REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 86 OF 2014

OC.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence by Hon. J. Kamau, Resident Magistrate,

delivered on 14th March, 2014 in Mombasa Chief Magistrate's Court Criminal Case No. 2549 of 2013.

JUDGMENT

1. The appellant was convicted for the offence of committing an 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 1st February, 2012 and 14th day of October, 2013 at Particulars Withheld], within Mombasa County, he intentionally and unlawfully touched the buttocks and anus of KK [name withheld] a child aged 12 years with his penis. He was sentenced to serve 20 years imprisonment.

2. The appellant initially filed his petition of appeal on 7th April, 2017. He amended the same on 5th November, 2019, with leave of the court. His grounds of appeal are that the charge of indecent act was not proved because PW1 was not a reliable witness. He raised the ground that his source of arrest was not established. He also challenged the sentence of 20 years imprisonment which in his view, was harsh and excessive.

3. In his written submissions, the appellant stated that PW2 relied on information from PW1, that he was inserting in her body something which was not meant to be put in and that he did bad manners her. The appellant argued that if the foregoing used to happen, then bruises would have been found on PW1's private parts when she was medically examined.

4. The appellant indicated that PW1's mother was not called as a witness to testify and state if at all he used to enter the children's room. He also submitted that the persons who arrested him were not called to testify and disclose why they arrested him. He relied on the case of **James Kuloba Walishe v Republic** [2008] eKLR, to support his submission that the persons who arrested him should have been called by the prosecution as witnesses. In addition, the appellant submitted that the Investigating Officer stated that he was arrested by his colleague, but the said police officer was not called to testify in court..

5. On the issue of the sentence imposed on him, the appellant pointed out that the minimum sentence for the offence of indecent act is 10 years imprisonment, yet he was sentenced to 20 years imprisonment. He was of the view that since the circumstances of the case were unexplained, the Trial Court ought to have given him a less severe sentence. He indicated that he had been in custody for 6 years since 21st October, 2013. He prayed for his appeal to be allowed.

6. Ms Mwangeka, Prosecution Counsel, filed her written submissions on 3rd December, 2019. She submitted that the evidence of PW1 was to the effect that the appellant, whom she referred to as her father, would at night, go into the room in which she and her siblings used to sleep, undress her, lie next to her naked, with her back facing him. That he would then insert in her body something which was not meant to be put in.

7. The Prosecution Counsel submitted that the medical evidence was not the only means by which a charge of defilement could be proved, but oral evidence of a victim or circumstantial evidence could on their own, prove the said offence. Ms Mwangeka cited the case of **Charo Changawa Karisa v Republic** [2018] eKLR, to support her submission. She stated that in the Judgment arising from the case in the lower court, the Trial Magistrate noted that PW1 was taken to hospital 6 days after the alleged defilement, since her mother hid her. She indicated that the Court further said that it took the intervention of the police to have PW1 taken to hospital.

8. She further submitted that under Section 124 of the Evidence Act, a court can convict an accused person on the evidence of the victim alone, if it believes that he/she is truthful. To support her submission, she relied on the decision in **Martin Okello Alogo v Republic** [2018] eKLR. She stated that the Trial Court found PW1's evidence clear, undeterred, consistent and that it was corroborated by the evidence of PW2, PW3 and PW5.

9. On the issue of PW1's age, it was submitted that an age assessment report was produced to confirm that PW1 was a minor at the time the offence was committed. The Prosecution Counsel submitted that penetration was proved by the evidence of PW1 who told PW2 that the appellant had defiled her anally.

10. The Prosecution Counsel submitted that the appellant was positively identified by PW1 as he was known to her and lived with her, her mother and her siblings. That PW1 knew the appellant as her step-father. It was stated that the appellant did not deny the allegations leveled against him or dispute that he lived with PW1 and her siblings.

11. In closing her submissions, Ms Mwangeka urged this court to invoke its powers under the provisions of Section 354(3)(ii) of the Criminal Procedure Code and convict the appellant for the offence of defilement under the provisions of Section 8(1) as read with Section 8(3) of the Sexual Offences Act, and sentence him to 30 years imprisonment.

12. In his brief rejoinder filed on 22nd May, 2020, the appellant reiterated that PW1 was not a reliable witness and that the Trial Magistrate failed to follow sentencing guidelines when he sentenced him to 20 years imprisonment.

THE EVIDENCE ADDUCED BEFORE THE LOWER COURT

13. The appellant was convicted on the evidence of PW1, KA [name withheld] she was taken through *voir dire* examination and gave sworn evidence. She stated that the appellant was her step-father, but she did not know his name. PW1's evidence was that they used to live in a house with 2 rooms. Her mother and the appellant used to sleep in one room, while she and her 2 brothers would sleep in another room which had one bed.

14. PW1 testified that the appellant used to go to their room at night when they were asleep and go behind her. That he would remove her clothes and do bad manners. That the others would be asleep but sometimes she never used to sleep and used to see him. In her evidence, PW1 said that the appellant never used to talk. In her own words she said *"He would weka kitu ambacho hakifai kuingia mwili wangu."* and it was very painful. She also stated that the appellant would go to her even when her mother was asleep.

15. PW1 explained that the appellant would go to her at night only in a towel but she did not tell her siblings, scream or make noise. That she used to go to school in the morning. PW1 stated that she told her class teacher who told her to sit (sic). PW1 testified that her mother had gone to the mainland and when she returned, she told her what had happened and she spoke to the appellant severally.

16. It was PW1's evidence that after she reported to her mother, she called her Aunt and they said they would report to the police. Her Aunt took her to hospital and on going back home they found that the appellant had been arrested. She indicated that she went to the police station with her Aunt and mother. She indicated that the appellant left their house for a few days after her mother confronted him.

17. PW2, BM [name withheld] was a neighbour to PW1. Her evidence was that on 14th October, 2013 at around 4:00p.m., she heard screams. On going out of her house she met PW1's mother and Aunt. PW2 stated that PW1's Aunt was screaming that PW1's step-father had defiled PW1. PW2 said that she asked PW1's mother about it and took PW1 to her house in the company of 2 other women. PW2 stated that PW1 told her that her step-father would sleep with her when her mother was away. PW2 testified that she stripped PW1 and asked her to touch the part of her body where the incident happened. That PW1 touched her buttocks. PW2 testified that PW1 told her that her step-father used to go to her room carrying oil, when her mother was sleeping.

18. PW2 indicated that PW1's mother said she would not do anything about the incident. PW2 took the child to the village elder but PW1's Aunt declined to go with them She stated that PW1 repeated the story to him. PW2 further indicated that PW1's mother refused to give them PW1 and hid her. That they reported the same to the OCS (sic) and they were assisted. That they went to Coast Province General Hospital (CPGH), where PW1 was examined. It was PW2's evidence that the appellant ran away from his house for 3 days.

19. PW3, Asthman Bakari Ngote, a village elder testified of how he received a report from PW2 at 7:00p.m., on 14th October, 2013. The following day, he took PW1 to CPGH in the company of PW2, the village chairman and 2 police officers. He stated that PW1's mother used to live with different men, with the appellant herein being the 3rd one. PW3 indicated that PW1's mother was uncooperative in the case involving her child, PW1.

20. Doctor Lawrence Ngone of CPGH testified as PW4. He stated that the P3 form showed that PW1 was defiled from February to October, 2013. She was taken to hospital on 21st October, 2013. It was the Doctor's evidence that on examination, PW1's hymen was intact and she was still a virgin. The Doctor indicated that on anal examination, no injuries were seen and no physical injuries were noted on her. The doctor's conclusion was that there was no evidence of defilement on the complainant. He signed the P3 form on 25th October, 2013. He produced the P3 as well as the PRC forms in evidence.

21. PW5 was No.75329, Sergeant Hellen Maloba of Changamwe Police Station, Gender and Children Department. She testified that on 19th October, 2013 while in the office at 8:00a.m., she went through the occurrence book and saw a case of incest which had been reported. She recorded statements from witnesses and spoke with the child's (PW1's) mother. PW5 said that PW1 told her that from February, 2012 she had been defiled by the appellant. She was further told that when PW1's mother would be away, the appellant would go to the children's bedroom, go behind PW1 and would use lubrication to penetrate PW1's anus. She was also informed that the appellant used to tie a towel when going to the children's bedroom. PW5 stated that she took PW1 to hospital where she was examined by a Dentist, who established her age as 12 years. PW5 was given an age assessment form for PW1. She indicated that although PW1 complained to her mother, the latter did

not think it was serious.

22. It was PW5's evidence that 6 days after the incident, on 20th October, 2013, PW1 was taken to hospital by PW2. PW5 stated that she collected the results on 25th October, 2013 from CPGH. PW5 disagreed with the contents of the medial examination that PW1 was not defiled. She stated that PW1's evidence was strong that the appellant used to penetrate her anus.

23. She stated that she charged PW1's mother with the offence of failing to protect a child from sexual exploitation. PW5 indicated that the appellant was arrested by her colleagues (police officers) after the villagers complained and he was taken to the police station.

24. The appellant gave sworn defence and stated that on 14th October, 2013, his second wife told him that she was going home. He stated that when he went home in the evening, after work and everything was normal. He indicated that he saw PW2 and the police. That on 16th February, 2012, he and PW2 had fought since she used to go to his house and make him fight with his wife. That she had threatened that she would evict him and they even went to the chief to sort out the matter. He said that he did not understand why the charges had been brought against him.

ANALYSIS AND DETERMINATION

25. The duty of the 1st appellate court is to analyze and re-evaluate the evidence adduced before the lower court and come up with its own conclusion, while bearing in mind that it has neither seen nor heard the witnesses testify and make an allowance for the said fact. The said duty was espoused by the Court of Appeal in the case of ***Njoroge v Republic*** *[1987] KLR 19 at page 22 in the following words:-*

> ***"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya Vs Republic [1957] EA 336, Ruwalla Vs Republic [1957] EA 570."***

26. Having gone through the written submissions by the appellant and the Prosecution Counsel and the authorities cited as well as the proceedings of the lower court case, the issues that call for determination are:-

> (i) If the prosecution proved its case beyond reasonable doubt; and
>
> (ii) If the procedure followed by the DPP to seek substitution of the charge for which the appellant was convicted and enhancement of sentence was proper.

27. One of the ingredients that must be proved in a case of defilement is the identity of the offender. On the said issue, PW1's evidence was as follows:-

> *"In [Particulars Withheld] where I used to live there were two rooms. I used to sleep in the same room with my brothers. The next room was my mother and father. My room had 1 bed. My mother used to come to my room……*
>
> *My father works at the port. <u>He used to come to our room at night</u>. He used to come when we are (sic) asleep. Sometimes I never used to sleep so I would see him. He used to come behind me. I used to sleep with my clothes. He used to do manners (sic). He would remove my clothes as I sleep. The others are asleep (sic). <u>He never used to talk</u>.*
>
> *He would "weka kitu ambacho hakifai kuingia mwili wangu."(something that is not supposed to enter). It was very painful."*(emphasis an added).

28. PW1's evidence dwells on an offence that used to be perpetrated at night when she and her brothers were sleeping. According to the evidence she adduced, there were times when her step-father would go to her bed, lie next to her and insert something in her body, which was not supposed to enter it.

29. One issue which was not raised by the prosecution or the appellant but which is of critical importance in an offence which is said to have been committed at night, is the source of the light which enabled PW1 to identify the appellant as the person who used to defile her. Even if the appellant used to live with PW1, her siblings and her mother, it was the duty of the prosecutor to lead evidence to establish the source of light which was in the bedroom in which PW1 used to sleep. The evidence of PW1 left unanswered questions such as, if PW1 and her siblings used to leave electric lights on at night or if a lamp would burn throughout the night in their bedroom, as they slept.

30. The particulars of the charge were that the offence was committed on diverse dates between 1st February, 2012 and 14th October, 2013. That was a duration of one and a half years. PW1 did not state in her evidence if the appellant ever defiled her during the day. The onus was on the prosecution to prove that the circumstances prevailing at the time when the offence was said to have happened were favourable for positive identification. The issue of the source of light which was available, if any, when the alleged incident happened, was completely omitted by the prosecution when PW1 was testifying. This court notes that the case in the lower court was heard in the era when criminal cases were conducted by police prosecutors, who may not have been fully trained or conversant with the fundamental principles of criminal jurisprudence.

31. The Court of Appeal in the case of ***Wamunga vs Republic*** *[1989] KLR 424* **stated** *as follows at page 426:-*

"...where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction."

32. PW1 in her evidence said that whenever the appellant would go to her bed at night, he never used to talk to her. The foregoing aspect bolsters the weakness of the prosecution case as to the identity of the appellant. The appellant was therefore also not identified by voice. The absence of evidence of the lighting condition in the bedroom and the fact that the PW1's assailant never used to talk to her, leads to the conclusion that the appellant was not positively identified by PW1.

33. It was therefore erroneous for the Trial Magistrate to convict the appellant for the alternative charge of indecent act with a girl. Since the said Magistrate believed that the offence was committed at night, she was duty bound to ensure that all the prerequisites of the said crime were proved beyond reasonable doubt.

34. In the case of **Woolmington v DPP [1935] A.C 462 p. 481, Viscount Sankey L.C,** stated the law on the legal burden of proof in criminal matters as follows-

"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.''

35. This court resolves the doubt on the identification of the perpetrator of the offence to the benefit of the appellant. The court has to go by the evidence on record and cannot make assumptions. The finding of this court is that the prosecution failed to prove its case beyond reasonable doubt.

36. On the 2nd issue, in her written submissions, the Prosecution Counsel prayed for the setting aside of the appellant's conviction for the offence of indecent act and urged this court to substitute it with a conviction for the offence of defilement. Ms Mwangeka also requested the court to sentence the appellant accordingly, under the powers conferred on appellate courts by Section 354(3)(ii) of the Criminal Procedure Code.

37. Section 354(1),(2) and (3) of the Criminal Procedure Code provides as follows on the powers of the High Court on appeal-

"(1) At the hearing of the appeal the appellant or his advocate may address the court in support of the particulars set out in the petition of appeal and the respondent or his advocate may then address the court.

(2) The court may invite the appellant or his advocate to reply upon any matters of law or fact raised by the respondent or his advocate in his address.

(3) The court may then, if fit considers that there is no sufficient ground for interfering, dismiss the appeal or may-

(a) in an appeal from a conviction –

(i) Reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or

(ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or

(iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;

(b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence;

(bb) in an appeal from an acquittal, an appeal from an order refusing to admit a complaint or formal charge or an appeal from an order dismissing a charge, hear and determine the matter of law and thereupon reverse, affirm or vary the determination of the subordinate court, or remit the matter with the opinion of the High court thereon to the subordinate court for determination, whether by way of rehearing or otherwise, with such directions as the High Court may think necessary, and make such other order in relation to the matter, including an order as to costs, as High the Court may think fit;

(c) In an appeal from an acquittal, an appeal from an order refusing to admit a complaint or formal charge or an appeal from an order dismissing a charge, hear and determine the matter of law and thereupon reverse, affirm or vary the determination of the subordinate court, or remit the matter with the opinion of the High Court thereon to the subordinate court for determination, whether by way of re-hearing or otherwise, with such directions as the High Court may think necessary, and make such other order in relation to the matter, including an order to costs, as the High Court may think fit;

> ***(d) in an appeal from any other order, alter or reverse the order, and in any case make any amendment or any consequential or incidental order that may appear just and proper."*** (emphasis added).

38. The correct procedure where the Director of Public Prosecutions (DPP) seeks substitution of a conviction or enhancement of sentence under the provisions of Section 354(3)(ii) or 354(3)(iii), is for the prosecution to file a notice expressing its intention to seek substitution of the conviction and/or enhancement of sentence imposed on an appellant in a particular case. The foregoing must however be done as soon as the Office of the Director of Public Prosecutions has been supplied with the Record of Appeal.

39. Once the said notice has been filed, the appellate court is duty bound to inform the appellant of the consequences of such a notice. Doing so forewarns him that his appeal might take a turn for the worse. It therefore prepares the appellant psychologically for any outcome once the notice is filed, the DPP can then canvass the issue of substitution of the conviction and/or enhancement of sentence in its written submissions. When an appellant is served with a notice early enough, it gives him sufficient time to decide whether or not he should pursue the appeal and for him to prepare adequately for the hearing of his appeal.

40. In ***JJW v Republic*** *[2013] eKLR,* the Court of Appeal held that notwithstanding the fact that section *354(3)* of the Criminal Procedure Code empowers the High Court to enhance or alter the nature of the sentence imposed by the Trial Court, in the absence of an appeal against sentence, the court must warn the appellant before it enhances the sentence. The Court stated thus:-

> ***"It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal."***

41. In this appeal, no notice of substitution of the conviction and/or enhancement of sentence was filed in court by the DPP. The prosecution brought up the issue for the first time in its written submissions. That is not appropriate and cannot be equated to issuance of the requisite notice.

42. Having earlier found that the prosecution failed to prove its case beyond reasonable doubt, I quash the conviction and set aside the sentence of 20 years imprisonment. The appellant shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 17th day of July, 2020. Judgment delivered through Microsoft Teams online platform due to the outbreak of covid-19 pandemic.

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Mr. Muthomi, Prosecution Counsel, for the DPP

Ms Peris Maina - Court Assistant