REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 29 OF 2019

CK.....APPELANT

-V/S-

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence by Hon. E. Mutunga, Senior Resident Magistrate on 14th December 2018 in Criminal Case No. 1258 of 2017, *Republic v Cosmas Katana*).

JUDGMENT

Background

1. CK was charged in Mombasa Chief Magistrate's Court Criminal Case No. 1258 of 2017 with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars are that CK on the 25th day of July 2017 in Changamwe Sub-county within Mombasa County intentionally and unlawfully caused his penis to penetrate the anus of RS a girl aged 3 years old.

2. In the alternative count, the appellant was also charged with the offence of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

3. The trial magistrate considered the evidence of the four prosecution witnesses and the unsworn statement of the appellant and his witnesses DW2 and DW3 and convicted the appellant who was sentenced to serve life imprisonment.

4. The appellant was aggrieved by the conviction and sentence and he preferred the appeal herein on the following grounds:-

1) That the trial magistrate erred in fact and in law in conducting the proceedings without recording the language used.

2) That the appellant was denied the right to have the proceedings in the trial court interpreted by an official and non-partisan interpreter into a language he understood.

3) That the appellant was denied the right to have the salient facts of the case narrated to him and he be given an opportunity to quantify the same.

4) That the totality of the evidence against the appellant does not attain the required standard as to discharge the prosecution's burden of proof in the case. Consequently, the accused was wrongly convicted.

5) The sentence is excessive and illegal.

6) The court failed to appreciate that the appellant has diminished mental capacity following a road traffic accident on 12/06/2014 long before the alleged incident leading to this case and ought to have had him. Medical examined to ascertain suitability for trial.

5. The appellant prayed that the appeal be allowed, conviction quashed and sentence set aside. This appeal was canvassed by way of written submissions.

6. Brief facts of the case are that PW1 the mother of the Complainant returned home and found the child was uncomfortable. That the child told her she had pain on her private parts. PW1 inquired from PW2 – S her daughter who had remained with the child at home and she was

told the child said that accused had done 'tabia mbaya' to her after ordering her to remove her panty.

7. Complainant was taken to Port Reitz Hospital and she was referred to Coast General Hospital where she was treated and P3 form as well as PRC form filled by Doctor Ogote and produced by Dr. Salim Said- PW 3. Examination of the child according to ExP2 – P3 form showed the Complainants labia minora was lacerated and that there was laceration and tear all around the anal splinter.

8. On 12/10/2017 when matter came up for hearing the trial Magistrate observed that the 3 years old child had difficulty speaking in court and matter was adjourned to see if she could have another chance to testify on her own.

9. On 17/10/2017 the court attempted to have the Complainant testify again but it failed. The prosecuting counsel applied that her mother testifies as an intermediary. However, the mother PW1 testified on what she found at home on return and slept. She reported the matter to the police and took the minor to hospital. PW1 testified that accused was identified as the one who defiled the child near the latrine after applying saliva to his penis.

10. PW 2 said she had remained with the Complainant at home and when she went to look for her outside she found she was crying. On inquiry the Complainant told PW2 that K had removed her panty and defiled her. PW2 said K the appellant is her cousin.

11. PW4 CPL Isaiah Kanene investigated the offence and preferred the charge against the appellant. He said when he interviewed the minor she said she was taken near a latrine which was near a bush. He said that appellant was found at the scene of offence and taken to the Changamwe Police Station by members of the public on 25th July 2017.

12. The accused in unsworn statement said that he was arrested together with his friend's town including DW2 and DW3 and that DW2 and DW3 were released but he was charged with defilement. He said that the Complainant could not speak. He said the charge was not true and that the witnesses were not at the scene. He said he didn't report that he was beaten by police who faced him to take plea.

13. DW2 testified and said that members of public arrested him and asked about his friends. That he took them where his friends were and they were arrested and taken to Changamwe Police Station. He said he was with the appellant in the morning.

14. DW3 testified that he had gone to pick bread when he was arrested together with the appellant who was said to have defiled and when he was released, the appellant remained at Changamwe Police Station. He said he didn't know what the appellant did on 25/07/2017 as they were not staying together.

Appellant's Submissions

15. The Appellant submits that he was supplied with witness statements which he could not read due to illiteracy and no assistance was given by the court to ensure that he had the evidence in those statements interpreted to him in the language he understands despite his confession to court that he does not know how to read. The Appellant submits by inviting the court to confirm the position in the 2nd last and last lines of page 6 as well as lines 1-3 of page 7 of the proceedings.

16. The Appellant submits that during the prosecution case, the prosecutor stated that the victim could not speak but was going to testify through an intermediary. This did not happen as the prosecution commenced and closed her case without involving the victim.

17. The Appellant submits that the prosecution called the victim's mother one FK who testified as PW1 and told court that the accused was his niece and she knew him before the incident. She stated that on the material day, she found her daughter already defiled but the Appellant was not present. The minor allegedly told her mother that she was defiled by KY at a latrine. She admitted that she was not at the scene.

18. The Appellant submits that SM testified as PW2 and told the court that she was the sister to the victim. She also stated that she was not at the scene during the defilement and that she only learnt later of the same and the minor informed her that the act had been perpetrated by KY. The Appellant was not anywhere around the scene and had not been spotted by anyone else.

19. The Appellant submits that Dr. Salim from Coast General also testified and confirmed that indeed the victim was defiled. He produced the Post Rape Care form (PRC). The salient things that came out from the PRC produced are, the victim was seen one day after the incidence, the victim was in changed clothes and those that she had worn at the time of the incidence had been left at home, and no tests were conducted on the victim to ascertain any DNA of the perpetrator. The doctor whose evidence was given in English confirmed that he only carried eye examination.

20. The Appellant submits that the prosecution called PW4, Police Constable Isaiah from Changamwe Police Station who alleged that the Appellant was taken to the station on the date of the incidence by the public having been caught in the act. The officer did not however ensure to avail any eye witnesses from the public who had allegedly caught the Appellant in the act. He did not also endeavor to obtain any further evidence to link the Appellant to the act. All he says is that he interrogated the victim who identified the accused.

21. The Appellant submits that in his defence at page 23 lines 12-14 maintained that he was arrested and taken to Changamwe Police Station where the victim was availed but the same did not identify him and neither did the witnesses allegedly at the scene. He was arrested with several friends whom they had gone to collect bread.

22. The Appellant submits that from the foregoing, the issues that emerged are whether a fair hearing was conducted in the instance and whether the case was proved beyond reasonable doubt. On the issue of whether a fair hearing was conducted, the Appellant submits that the right to fair hearing is a constitutional right enshrined under Article 50(2) of the Constitution of Kenya and the Appellant was denied the right to have adequate time and facilities to prepare a defence as provided in clause (c), during the testimony of the doctor who testified in

English, the Appellant was denied the assistance of an interpreter as given under clause (m), and this was a serious case and the Appellant was evidently not fit to go through trial without the help of legal representation He was not assigned a State Counsel or even informed of this right as is required under clause (h).

23. The Appellant submits on the issue of whether the prosecution proved their case beyond reasonable doubt by citing the case of *George Opondo Olunga v Republic* [2016] eKLR and *Mohamud Omar Mohamed v Republic* [2020] eKLR where it was stated as follows:-

> *"…the ingredients of an offence of defilement are identification or recognition of the offender, penetration and the age of the victim."*

24. The Appellant submits that the age of the offender and penetration were proved. However, the prosecution failed to give sufficient evidence on the identification of the perpetrator. The Appellant cited the case of *Kariuki Njiru & 7 Other v Republic* and *Daniel Kipyegon Ng'eno v Republic* [2018] eKLR where the court held:-

> *"…the law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error."*

25. The Appellant submits that according to Section 31 (7) of the Sexual Offences Act No. 3 of 2006, the role of an intermediary is not to testify on behalf of the vulnerable witness but is limited to conveying the general purport of any question to the witness, informing the court at any time that the witness is fatigued or stressed and requesting the court for a recess. The act is clear in sub paragraph (10) thereof that the court shall not convict an accused person solely on the uncorroborated evidence of an intermediary.

26. The Appellant submits that the prosecution alluding to court that the victim would testify through an intermediary and therefore omitting to call victim and prefer to move court into finding that the uncorroborated evidence of the intermediary in the absence of the evidence of the victim was sufficient to establish proper identification of the perpetrator was absurd, unjust and misleading. It goes against the principles set out in the renowned case of *Bukenya & Others v Uganda* as cited in *Daniel Kipyegon Ng'eno* (supra) where it was held:-

> *i. The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.*
>
> *ii. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.*
>
> iii. *Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution."*

27. The Appellant submits that no proper identification was conducted. Throughout the evidence of the victim's mother and sister, it is reported that the victim accused one KY and KY not CK herein. This sends doubt whether the right person was arrested and charged. We urge this Honourable Court to find that there was no caution in identifying the offender. The name of the offender was given by a 3 year old minor and no care was given to ensure that she had properly identified the offender. The names given by the minor we conflicting and different from the Appellant's real or proper names. The Appellant submits that further it was the evidence of PW2 that they did not live with the accused and that further despite being 16 years of age, it was on the date of the defilement that he knew the Appellant to be his cousin. It therefore goes that the Appellant was never in close relations with the victim and thus it was improper for the trial court to assume that the victim knew the Appellant so well as to properly identify him by names only, which were in any event incorrect.

28. The Appellant submits that his evidence and that of his witnesses DW2 and DW3 on his alibi of being in town with friends is consistent and was not successfully challenged by the prosecution or at all. In the case of *Bernard Odongo Okutu v Republic* [2018] eKLR the court cited the case of *Victor Mwendwa Mulinge v Republic* where the Court Appeal stated on the issue of alibi as follows:-

> *"It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution, …in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all the reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigating and thereby prevent any suggestion that the defence was an afterthought."*

Respondent's Submissions

29. The Respondent submits that the Court of Appeal in *M. M. v Republic* [2014] eKLR while dealing with a similar set of facts where the minor did not testify held as follows:-

> *"Turning to the appeal before us, we reiterate that the victim did not herself testify due to her tender year. In cases like this where the victim is too young to give evidence, Section 33 of the Sexual Offences Act Allows the trial court to rely on either the evidence of the surrounding circumstances, or under Section 31 (4), to give evidence through an intermediary or both.*
>
> *In the absence of the complainant's testimony, there was independent evidence of the complainant's mother, that of the father and the clinical officer that linked the appellant to the defilement of the complainant. From what we have said, we conclude that it was in error for the two courts below to treat the evidence of the complainant's mother as that of an intermediary, the steps leading to such appointment having not been followed. It was sufficient to rely on her direct evidence as an independent eye witness.*

Any requirement that insists on a child victim of defilement, irrespective of his or her age to testify in order to found a conviction would occasion serious miscarriage of justice. What fair hearing would a child victim aged six (6) month, like that in the case of Robinson Tole Mwakuyanda v R HC. Cr. Appeal No."

30. The Respondent submits that the evidence on record was sufficient to sustain a conviction against the Appellant. The Respondent further submitted that the Appellant indicated that he was ready to proceed. He went ahead and cross-examined the doctor and raised no objection nor did he indicate that he was unable to follow the doctor's evidence, The Appellant's ground of appeal is therefore an afterthought.

31. The Respondent submits on the Appellant's ground of appeal that his constitutional rights were violated in that he was not accorded an advocate by citing the case of *HO v Republic* [2020] eKLR on the issue of an unrepresented accused person charged with defilement.

32. The Respondent submits that the law as to when a retrial should be ordered has long been settled by citing cases of *Fatehali Manji v Republic* [1966] EA 343, *Muiruri v R* [2003] KLR 552 and *Mwangi v Republic* [1983] KLR 522 where it was held that:-

"*We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant."*

33. The Respondent submits that in the event the Honourable Court finds that the manner in which the trial was conducted was defective, a retrial ought to be ordered in the interest of justice as espoused in *JK v Republic* [2021] eKLR, otherwise the Respondent prays that the conviction and sentence herein be confirmed.

Analysis and Determination

34. This being the first appellate court, I am guided by the principles in **David Njuguna Wairimu v Republic [2010] eKLR** where the court of appeal held:-

"The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

35. After considering the grounds of appeal Records of trial courts submissions and circumstances of the case, issues for determination are as follows:-

i. Whether the trial court established that the Appellant was fit to plead to the charge against him (whether he had diminished mental capacity)

ii. Whether the trial in the lower court was conducted in a language that the Appellant understood and whether he was accorded the assistance of an interpreter

iii. Whether the mother of the victim qualified to be an intermediary

iv. Whether the prosecution proved their case beyond reasonable doubt

Whether the trial court established that the Appellant was fit to plead to the charge against him (whether he had diminished mental capacity)

36. There were no submissions in respect to the Appellant's mental capacity and a part from the age assessment reports, dated 11.8.2017 from Coast General Hospital there is no other medical report about the mental capacity of the Appellant. Therefore, this ground fails.

Whether the trial in the lower court was conducted in a language that the Appellant understood and whether he was accorded the assistance of an interpreter

37. The right to a fair hearing is among the fundamental rights and freedoms that may not be limited. **Article 50(2)(m)** of the **Constitution of Kenya 2010** correctly interpreted means that an accused person should be able at all stages of the trial to understand the case against him or have the case explained to him in a language that he understands. The sole purpose of doing so is so is to ensure that an accused at all stages of the trial understands the case against him and avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence at the opportune time both in cross-examination and in his defence.

38. From the proceedings, the Appellant responded to the charge against him in Kiswahili language 'sio ukwel'. It can then be presumed that the same was interpreted to him in Kiswahili language which he understood. The Appellant asked the court for statements which were supplied on 5.10.2017. On 17.10.2017, he said that he had statements but he did not know how to read but the witnesses testified in Kiswahili language which the Appellant understood. Although the Doctor is shown to testify in English, the Appellant cross-examined him and it can be presumed that the court assistant must have interpreted to him what the doctor was saying and that is why he was able to cross examine the doctor extensively.

Whether the mother of the victim qualified to be an intermediary

39. When the Complainant went to court to testify on 12th October 2017, the trial magistrate tried to conduct voir dire examination but it was noted that the child had difficulties speaking in court. The child was therefore given a recess to come to court on another date to testify or to have directions given. On 16th October 2017, the prosecuting counsel informed the court that the minor cannot speak and she applied that she testifies through an intermediary who is the mother. The Appellant said that he had no objection.

40. Although the Appellant's advocate submitted that the process of the complainant testifying through her mother as an intermediary did not materialize, the decision by Ochieng' J. in ***Kennedy Chimwani Mulokoto v Republic*** **Eldoret High Court Criminal Appeal No. 51 of 2011** stated:-

> **"When the mother of the little girl gave her evidence, she was deemed to be giving evidence on behalf of that little girl… Therefore, for all intents and purposes, when the mother of the little girl gave evidence, she did so as a legally recognized intermediary, for and on behalf of the little girl. Such evidence was admissible."**

41. In the case ***M.M v Republic*** **[2014] eKLR** of it was held that:-

> **"Any requirement that insists on a child victim of defilement, irrespective of his or her age to testify in order to found a conviction would occasion serious miscarriage of justice. What fair hearing would a child victim aged six (6) months, like that in the case of Robinson Tole Mwakuyanda V. R. H. C. Cr. Appeal No. 227 of 2007, get if the courts were to insist on the evidence of such a child, who on account of his/her tender age cannot speak."**

42. The adoption of the evidence of the mother of the child as an intermediary was therefore proper in the circumstances of the above quoted authorities as the Complainant, a child of tender years aged 3 years old was unable to testify in court.

Whether the prosecution proved their case beyond reasonable doubt

43. It is not in dispute that a girl RS aged 3 years was defiled because from the P3 and PRC forms produced by Dr. Salim, she had injuries on the higher side of the neck, she also had lacerations on her labia minora and tear on anus and she was put on treatment for STI. PW1, the mother of the child testified that she came home and found the child was uncomfortable and PW2 explained that the Appellant had sodomised the child. According to PW1 and PW2, the Appellant was their nephew and cousin respectively. In that regard the Complainant must have known the Appellant as they were related.

44. As to the age of the complainant PW1 produced a certificate of birth showing that she was born on 23rd of April 2014. This confirms that she was 3 years as at 5th of June 2015 when the offence was committed. The age of the Complainant and the fact that she was defiled was proved by the prosecution evidence.

45. Whether the Appellant was identified as the perpetrator, PW1 testified on page 8 of the typed proceedings that the Complainant informed her that it was the Appellant, who was a nephew to the Complainant's mother. PW2, the sister of the Complainant, also informed the mother and testified in court according to page 9 of the typed proceedings that it is the Appellant, their cousin, who defiled the Complainant.

46. However, on account of the many names used to refer to the Appellant, we are not certain who the perpetrator was. PW2 said that the Appellant was their cousin but was not staying with them. Additionally, with the contradiction in names, it was not clear how the Complainant got to know the names of the Appellant who according to PW2 was not staying with them. It is not clear which one of the three names, CK, YK and KY, belongs to the perpetrator.

47. Although the Appellant could not remember what transpired on 25.7.2017, the date when it was alleged that he had defiled the Complainant, also his witness DW2 did not know what the Appellant did on 25.7.2017. Additionally, the Appellant was not found in the act. Members of the public who arrested the Appellant after being led by DW2 to where he was did not testify.

48. In conclusion, this court finds that although penetration and the age of the Complainant were proved, the identity of the perpetrator was not proved to the required standard. It is not clear which one of the three names referred to the Appellant, he was not caught in the act, the Complainant and members of the public who arrested him did not testify. Therefore, the appeal herein is allowed as the conviction and sentence by the trial court were not proper. The Appellant is set at liberty unless lawfully held. Orders of the court accordingly.

DATED, SIGNED AND DELIVERED ONLINE THROUGH MS TEAMS, THIS 9TH DAY OF DECEMBER 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE

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

Otolo- Court Assistant

Mr. Mulamula for Respondent

Ms. Nduku for Appellant – No appearance.

Appellant-Present in Person

HON. LADY JUSTICE A. ONG'INJO

JUDGE