REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 21 OF 2019

KITSAO KIDUDE MANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence in Malindi Criminal Case No. 156 of 2015

as presided over by Hon. J. N. Wandia (RM) at Malindi Law Courts

dated 15th March 2017)

CORAM: Hon. Justice R. Nyakundi

Appellant in person

Ms. Sombo for the State

JUDGMENT

In this appeal, the court has been asked to set aside the conviction and sentence passed against the appellant for offence of defilement of a boy contrary to Section 8 (1) of the Sexual Offences Act No. 3 of 2006 by the trial Court at Malindi in Criminal Case No. 165 of 2015.

The particulars of the charge pursuant to Section 8 (1) (2) of the Act were that on the 18th day of March 2015 in Malindi, the appellant unlawfully and intentionally caused his penis to penetrate the anus of **RC** a child aged 11 years.

After careful consideration of the evidence from the five (5) witnesses for the prosecution and the unsworn statement of the appellant, the court came to a conclusion that the charge had been proved beyond reasonable doubt. Secondly, the appellant was guilty as charged.

That on the basis of that conviction the appellant was sentenced to life imprisonment. Consequently, being aggrieved with the conviction and sentence, the appellant lodged an appeal anchored on the following grounds:

> ***1. That the learned Magistrate erred in law and facts by failing to consider that the legal provisions provided for a mandatory minimum sentence under Section 8. In this case Section 8 (2) of the Sexual Offence Act, violates contradicts the provision of Section 216 and 329 of the Criminal Procedure Code.***
>
> ***(ii). The sentence originating from the provisions of Section 8 of the Sexual Offences Act denies the judicial officer in this case the trial Magistrate exercise of discretion to record and consider mitigation circumstances for purpose of passing an appropriate sentence.***
>
> ***2. That the learned Magistrate erred in law and fact by failing to consider that the confession made by the appellant to the village elder (PW3) was in admissible in evidence in breaching of Articles 49, (1) (d) and 50 (4) of the constitution.***
>
> ***(i). The sentence originating from a confession made before a village elder (PW3) violates the provisions of Section 25 a (10) and 26 of the evidence act.***

3. That the learned Magistrate erred in law and facts by failing to consider that the voire dire was improper PW1 (complainant) testimony was a nullity as it did not meet or fulfill the threshold set under Section 19 of oaths and statutory declaration act.

4. That the learned trial Magistrate erred in law and fact by failing to consider that no certified copy of a birth certificate or an age assessment report was produced and admitted in evidence to prove PW1 age as at the time of commission of the alleged offences.

5. That the learned trial Magistrate erred in law by failing to consider the identification of the assailant was impeded by darkness as there was no mention of either the source of light or type of light at the alleged scene at the time of the incident.

6. That the learned Magistrate erred in law and facts by failing to consider my defence.

The appeal was directed to be disposed of by way of written Submissions. As far as the appellant submissions are concerned, the prosecution case was not proved beyond reasonable doubt.

That the trial court ignored the fact of non-admissibility of a confession statement before the village elder in connection that he had pleaded to the charge and only blamed the devil for it. As seen from the submissions appellant argued that if there was such an admission the trial court ought to have excluded it pursuant to the provisions of Article 49 (1) and Article 50 (4) of the Constitution on evidence obtained in a manner that violates any right to fundamental freedom in the bill of rights shall be excluded, if it would render the trial unfair.

The appellant contended that there was no confession statement worthy the probative voire in evidence ever made to the village elder which the trial court was capable of admitting to make a finding of guilt.

The appellant further submitted on the improper voire dire inquiry carried out with regard to the complainant in total breach of Section 19 of the Oaths and Statutory Declarations Act.

According to the appellant, the danger with the evidence of the complainant was that the criteria to establish that she was capable of telling the truth was not properly addressed by the trial Magistrate.

On this proposition appellant cited the case of **Kinyua v R [2002] 1 KLR 256.** In his view the appellant submitted, there was no rationale that the minor possessed sufficient intelligence and understood the duty to speak the truth for him to be sworn.

The appellant also questioned the documentary evidence admitted to proof the age of the complainant. For this misdirection by the trial Magistrate, appellant relied on the principles in the cases of **Hudson Ali Mwachongo v R [2016] eKLR, Alfayo Gombe Okello v R Criminal Appeal no. 203 of 2009 (Kisumu) ,Eliud Waweru Wambui v R C.A. No. 102 of 2016.** Appellant contended that the absence of production of an original birth certificate was fatal to the prosecution case on proof of age.

The other main ground of the appeal by the appeal was non-disclosure of the evidence in advance by the prosecution under Article 50 (2) (a) (b) (c) and (j) of the constitution that violated his rights to a fair hearing.

Finally, the appellant objected to the evidence on identification that it was tainted with discrepancy in the sequence of events alleged by the complainant. In accordance with the appellant's submissions identification was not proved as rightly so established in **Abdalla Bin Wendo v R [1953] EACA 166, Mwaura v R [1978] eKLR** All what the appellant asked this court to find is that the whole charge was fabricated by the complainant and his family.

Ms.Sombo prosecution counsel on behalf of the state in arguing against the grounds of appeal submitted that the conviction and sentence was against the overwhelming evidence by the witnesses availed in support of the charge.

Analysis and determination

I have considered the charge, Judgment of the trial court and several grounds of appeal by the appellant. The broad principles underlying the jurisdiction of a first appellate court are as stated in **Pandya v R [1957] EA 336 and Ruwala v R [1957] EA 570** it is the duty of the court on first appeal to evaluate the evidence for itself bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

In the impugned Judgment, the appellant faced the charge of defilement contrary to Section 8 (1) (2) of the Sexual offences Act. It is expected that the prosecution discharged the burden of proof beyond reasonable doubt on the following elements:

a. The occurrence of a sexual act of penetration of the genitalia of the victim.

b. The age of the victim must be below 18 years old.

c. The appellant was positively identified as the perpetrator of the crime.

Section 2 of the Sexual Offences Act provides inter alia:

"That an offender is stated to have been found liable for penetration if the evidence shows either partial or complete penetration of the genital organs of his person into the genital organs of the victim. For purposes of completeness of the

offence of defilement genital organs includes the whole or part of male or female genital organ and the anus."

In accordance to proof of ingredients of the offence (**See Charles Wamukoya Karani v R Criminal Appeal No. 72 of 2013.**) It is also fundamental not to lose sight even on appeal to repeat the exposition of the doctrine on presumption of innocence which at all material times is availed to the accused persons under Article 50 2(a) of the constitution.

The test on appeal would be whether the prosecution put forward all the evidence before the trial court to proof the guilty of the appellant in order to rebut his innocence. So important is the right that in the case of **Miller v Minister of Pensions [1947] 3 ALL ER Lord Denning** reminded us "***That proof of beyond reasonable doubt does not mean beyond the shadow of doubt"*** or **Sankey J** said in **Woolmington v DPP [1935] AC** "***beyond shadow of doubt does not mean to the hilt. It is against these principles each ingredient of the offence would be tested to either affirm or quash the Judgment of the trial court."***

With regard to penetration, the victim (PW1) stated that it all started with a request by her mother to join the appellant after super so as to spent a night with him in his new house since he stayed alone.

According to the victim testimony he went to sleep on or about 10.00 p.m. he smelt something unusual which he describes as faeces but on waking up the appellant's penis had penetrated his anus. To his screams was an automatic reaction which caused the appellant to flee. According to the victim, he got an opportunity to leave the appellant's house for the parents' house to report to them that he has been defiled. That source of evidence was confirmed by **PW2 CK** in his testimony after receipt of the information PW2 considered it fit to examine the genitalia of the victim only to notice what appears to be spermatozoa from the anal orifice. Having already formed a basis that defilement may have taken place PW1 and PW2 decided to have the village elder PW3 know of the incident.

On second day **PW3** stated in court that in company of the victim and PW2 they proceeded to Malindi Police Station. Having done so the victim was issued with a P3 Form which became a subject of evidential matter by **PW5 Ibrahim Abdulahi** of Malindi County Hospital. In his testimony on examination the victim showed that there were bruises on his genitalia more specifically the anal orifice. PW5 formed the opinion that in view of the depth of the bruises there was probative evidence of penetration. The treatment notes, P3 Form and Post Rape Care Form were all admitted in evidence as exhibit 2, 3 and 4 respectively.

The nature of the victim's evidence on the incident was that immediately after the sex act he wanted to get help from the people he knew, in this case his parents (PW3). In **Uganda v George Wilson Simbwa SC Criminal Appeal No. 37 of 1995** the court addressed the principles on corroboration that:

> ***"corroboration affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, which confirms in some material particular not only the evidence that the crime has been committed but also the defendant committed it. The test applicable to determine the nature and extent of corroboration is the same whether it falls within the rule of practice at Common Law or within the class of offences for which corroboration is required."***

Though corroboration is not mandatory to proof a fact of an unlawful act, in this particular case circumstantial evidence of PW2 and PW5 is the strongest evidence that the appellant defiled the victim. **(See R v Mwarage {1994} KLR.** Taking the evidence as a whole the inference is irresistible that the complainant was penetrated by the appellant. The most important piece of evidence which transpired from the prosecution is that PW2 quick physical examination and notification of remnants of spermatozoa oozing out of the orifice of the victim.

In the case of **R v Redpath [1962] 45 Criminal Appeal R 319** the court held as follows:

> ***"It seems to this court that the distressed condition of a complainant is quite clearly capable of amounting to corroboration of course, the circumstances will very enormously and in some circumstances quite clearly no weight, or little weight could be attached to such evidence as corroboration. Thus, if a girl goes in distressed condition to her mother, and makes a complaint, while the mother's evidence as to the girls condition, may in Law be capable of amounting to corroboration….."***

In the instant case, the victim conduct after the sexual intercourse seemed that he was distressed of the appellant of having penetrative carnal knowledge, an act he least expected to be carried out by his uncle in the first place.

The Learned trial Magistrate besides believing and affirming the credibility and reliability of the victim evidence he took cognizance of the existence of independent evidence as to the sexual act of penetration. In accordance to the principles in **Ruwala v R (supra)** as an appellate court due allowance should be given to the trial court advantage of seeing and hearing witnesses.

In determining this issue the persuasive authority form the Court of Appeal of Ghana in **Kylafi v Wono [1967] GLR 463 at 467** held as follows:

> ***"It must be observed that the questions of impressiveness or convincingness are products of credibility and veracity, a court becomes convinced or unconvinced, impressed or unimpressed with oral evidence according to the opinion it forms of the veracity of witnesses."***

The evidence of the victim from examination in chief to cross-examination as the record stands, there is nothing to discredit his disposition on the evidential material with regard to the commission of the offence. The result is that the appellant engaged in sexual intercourse with the victim on 18.3.2015 while spending a night at his house.

The other ingredient of importance is that of age of the victim.

The Law

Age of the victim stands out for reason that any sentence of an offender is based on the exact age as at the time of the defilement. It is necessary to state the principles of law germane to a consideration of this ingredient.

In **Kaingu alias Kasumo v R Criminal Appeal No. 504 of 2010** the court stated:

> ***"Age of the victim of the sexual assault under the Sexual Offences Act is critical component. It form part of the charge which must be proved; the same was penetration in the case of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."***

In the case of **Francis Omurani v Uganda Criminal Appeal No. 2 of 2000**

> ***"age is proved from medical evidence or may be proved by both certificate, the victim's parents or guardian and by observations and common sense."***

The issue raised by the appellant was that the prosecution proved the element by way of uncertified copy of birth certificate admitted as exhibit 1. The paucity of evidence on the age assessment was by production of a copy of a birth certificate duly issued by the Republic of Kenya. The provisions under Section 64 and 66 of the Evidence Act does not exclude admission of copies of birth certificate in evidence as the trial court did with regard to the case against the appellant. This ground also fails.

This brings me to the ground on identification. The Learned trial Magistrate placing reliance on the victims evidence prior knowledge of the appellant ruled that the identification of the appellant was without error or mistake.

It is trite that the Law on identification of an appellant or offender for that matter to place him or her at the scene of the crime is now settled. See **Abdullah Bin Wendo v R 1953 20 EACA 166, Roria v R 1967 EA 583** The Court of Appeal in **Anjononi & others v R [1976 – 80 IKLR** authoritatively stated on this issue as witness:

> ***"This was a case of recognition not identification of the assailants, recognition of an assailant is more satisfactory, more assuming and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or another."***

It is of significance as stated in **Wamunga v R [1989] KLR.**

> ***"That where the only evidence of identification or recognition is that of a single identifying witness the trial court ought to examine carefully the evidence to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it a basis of a conviction."***

In this particular case the evidence of recognition against the appellant was entirely that of the victim, the evaluation of the evidence shows that the victim is a nephew to the appellant. It will be accepted that the two of them had enjoyed familial relationship which was cordial before the last incident of sexual intimacy. While of course the sexual act took place at night there was no other person at the scene of the crime except the appellant and the victim. The remarkable testimony of the victim evidence in chief and on cross-examination describing the act of penetration and particularizing the assailant as his uncle throughout the ordeal is a clear confirmation that he positively recognized the appellant. There was use of force by the appellant who permitted to defile the victim on his premises.

Based on this the evidence to support recognition is free from error, mistake or fabrication.

It is against that background I consider that the victim being familiar with the appellant for a lengthy period of time and in his visual identification, this evidence directly places the appellant at the scene of the crime.

The case against the appellant comprised of the victim account on identification and not on the testimony of admissibility of extra judicial statement to the village elder. In assessing this ground of appeal under Section 25 A of the Evidence Act with the Judgment of the trial court, the appellant has incorrectly stated there was a confession which formed the basis of the conviction. The purported confession referred to by PW3 on the side of the prosecution was never material statement at the trial. Notwithstanding the lengthy submissions by the appellant on this ground the direct and circumstantial evidence by the prosecution on the charge was never in respect of any such extra judicial statement. Without laboring the point pursuant Article 49 (1) (d) and 50 (4) of the constitution on the importance of excluding evidence illegally obtained where such evidence will render the trial unfair has not been infringed by the state.

It is unfortunate that the appellant urged this court to rule on an issue which was not grounded as part of the findings of the trial court. Though he introduced it on appeal, he failed to provide sufficient evidence that his conviction had something to do with admission of an alleged confession made to the village elder.

I shall now consider the ground on voire dire examination.

The borne of contention by the appellant is that the peculiar circumstances of the victim age as a minor capable of possessing the necessary

intelligence to speak the truth was never established by the Learned trial Magistrate. The appellant submitted that voire dire inquiry did not confirm with the directions in **Alex Mwangai v R Criminal Appeal No. 365 of 2012**, **Kibageny Arap Korir v R 1959 EA 92,** whether he understood the nature of an oath and the findings made at the end of it by the Learned trial Magistrate.

In the case at hand in accordance with the principle in **Nywela v R [1989] KLR** ***"There is no definition in the oaths and Statutory Declarations Act (Cap) 15 of the expression child of tender years but in the absence of special circumstances the court takes it to mean any child of an age or apparent age under fourteen years."***

However, whether a child is of tender years is a matter of the good sense of the court, there is no statutory definition in this Act. Although under the Childrens Act a child of tender year is stated to be one who is under the age of 10 years. In exercising discretion on voire dire the court will have to consider the baseline of 10 years or the unique circumstances which may require a voire dire inquiry. The decision whether or not to conduct a voire dire examination of a child witness of tender years' rests with the trial court.

If from its general assessment the court thinks a witness is not a child of tender years, an appellate court which has no advantage of seeing the witness will be at no firm position to find that the trial Magistrate exercise of discretion in accepting the witness testimony without a voire examination was wrong. The Court of Appeal in **Johnson Muiruri v R [1983] KLR 447** ***took the approach***

> ***"that were in any proceedings before any court a child of tender years is called as a witness, the court's required to form an opinion on voire dire examination. Whether the child understood the nature of an oath, in which event his evidence may be received, if the court is not so satisfied his unsworn evidence may be received if it's the opinion of the court he is possessed of a sufficient intelligence and understands the duty of speaking the truth. In the later event an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him……."***

In response to the argument by the appellant based on the record, I find nothing to support the conclusion that the Learned trial Magistrate never exercised discretion to determine correctly that the victim understands the importance of speaking the truth and his evidence can be received on oath. I see no flaws on the voire dire examination to call upon this court to exercise discretion in interfering with the decision.

Secondly, with the test whether the trial court can be held to be right to have come to the conclusion that the victim was intelligent and understands the importance of telling truth is also a discretionary function which cannot be impugned by an appellate court. The case for voire dire examination is built on a weak ground and incapable of being resolved in favor of the appellant.

In this appeal, the appellant in his defence did not come out clearly to address the issues raised by the prosecution with regard to the charge and corresponding elements. The appellant testimony was to the effect that upon his arrest and arrival at the police station he was waiting to be paid money by the father of the victim (PW2) for work done to build his house. Although the statement of the appellant appears to amount to a denial, it remained far fetched nevertheless to clearly disable the primafacie evidence formulated by the prosecution which the trial court dealt with firmly.

When one views the appellant statement of defence, it is not an answer to the charge but a mere allegation inconsistent with the principle in Criminal Law that the burden bearer under Section107 of the Evidence Act proved the existence of facts on the charge against the appellant beyond reasonable doubt. When all said and done, I am satisfied that the appeal fails in its entirety to the extent that conviction for the offence of defilement is hereby affirmed.

Sentence

The philosophy behind mandatory sentences under the Sexual Offences Act is based on two goals deterrence and retribution. The evaluation of a mandatory sentencing in Kenya was reinstated by none other than the Supreme Court of Kenya in **Francis Karioko Muruatetu & Another v R [2017] eKLR**

> ***"on the whole, the court ruled that the mandatory nature of the death penalty for the offence of murder under Section 204 of the Penal Code was unconstitutional. The rationale was that the mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of a fair trial that accrue to the accused person under Article 25 of the Constitution, an absolute right."***

Sentencing as a key cog in our criminal justice is basically a function of the trial court. An appellate court is only to interfere with such a sentence unless the order on sentence has been brought within the purview of the guidelines in the case of **Ogolla S Co. Owuor v R [1954] EACA 270**. The court held:

> ***"That the court does not alter a sentence unless the trial judge has acted upon wrong principles or overlooked some material factors. To this, we would add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case."***

I gauge the aggravating and mitigation circumstances as drawn from the submissions filed before the trial court. From the record, the appellant took advantage of the complainant vulnerability and abused the trust placed upon him that he was able to direct him to his parents' house. The physical injury involving sexual intercourse between an adult male against a child of tender years of eleven (11) years is a psychotraumatic experience likely to leave permanent emotional and physical scars.

Though the appellant is stated not to have any previous convictions, substantial and grave harm done to the complainant outweighs any mitigation as an intervening factor to vary and substitute the sentence of life imprisonment with any other lesser punishment.

I also hold that, there is no evidence that the trial Magistrate misdirected himself or failed to appreciate the circumstances of the case when imposing the sentence. The appeal on sentence is also dismissed. The upshot the entire appeal on both conviction and sentence is hereby dismissed, thus confirming the Judgment of the trial court.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF APRIL 2020

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Ms. Sombo for the respondent

2. The appellant