent submitted that it is not a necessary ingredient to prove the offence of defilement. It cannot be said to be material in showing the consistency or otherwise of the prosecution witnesses simply because the only two people who knew where the incident happened were a vulnerable 3 year old child and his assailant. The complainant was not able at first to state where the incident occurred. However, during his third or fourth visit to court, the complainant was able to articulate a little better as to where this incident may have occurred. He said it happened outside the school premises and outside the appellant's house. It is not clear where the appellant was living at the time and none of the prosecution witnesses testified on the aspect. The Respondent asked the court to disregard this issue.

17. On sentencing, the Respondent submitted that the appellant is serving a life sentence which was proper and legal based on the Sexual offences Act as the minor was a of very tender years, a 3 year old child. The impact on the little boy's life may not even be understood. The Respondent then urged the court to dismiss the appeal in its entirety as it is wholly without merit as the prosecution proved its case against the appellant.

Analysis and Determination

18. This is the first appellate court and its duty is to reanalyze and reevaluate all the evidence from the lower court before making its conclusion. Duties of the first appellate court were set out in the case of Okeno v Republic [1972] EA 32 where it was held 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."**

19. After considering the grounds of appeal, circumstances of the case and submissions by both parties, the issues for determination are as follows:-

> i) Whether the Appellant was convicted on the basis of contradictory evidence in the identification of the Appellant as 'Uncle wa Maji'.
>
> ii) Whether the Appellant was convicted without having due regard to the contradiction in dates.
>
> iii) Whether there was proper identification of the Appellant by a 3 year old who had failed to conclusively identify the Appellant in the docks.
>
> iv) Whether the place where the incident occurred was properly established.
>
> v) Whether the sentence was manifestly excessive.

Contradiction in identification of the appellant as 'uncle wa maji'

20. When the complainant was interrogated in their house on 27.10.2016 in the presence of PW1 and PW5, he said that it was 'uncle wa maji' who had defiled him. The said 'uncle wa maji' is the accused person herein who worked in the school as a toilet cleaner and whom the children generally referred to as 'uncle wa maji', according to PW5. When the minor was taken back to school on 27.10.2016 and all workers summoned, the minor was still able to point out the accused as the perpetrator who was not a stranger to the minor.

21. In *Peter Musau Mwanzia v Republic* [2008] eKLR, the Court of Appeal stated as follows:-

> **"We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the**

suspect at the time of the offence, can recall very well having seen him earlier on before the incident. It is not clear whether that is what Mr. Mutuku refers to as basis for recognition."

22. On page 4 paragraph 3 of the Appellant's Written Submissions, it is submitted that since the name 'uncle wa maji' was commonly used by children in the school, one of the children should have been called to give a testimony. This position contradicts **Section 124** of the **Evidence Act** on the evidence of children which states as follows:-

Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is 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.

23. Further to the above, the court in *Mohamed v R* [2008] 1KLR G&F 1175 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 the child is truthful.

Contradiction on dates

24. The offence of defilement according to the charge sheet happened on 27.10.2016 while the accused person was arrested on 1.11.2016 when they were preparing for a graduation. However, PW5 stated in her testimony in court that the offence happened on 24.10.2016. Possibilities of memory loss that results from lapse of time is in human nature. Therefore, contradiction in dates in this case is minor and does not qualify to be considered as having the possibility of occasioning injustice.

25. In *Willis Ochieng Oderro v Republic* [2006] eKLR, the Court of Appeal held:-

"As for the contradictions in the prosecution evidence it may be true that such contradictions, particularly with regard to the date indicated on the P3 form as the date of the offence, is different. But that *per se* is not a ground for quashing the conviction in view of the provisions of *section 382* of the *Criminal Procedure Code*."

26. In *Twehangane Alfred v Uganda*, Crim. App. No. 139 of 2001, [2003] UGCA, 6, it was held as follows:-

"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

27. In *Eric Onyango Ondeng' v R* [2014] eKLR, the court held as follows:-

"The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyze that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers."

28. In Kauli Beja Lewa v Republic [2018] eKLR, Odunga, J. held:-

"In my view the contradictions pointed out were not so material as to vitiate the conviction."

Identification parade

29. The accused person had worked in the school as a toilet cleaner for a long time as a result of which the minor was able to visually identify him as 'uncle wa maji'. The frequent interaction between the children in the school including the minor and the accused, the minor is said to have seen the accused severally before the identification parade was conducted. The identification parade was conducted to confirm that the accused is indeed the perpetrator. The minor was able to pick out the accused person four times by touching him. Before the identification parade was conducted, PW6 informed the Appellant of the purpose of the parade and his legal right of representation but the Appellant chose not to avail an advocate or a friend. After the identification parade, the accused stated that he was satisfied with how the identification parade had been conducted.

30. In *Michael Nganga Kinyanjui v Republic* [2014] eKLR the Court of Appeal considered these cases and quoted from *Cleopas Otieno Wamunga v R* that:-

"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to

a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant on reliance on the correctness of the identification. The way to approach the evidence was succinctly stated by Lord Widgery, C.J. in the well-known case of *Republic v Turnbull* [1970] 3 ALL E.R. 549…"

"... 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."

The locus in quo

31. There are conflicting testimonies as to where the offence of defilement occurred. The offence happened in the toilets as per PW5, in an unknown location as conveyed by the child on 1.11.2016, or outside the assailant's house according to the child. According to PW5, the school is fenced with has a gate and children are not allowed to go outside the school. On the day of the incident, PW1 took the minor to school in the morning and fetched him at noon and the wounds at the anal area were raw. It is clear that the incident happened within the school compound. The Appellant in his testimony states that he lives in Jomvu. Therefore, the possibility of the offence occurring outside the assailant's house is ruled out. However, be as it may, the issue of locus in quo is not an element of defilement that needed to be proved beyond reasonable doubt by the prosecution. It is therefore disregarded by this court.

32. In *Mukasa v Uganda* [1964] EA 698, it was held that:-

"A view of a locus in-quo ought to be, I think, to check on the evidence already given and, where necessary, and possible, to have such evidence ocularly demonstrated in the same way a court examines a plan or map or some fixed object already exhibited or spoken of in the proceedings. It is essential that after a view a Judge or Magistrate should exercise great care not to constitute himself a witness in the case. Neither a view nor personal observation should be substituted for evidence."

Whether the sentence meted was manifestly excessive

33. The sentence of life imprisonment cannot be said to be excessive as the lower court relied on circumstances of the case where the elements of defilement of the age of the complainant, proof of penetration and positive identification of the assailant were proved by the prosecution beyond reasonable doubt. Also, the Sexual Offences Act under Section 8(2) prescribes the penalty of life imprisonment for the offence of defilement of a child aged eleven years or less.

34. In the case of *D W M v Republic* [2016] eKLR, court held that:-

"As for the sentence the 1st appellate court properly addressed its mind to the operative words in Section 20(1) of the Sexual Offences Act that the offender "*Shall be liable to imprisonment for life*" means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant's protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was within his powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion."

35. The opinion of the Court of Appeal in *Jared Koita Injiri v Republic* [2019] eKLR it was held that:-

"In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by *section 8 (1)* of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy. Needless to say, pursuant to the Supreme Court decision in *Francis Karioko Muruatetu & Another vs Republic (supra)*, we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."

36. In conclusion, I have established that that all the elements of defilement were proved by the prosecution beyond reasonable doubt. However, on the issue of sentencing I hereby set aside the sentence of life imprisonment and substitute it with twenty (20) years imprisonment to run from 15.05.2019 when he was convicted pursuant to section 333(2) of the Criminal Procedure Code.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 16TH DAY OF SEPTEMBER 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE

<u>In the presence of:-</u>

Mohamed- Court Assistant

Ms. Keya for Respondent

Ms. Mwakisha for Appellant

Hon. Lady Justice A. Ong’injo

Judge