REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 285 OF 2017

JOSEPHAT KIMEU MUTEVU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Hon. H.M Ng'a ng'a (RM) in Tawa Senior Resident Magistrate's Court Criminal Case No. 154 of 2016 delivered on 5th December 2016

JUDGMENT

1. **Josephat Kimeu Mutevu** the Appellant was charged with the offence of defilement of a child contrary to section 8(1) as read with sub-section 3 of the Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant between the 13th and 14th day of June 2016 at Nduuni sub-location, Kalimani location in Mbooni east district within Makueni county intentionally and unlawfully caused his penis to penetrate the vagina of **EWM** a child aged 15 years.

2. He faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars were that the Appellant on the 13th and 14th day of June 2016 at Nduuni sub-location, Kalimani location in Mbooni east district within Makueni county, intentionally and unlawfully did an indecent act to **EWM** a child aged 15 years by touching her private parts namely vagina with his penis.

3. After a full hearing, the Appellant was found guilty and convicted on the alternative count and sentenced to serve ten (10) years imprisonment. He was dissatisfied and so filed this appeal on the following grounds:

> *a) **That,** the trial Magistrate misdirected himself when convicting him while failing to observe there was no complainant who testified having been defiled.*
>
> *b) **That,** the trial court faulted in points of law and fact when failing to note that he was just made a victim of circumstance.*
>
> *c) **That,** the learned Magistrate erred in law and fact by not finding that the prosecution case was riddled with both contradictions and inconsistencies.*
>
> *d) **That,** the trial court faulted in points of law when not finding that the prosecution side had not proved their case beyond shadows of doubts as is required by the law.*
>
> *e) **That,** the trial Magistrate further erred in law and fact when rejecting his defence of alibi without giving any cogent reason for so doing hence contravening the law under section 69(1) of the Criminal Procedure Code.*

4. The prosecution relied on the evidence of four witnesses. The complainant (EWM) testified as Pw1. She testified that on 13th June 2016 evening she met the Appellant who asked her to go to his home. She slept in his house and had sexual intercourse with him. She stated this: *"When I was with Kimeu, he entered where he urinates into my place where I urinate. He did that at night on 13/06/2016."* She was not so sure of her age but an age assessment report was filed. She went to hospital on 16th June 2016.

5. She was able to identify the black biker, (EXB4) white faded underpants with blue lining (EXB3) as what she was wearing that day. She also identified two white dirty sheets (EXB5) as belonging to the Appellant.

6. In cross examination, she said she had carried clothes and she stayed in his house for three days when he told her he had a wife. That they met on the way and he told her they go to his house.

7. In re-examination she appeared not sure if she took her clothes to the Appellant's house. She however said she stayed with the Appellant's mother for three days and at the time of incident she was staying with mama Ken.

8. Pw2 **Theophilar Mutuku** is the assistant chief of Ndituni sub-location. He testified that on 14th June 2016 11:00 am he received a call from elder Pius Mutuku informing him of a girl found locked in the Appellant's house. He advised the elder to look for the Appellant. At 2:00 pm he went to the scene with Maria Mutie, Kyeli Mutua and Kyalo Matata. He was shown the house by Appellant's mother who even opened it. He found the girl inside and they went with her to his office.

9. Mr. Kyali and Kyalo were sent to look for the Appellant. Later the two messengers came with him. Pw2 called the police from Mbumbuni who came and took the Appellant and Pw1 to the station. He confirmed that the Appellant had a wife but they were separated.

10. In cross examination he said there was a bag which was brought and the Appellant's mother went back with it.

11. Pw3 **No. 81694 Corporal Mwaka Mwamuye** was the investigating officer. He visited the scene and recovered some clothings and bed sheets (EXB5) which had some stains. He also found E.M's underwear which had a stain (EXB3) plus a black biker (EXB4). He took Pw1 to Kisamu sub-county hospital and issued her with a P3 form.

12. Pw4 **Dr. Stephen Mwangi** said he examined E.W.M and this were the findings: -

- Labia intact
- No injury
- Found evidence of penetration
- Was in her menses
- HIV and pregnancy were negative.
- It was not easy to tell if penetration was fresh but if it was the first time it would have been painful.

He produced the P3 form as EXB2, treatment card EXB6. He also examined the Appellant and filled his P3 form (EXB7) and treatment card (EXB8).

13. In cross examination he said there was evidence of penetration as his two fingers entered the vagina meaning the hymen was broken. It could have happened way before.

14. When placed on his defence the Appellant elected to remain silent. He however called one witness Dw1 **John Musyoki Kimilu** who is his neighbor. He stated that on 15th June 2016 at 11:00 am he saw nyumba kumi wazee going to Appellant's home. He was curious to know what they were upto, so he went there. They found the Appellant's mother resting outside. The wazees asked her what had happened and she told them a girl called W had carried her bag of clothes which had been brought that day.

15. The girl was arrested and taken to the office of the assistant chief. Later Dw1 saw the Appellant with wazee of nyumba kumi. He too was taken to the assistant chief's office. The prosecution had no question for him.

16. The appeal was canvassed by way of written submissions.

17. The Appellant in his submissions filed on 30th June 2020 contends that he made an alibi defence but the same was not considered by the trial court. He disputes EWM's evidence saying he could not invite her to his house since his family was there. He further submits that the assistant chief did not bother to establish the issue of the clothes EWM had stolen since they did not want to listen to his mother.

18. The Appellant argues that the medical examination did not support EWM's allegations, since her labia was intact with no injury and the high vaginal swab revealed no sperms.

19. The Respondent filed its written submissions through learned counsel Mrs. Monica Owenga. After doing an analysis of the evidence counsel concludes that the Appellant was not properly convicted since the evidence tendered did not meet the evidential threshold to warrant a conviction. She further submits that the ten (10) years sentence was unlawful considering the evidence upon which he was convicted.

20. Counsel further submits that though there was sufficient evidence to convict the Appellant the conduct of the trial was not fair as the provisions of Article 50(2)(f) of the constitution were not observed. That there was nothing on record to show the Appellant's preparedness for the hearing, since he did not confirm having been supplied with witness statements. For this reason, she conceded the appeal and prayed for the quashing of the conviction and setting aside of the sentence with an order for a retrial.

Analysis and determination

21. This is a first appeal and this court is under a duty to re-analyse and re-consider the evidence and arrive at its own conclusion. I have to

take into account the fact that I did not see or hear the witnesses and give an allowance for that. See **Okeno –vs- Republic (1972) E.A 32; Ogeto –vs- Republic (2004) 2KLR 14; Kiilu & another –vs- Republic (20050 I KLR 174.**

22. After considering the evidence on record, grounds of appeal, both submissions and the law, I find two issues falling for determination:

i. Whether there was violation of the Appellant's right to fair trial as envisaged under Article 50(2)(j) of the constitution.

ii. Whether the evidence adduced was sufficient to sustain a conviction.

Issue (i) Whether there was violation of the Appellant's right to fair trial as envisaged under Article 50(2)(j) of the constitution.

23. Article 50(2) (j) of the constitution provides.

(2) Every a ccused person has the right to a fair trial, which includes the right –

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

24. Time and again courts have been asked to ensure compliance with this provision by ensuring that an accused person is supplied with witness statements and all the documents the prosecution intends to rely on, before the commencement of the case. This enables the defence to adequately prepare for the case. As rightly submitted by the Respondent the record does not bear any compliance with this provision.

25. The Appellant was unrepresented and did not even request for the statements, but the court and the prosecution had a duty to ensure the Appellant had the statements and documents.

See: **Thomas Patrick Gilbert Cholmondely –vs- Republic Nairobi Criminal Appeal No. 116 of 2007 (2008) eKLR; Ahamad Abolfathi Mohammed & Another –vs- Republic (2018) eKLR; Francis Kanyi Kirunda –vs- Republic (20190 eKLR.**

My finding is that there was a violation of the Appellant's right to a fair trial.

Issue no. (ii) ***Whether the evidence adduced was sufficient to sustain a conviction***.

26. The Appellant has submitted that there was no sufficient evidence to sustain a conviction. From the Respondent's submission counsel appears to have been under the impression that the Appellant was convicted on the main count of defilement hence her submission that the sentence of ten years' imprisonment was unlawful.

27. From the judgment, it is clear that the Appellant was convicted of the alternative count of committing an indecent act with a child.

Section 11(1) of the Sexual Offences Act provides:

(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

If properly convicted I find nothing unlawful about that sentence.

28. The person who examined and filled the P3 forms (EXB2 and EXB 7) was one Dr. S. Musembi. The one who testified as Pw4 is one Dr. Stephen Mwangi. In giving his qualifications he said he has a diploma in medicine and that he is the one who examined Pw1 and the Appellant. This cannot be true because every medical doctor has a 1st degree in medicine and surgery and not a diploma in medicine. He had no degree and so CANNOT therefore be Dr. Stephen Mwangi.

29. Secondly, it is clear that it is not him who examined EWM and the Appellant as he is not Dr. S. Musembi. He never said he was testifying on behalf of Dr. Musembi. I therefore find pw4's evidence to have been unprocedurely recorded and I expunge it from the record.

30. In her evidence EWM appears to give some contradictory statements. She says she was at the Appellant's house on the night of 13th June 2016 and was there for three (3) days. At the same time, she says she stayed with the Appellant's mother for three (3) days and that when this incident occurred she was staying with mama Ken who she says is a doctor.

31. It is not clear who mama Ken is in these proceedings. There is an issue about EWM having carried her clothes to the Appellant's house. At another point she denies having taken them there. In cross examination Pw2 said the Appellant's mother had brought a bag and returned with it but it was for her daughter.

32. Dw1 a neighbor also talked about a bag of clothes which the Appellant's mother told them had been brought by EWM who admitted having brought clothes to the Appellant's house. What were these clothes all about? Pw2 was very dismissive about them. Could there have been something more to this than met the eye?

33. Upon scrutiny of the record and in particular the proceedings of 17th June 2016 one clearly understands why EWM's evidence is not consistent. She was a child in need of care and protection and as her parents had neglected her. That when the offence occurred she had

broken into a shop because she was hungry. I will leave it at that.

34. Her evidence was very critical in this matter but it's not reliable enough to qualify under the proviso to section 124 of the Evidence Act. Even the evidence in the P3 form would not have supported it. That is why the trial court decided to convict the Appellant on the alternative count.

35. In **Kiilu & Another –vs- Republic (2005) I KLR 174** the Court of Appeal stated this:

> ***(4) The witness upon whose evidence it is proposed to rely should not make an impression in the mind of the court that he is not a straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.***

36. I find EWM to be that kind of witness described in the above decision. Her evidence alone cannot be relied on to sustain a conviction whether on the main count or alternative count.

37. I chose to analyse the evidence even after finding Article 50(2)(j) of the constitution to have been violated because I had already noted the inconsistencies and loopholes in the case and there would be no point of sending it for a retrial.

38. The upshot is that the appeal has merit and is allowed. The conviction is quashed and sentence set aside. The Appellant to be set free unless otherwise held under a separate warrant.

Orders accordingly.

Delivered, signed & dated this 7th day of October 2020, in open court at Makueni.

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H. I. Ong'udi

Judge