REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 29 OF 2018

GUZA BEJA MWAGUZO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence by Hon. D. Mochache, Senior Principal Magistrate,

delivered in Shanzu Senior Principal Magistrate's Court Criminal Case No. 1100 of 2015).

JUDGMENT

1. The appellant was on 23rd September, 2015 arraigned in court and charged with the offence of defilement contrary to Section 8(1) as read with subsection (sic) 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on diverse dates between 14th April, 2015 and 13th September, 2015 at [particulars withheld] area in Kisauni sub-county of Mombasa County intentionally caused his penis to penetrate the vagina of RO a child aged 6 years.

2. He was also charged with an alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.The particulars of the charge were that on diverse dates between 14th April, 2015 and 13th September, 2015 in [particulars withheld] area in Kisauni sub-county within Mombasa County, he intentionally touched the vagina of RO [name withheld] a child aged 6 years with his penis. The law firm of Kisiwa Koja & Company Advocates filed a memorandum of appeal on 26th April, 2018 on behalf of the appellant. Their grounds of appeal were that no *prima facie* case was established against the appellant, the prosecution case was not proved beyond reasonable doubt, the Learned Magistrate erred in law and fact by relying on hearsay and uncorroborated evidence. Other grounds of appeal were that the Learned Trial Magistrate erred in law and fact in failing to take into account material evidence in favour of the appellant and that his defence was not considered.

3. On 16th August, 2018, the appellant's Counsel filed their written submissions. In highlighting the same Mr. Bwika stated that the appellant ought to have been sentenced to 10 years imprisonment for the offence of indecent act contrary to Section 11(1) of the Sexual Offences Act and not to 15 years imprisonment. He further stated that the offence was said to have occurred on diverse dates between 14th April, 2015 and 13th September, 2015 which is within a time span of 5 months as no witness pinpointed the specific date when the alleged offence occurred. He stated that the complainant was either 6 or 7 years old.

4. It was submitted that the Trial Court found the appellant guilty of defilement but found that due to the amended charge, he could not have been sanctioned. It was pointed out that the minor was said to have been defiled severally and the P3 form indicated that she had bruises and a wound on her private parts. Mr. Bwika argued that it was quite odd that neither her mother nor the maid noticed that defilement had occurred. He contended that it was so unlike a child who had been defiled to immediately after the said act, go out and play. In so stating, he referred to the evidence of PW3 who testified that she went to look for PW1 and found her playing and that she told her that she had been defiled by the appellant.

5. The appeal was opposed by Ms Mwangeka, Prosecution Counsel, who relied on submissions which were filed on 12th February, 2019 by Ms Ogweno, Principal Prosecution Counsel. She submitted that the evidence adduced supported the offence of indecent act as the appellant showed PW1 a picture on his mobile phone which she referred to as *"picha ya tabia mbaya."* It was submitted that display of pornographic material to PW1 was an indecent act which attracts a minimum sentence of 10 years imprisonment.

6. Ms Mwangeka addressed the issue of defilement which she submitted is normally proved by evidence of identification, age and penetration. She stated that irrespective of any date having been pinpointed, an offence of defilement can still be proved.

7. It was stated by the Prosecution Counsel that offences of defilement are committed in secrecy and it is unlikely that the Aunt, mother or

relatives of PW1 saw the appellant committing the offence. It was further submitted that the appellant was known to PW1 as he was their neighbour. Ms Mwangeka stated that the appellant was properly convicted. She prayed for the appeal to be dismissed.

8. In response to the foregoing, Mr. Bwire submitted that the pornographic material which PW1was allegedly shown was not produced in evidence.

THE EVIDENCE ADDUCED BEFORE THE LOWER COURT

9. PW1 was RA [name withheld]. She was taken through voir dire examination and the Trial Court was satisfied that she was intelligent and understood the consequences of lying. She gave sworn evidence. She was 6 years old. She testified of how she was outside their house playing alone when the appellant whom she identified as Beja, called her. She stated that he showed her a picture on his phone *"picha ya tabia mbaya"*. He then removed her pant and that he removed his underwear. She testified that *"halafu akafanya tabia mbaya hapa."* (She pointed to her private parts). She stated that she felt pain but did not tell her mother what had happened. She however told Sophia who told her brother P. He in turn told their mother. She indicated that Sophia also told their friend Hamisi.

10. PW1 gave evidence that the appellant used to defile her many times and no other person had ever defiled her. She stated that she knew the appellant as their neighbor. She indicated that the appellant told her not to tell her mother what he had been doing to her. After she informed her mother, she was taken to hospital where she was examined on her private parts.

11. PW2 was CB a.k.a FB [name withheld] she was PW1's mother. She said her daughter was 6 years old. She testified that on 14th September, 2015 she reached home at 12:30 (sic) from Kongowea market. On arrival, she was told by her 16 year old son P, that PW1 had been defiled.

12. On inquiring from him who had told him, he said that he had been informed by Hamisi. PW2 stated that she looked for the appellant and asked him why he had defiled PW1. He became hostile and demanded to see Hamisi.

13. PW2 testified that she asked PW1 what had happened and she informed her in the presence of some neighbours who had gathered around that the appellant would call her to his house, show her obscene pictures and then he would hold, undress and defile her. He would tell her to leave and not inform anyone. PW2 indicated that the appellant was present when PW1 narrated to them what had happened to her.

14. PW2 gave evidence that she went to the police station to report. She stated that on that day, the appellant disappeared and resurfaced after 2 weeks. The appellant was thereafter arrested and taken to Nyali Police Station where he was locked in. She stated that she knew the appellant for 8 years and her children used to call him "mjomba" (uncle). PW2 further stated that PW1 would go to her Aunt's (PW2's sister's) house after school, where she would be fed as PW2 used to go home in the evening. PW2 testified that PW1 was examined in her presence and found to have a bad old tear (in her private parts).

15. PW3 was SBC [name withheld]. She recalled that on 14th September, 2015 she was at home when her neighbour's young child told her that PW1 had accompanied the appellant to his house. She went to his house and found him asleep. She looked for PW1 whom she asked what she had gone to do in PW1's house. She told PW3 that the appellant had called her to his house, showed her an obscene photo, undressed her, removed his clothes and defiled her.

16. PW3 stated that she reported the same to PW2 when she came home and told her to take PW1 to hospital. She further stated that PW1 was her sister's (PW2's) daughter and that she used to go and eat at her place and play outside the appellant's house. She indicated that the PW1 would be bathed by her cousin and so they did not notice that something was wrong with her. PW3 explained that Hamisi was her younger brother. She stated that the appellant was arrested by members of the public when she was trying to chase him.

17. Dr. Rehema Omar though recorded as PW3, was the 4th prosecution witness. She produced the PRC form for PW1 which showed that she had healing bruises in her vagina. Her hymen was broken with an old scar. She also had a P3 form for PW1 which had been filled by Doctor Morjat, whose handwriting and signature she was familiar with. The said Doctor on examining PW1 found her hymen broken with an old scar. Her vagina had old healing wounds. The approximate age of injury was 12 days. The injuries were classified as maim. Dr. Rehema Omar produced in evidence the PRC and P3 forms and a child immunization card for PW1. The said card showed that she was born on 20th June, 2009.

18. No. 95767 PC Virginia Wanjiru of Nyali Police Station received a report from PW1 who was accompanied by PW2. The report was that she had been defiled by the appellant who was her neighbour. PC Wanjiru escorted PW1 to Coast Province General Hospital (CPGH) for examination and the Doctor confirmed that she had been defiled. The Investigating Officer indicated that PW1's age was assessed to be 7 years.

19. The appellant gave sworn defence. He admitted that PW1 was his neighbour and his mother had constructed her stall in his plot from where she used to sell grocery. He claimed that PW2 wanted to be his girlfriend but he refused which led to her threatening him by staying that he would see. The appellant stated that after a week people descended on him and he was taken to the police station and told he had defiled a minor. He stated that he was treated at CPGH and thereafter charged. He produced evidence of the medical treatment he received.

20. The appellant called a witness who testified as DW2, Mbogo Mbeja. He stated that the appellant was his eldest brother and he had a friend whom he had permitted to construct a wall on his parcel of land. DW2 stated that after some time, he saw a mob beating him and they headed to the police station where they were told he had defiled the complainant.

ANALYSIS AND DETERMINATION

21. The duty of the 1st appellate court is to analyze and re-evaluate the evidence adduced before the lower court and reach its own independent decision while bearing in mind that it has neither seen nor heard the witnesses testify and make an allowance for that fact. See **Okeno v Republic**. [1972] EA 32.

22. This court found an anomaly in the Judgment of the Trial Court and that is the only issue it will address. The Trial Court found that after the appellant showed PW1 obscene photos, he went ahead and touched her private parts with his genitalia. She therefore found that the appellant committed an indecent act with a child.

23. The Trial Court then went ahead to consider if the charge of defilement had been proved beyond reasonable doubt. This court must state that it was rather odd for the Trial Court to determine if the alternative charge had been proved first before making a determination on the main charge. The appropriate procedure in all cases where an accused person is charged with a main charge and an alternative charge is for a Trial Court to consider if the main charge has been proved beyond reasonable doubt and make a finding on it. The outcome of the main charge is the one which determines if the court should consider if the alternative charge has been proved.

24. In the present case, the Trial Court sentenced the appellant for the alternative charge of indecent act instead of the main charge of defilement even after finding that the main charge of defilement had been proved. The said court proceeded to state as follows:-

> *"Be that as it may the court's hands are tied even though this court finds the accused person guilty of the offence of defilement, it cannot act on this finding of fact as the prosecution amended the charge sheet. A court of law is only as good the Counsel that practice before it, it is a travesty of justice that the accused person is guilty of the offence of defilement but he cannot be sanctioned for it due to the amended charge sheet. Going forward, the court does urge the prosecutor not to hastily amend any charge sheet(s) without taking into consideration the exhibits adduced and the testimony of the prosecution witnesses."*

25. This court has gone through the Record of Appeal and the original lower court file. It has found 2 charge sheets. One of them is amended. The Trial Court's Judgment is not specific as to which particular aspect of the amended charge led her not to convict the appellant on the main charge of defilement. The lack of clarity in explaining the reason why the Trial Court opted to convict the appellant on the alternative charge and not the main charge resulted in a mistrial and occasioned a miscarriage of justice. Needless to say that a Judgment of a Trial Court must be clear enough so that any third party reading it can comprehend the reason why the court arrived at a certain decision.

26. The result of this appeal is that it is hereby allowed on a technicality. This Court has however come to the inevitable conclusion that the appellant shall undergo a retrial for the same offence. The Court of Appeal had the following to say in the case of **Samuel Wahini Ngugi v. R [2012] eKLR –**

> ***"The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs. R** (1964) EA 483**, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:***
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> > ***"It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered……In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person."***

27. Similarly, in the case of **Benard Lolimo Ekimat vs. R** [2005] eKLR it was stated as follows:

> ***"…the principle that has been acceptable to Court is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it."***

28. It is the finding of this court that the justice of the case herein demands that it be heard afresh for justice to be done to both the victim and the appellant. The new trial shall be heard by any other Magistrate save for Hon. D. Mochache, SPM, whose Judgment forms the subject of this appeal. The appellant shall be arraigned before the Senior Principal Magistrate's Court Shanzu on 18th May, 2020 for plea taking.

It is so ordered.

DELIVERED through Teams online platform, DATED and SIGNED at MOMBASA on this 12th day of May, 2020.

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Ms Valerie - Prosecution Counsel for the DPP

Mr. Mohamed Mahamud - Court Assistant.