



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HCCRA NO. 43 OF 2019

SIMON MUCHORI KAMAU..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment and sentence of the Senior Resident Magistrate

Hon. M.N. Munyendo dated 14/06/2019 in Othaya SRM M.S.O No. 11 of 2018.)

JUDGMENT

1. **Simon Muchori Kamau** the Appellant herein was charged with the offence of defilement contrary to section 8(1)(3) of the Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant on the 30th day of June 2018 between 1500 hours and 1700 hours at [ParticularsWithheld] area at Karima location and at [ParticularsWithheld] within Othaya town, Nyeri south sub-county within Nyeri county intentionally caused his penis to penetrate the vagina of EWW a child aged 13 years without her consent..
2. He faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars being that the Appellant on the 30th day of June 2018 between 1500 hours and 1700 hours at Karima location and [ParticularsWithheld] within Othaya town Nyeri south sub-county within Nyeri county intentionally touched the vagina of EWW a child aged 13 years with his penis without her consent.
3. He denied the charges and the matter proceeded to full hearing with the prosecution calling four (4) witnesses while the Appellant gave a sworn statement and called three (3) witnesses. Later the Appellant was convicted and sentenced to twenty years imprisonment.
4. He was dissatisfied and filed this appeal through Mr. Wahome Gikonyo and A.T Oluoch raising the following grounds:
 - a) **That**, the learned trial Magistrate erred in law and in fact on the identification of him to his detriment.
 - b) **That**, the Honourable trial court erred in law and in fact by failing to objectively apply its mind to the defence he tendered and corroborated by his witnesses and which testimonies were made under oath and were not controverted or at all.
 - c) **That**, the learned trial Magistrate erred in law and in fact by relying on evidence of single identification by the alleged defiled minor who could have been coached.
 - d) **That**, the learned Magistrate misdirected herself in law by rejecting any *alibi* defence which sufficiently created a reasonable considerable amount of doubt as to the prosecution's case.
 - e) **That**, the learned trial Magistrate erred both in law and fact when she failed to consider that the doctor's findings had no facts that associated the Appellant with the alleged offence.
 - f) **That**, the learned trial Magistrate erred both in law and fact when she failed to consider the prosecution's failure to call a witness from the scene of crime to support their evidence.
 - g) **That**, the court erred in shifting the burden of proof to the him where it held that he did not convert or disprove the cell phone number supplied to the prosecution.

h) **That**, the learned trial Magistrate placed undue reliance on section 124 of the Evidence Act to the detriment of him leading to the shifting and lowering the burden of proof.

i) **That**, the learned trial Magistrate erred both in law and in fact by failing to order he undergo medical examination as required under section 122A of the Penal Code to establish that he was the one responsible for the defilement.

j) **That**, the court erred in law and fact by convicting the him without crucial exhibits being produced in court.

k) **That**, the learned trial Magistrate misdirected herself in law and facts by failing to appreciate that the prosecution case was not only insufficient but also a conjecture and lacked probative value to justify a conviction.

l) **That**, the learned trial Magistrate misdirected itself in law by rejecting any alibi defence which sufficiently created a reasonable considerable amount of doubts as to the prosecution's case.

m) **That**, the learned trial Magistrate erred in law and fact by failing to note that the prosecution did not prove their case beyond reasonable doubt.

n) **That**, his conviction based on the evidence on record was manifestly unsafe.

o) **That**, the learned trial Magistrate erred in fact and law by imposing on him a harsh, oppressive and excessive sentence totally disregarding his past records and mitigation.

Further grounds

a) **That**, the learned Trial Magistrate erred in law and fact in holding that the Appellant had defiled the complainant when the charge had not been proved beyond any reasonable doubt. A miscarriage of justice was thereby occasioned.

b) **That**, the learned trial Magistrate erred in law and fact in not holding and finding that there was sufficient doubt in the prosecution evidence, which doubt ought to have been resolved in favour of the Appellant. A miscarriage of justice was thereby occasioned.

c) **That**, the learned trial Magistrate erred in law and fact in shifting the burden of proof from the prosecution to the Appellant to prove his innocence. A miscarriage of justice was thereby occasioned.

d) **That**, the learned trial Magistrate erred in law and fact in failing to consider and find out whether the complainant's evidence is credible and holding that the same was corroborated without giving cogent reasons or testing the same.

e) **That**, the learned trial Magistrate erred in law dismissing the Appellant's alibi without testing the same or any valid reasons. A miscarriage of justice was thereby occasioned.

f) **That**, the learned trial Magistrate erred in law in not finding and holding that the vital witnesses were not called such lodge attendants and or employees and their evidence which should have been produced but was not produced, would have been unfavourable to the prosecution. A miscarriage of justice was thereby occasioned.

g) **That**, the learned trial Magistrate erred in law in relying in the evidence of a minor without complying with the provisions of section 124 Evidence Act. A miscarriage of justice was thereby occasioned.

h) Considering all the circumstances of the case, the sentence meted out is manifestly harsh, excessive and against the weight of the evidence on record.

5. The complainant (EWW) testified as Pw1. She told the court she was aged 13 years. She was able to identify her birth certificate (EXB1). It was her evidence that on 30th June 2018 at about 2:00 pm she was in Othaya town headed to the posho mill. On her return and while headed home at 3:00 pm she met with the Appellant at [ParticularsWithheld] petrol station. He asked her to follow him and she declined. He threatened to kill her if she did not comply with his demand. She followed him and they walked upto [ParticularsWithheld] into a tea and coffee plantation. Inside the bushes he removed her underwear as well as his blue jeans trouser and black under wear. He then inserted his penis inside her vagina.

6. She bled as she cried. The Appellant's white tee-shirt got blood stained. They dressed up and walked towards Othaya town. She followed him as directed and they ended up at a lodging T/A Cussons. He booked a room No. 9 and forced her inside the room where he again removed her clothes and inserted his penis in her vagina. When he finished he locked her in the room and left. He returned and thereafter allowed her to go home. He also showed her where he stayed near silent lodge. He gave her his phone number which she could not remember.

7. She got home and started bleeding. When she asked her mother (Pw2) for her pads Pw2 became suspicious. She was taken to Othaya sub-county hospital for examination and thereafter to the police station. She led police officers to the Appellant's place from where he was arrested. She showed the police officers the place where the incident took place. She said she bled from 30th June 2018 to 13th July 2018. She was admitted and went through surgery. She was able to identify her treatment notes. (EXB2) and P3 form (EXB3). It was her evidence that she did not know the Appellant prior to this incident.

8. In cross examination, she said from the petrol station to [ParticularsWithheld] is about 2 kilometres. She never raised any alarm nor told anyone since she had been warned by the Appellant. She stood near a corner as the Appellant booked the room. They left the lodging together. On further cross examination by counsel upon being recalled she said the Appellant had introduced himself as “*Kamau*”. Her clothes were blood stained same to the Appellant’s white tee shirt after the incident.

9. **Pw2 JW** is EWW’s mother. She said EWW was born on 11th June 2005. She confirmed having sent her to the posho mill on 30th June 2018 at 2:00 pm. She only returned home at 6:15 pm while sobbing, and she had Kshs.200/= with her. She gave it to Pw2 saying she got paid from work. She took her girl to Othaya sub-county hospital, thereafter to Othaya police station from where she explained everything that had transpired. EWW led the police to a house from where the Appellant was arrested.

10. She also took them to [ParticularsWithheld] and room 9 at Cussons lodging in Othaya town. The girl continued bleeding up to the time she was taken to Nyeri provincial general hospital from where she was stitched.

11. **Pw3 Thomas Mwangi** is a clinical officer at Othaya sub-county hospital. The findings after examination of the genitalia were:

- Blood on the labia
- Laceration plus freshly broken hymen with acute bleeding
- HVS revealed yeast cells and spermatozoa and bacteria.
- Urinalysis showed protein blood and red blood cells
- Tear measuring 2 centimetres with heavy bleeding and foul smell.

The final finding was one of defilement.

12. **Pw4 No. 928842 PCW Judy Wathima** was the investigating officer in this case. She was at the station on 30th June 2018 when a report of defilement EWW was made. After the hospital EWW led them to the Appellant’s house, from where he was arrested. She narrated to her what had happened. She confirmed visiting the scene in [ParticularsWithheld] and the Cussons lodging but took no evidence from there. She collected a white shirt from the Appellant which was sent to the government chemist. She also took a blood sample from the Appellant which she preserved before taking it to the government chemist. She admitted to not having produced a DNA report. She did not recover the Kshs.200/=.

13. The Appellant gave a sworn statement of defence and denied the charge. He said he is married with four (4) children and from January – June 2018 he was staying at [ParticularsWithheld] Plaza along Othaya – Gatuini road within Othaya town. On 30th June 2018 he relocated to a house near silent lodge. He was busy the whole morning parking and was assisted by DM (Dw2) and JK (Dw4).

14. He moved his belongings and arranged them between 12 noon – 4:30 pm. At night he heard a knock on his door and on opening he found three police officers, a girl and a woman. He was arrested for being a suspect of rape. All these people were strangers to him.

15. He was escorted to [ParticularsWithheld] plantation with the officer, girl and woman. The girl who was the complainant pointed a fenced tea plantation where she claimed to have been raped. He said there were houses around there. He was then taken to Cussons lodge within Othaya town where they met a receptionist, watchman and two others. His name was not traced in the receipt for the day. They also went to room 9. The distance between Othaya town and [ParticularsWithheld] is about 2 kilometers and would take 40 minutes walking.

16. In cross examination he said he is a teacher at [ParticularsWithheld] girls secondary school and was arrested in his house at Othaya town. His friends and colleagues knew his house. He did not have receipts for the movement of his belongings. He said his was a case of mistaken identity.

17. **Dw2 DMM** is a carpenter in Othaya town. He said he had known the Appellant for five (5) years as a teacher at [ParticularsWithheld] girls. On 30th June 2018 the Appellant came to his workshop at 10:00 am asking for someone to help him move the bed he was making for him. He got JM (Dw3) to do that. He said he had been to [ParticularsWithheld] lodge before and it was a place where one can be easily spotted. In cross examination he said he was with the Appellant from 2:00-4:00 pm assembling his bed for him. He dismissed the charges against the Appellant.

18. **Dw3 JMM** is an electrician within Othaya town. He said he knew the Appellant a teacher in the year 2017. It was his testimony that on 30th June 2018 4:30 pm the Appellant called him to check on the electrical connection in his new house which is close to Silent lodge. He found the Appellant with other people plus his wife. He did the work and finished at about 7:00 pm. He dismissed the charges as false since he was with the Appellant at the material time.

19. The appeal was canvassed by way of written submissions. Mr. Wahome for the Appellant in his submissions states that failure to conduct a *voir dire* examination for the complainant E.W.W (Pw1) was fatal to the prosecution case. To support this he refers to the cases of **Johnson Muiru –vs- Republic (1983) KLR 455; Patrick Kathurima –vs- Republic (2015) eKLR**. EWW was aged 13 years. He has further pointed out to what he believes are inconsistencies in Pw1’s evidence.

20. Counsel has referred to alleged blood stained pant, dress, tee-shirt and spermatozoa which were allegedly sent for forensic examination with no exhibit memo being presented to the court. He has cited parts of the proceedings which refer to the alleged exhibits. On this he cites

the cases of **Anthony Murage Kabethi –vs- Republic (2012) eKLR** and **John Mutura Muraya –vs- Republic Court of Appeal Criminal Appeal No. 384 of 2009 (Nyeri) (U.R)**

21. Referring to the case of **Nguku –vs- Republic (1985) KLR 412** and **Juma Ngodia –vs- Republic (1982 – 1988) 1 KAR 454** he submits that failure to produce evidence from Cussons lodge meant that such evidence would have been unfavourable to the prosecution. He has also referred to Pw1 and Pw4 as incredible and unreliable witnesses.

22. On this he referred to the case of **Kiilu & Another –vs- Republic (2005) 1 KLR 174** where it was held that:

“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”.

Based on all the above he asked the court to quash the conviction.

23. On the issue of mandatory and maximum sentence he termed the same unconstitutional while referring to the case of **Evans Wanjala Wanyonyi –vs Republic (2019) eKLR** where the mandatory sentence of 20 years imprisonment was set aside and substituted with 10 years' imprisonment. He urged the court to make a similar finding.

24. In conceding the appeal Mr. Duncan Ondimu for the Respondent submits that it is always the duty of the prosecution to prove its case beyond reasonable doubt. See section 107(1) Evidence Act. He cites one of the grounds of conceding the appeal to be the events leading to the identification of the Appellant. He has referred to E.W.W's evidence at pages 6,8,9 in chief, cross examination and re-examination and when she was recalled. He submits that the instances cited above bring to doubt the Appellant's identification.

25. He argues that EWW was meeting the perpetrator of this offence for the first time. It is nowhere indicated by Pw4 (*the investigating officer*) that E.W.W ever gave any description of the perpetrator before the arrest of the Appellant by police officers. The Appellant was arrested at 23:30 hours.

26. Counsel referred to the case of **Hassan Abdalla Mohammed –vs- Republic (2017) eKLR** where it was held that:

“7. Visual identification in criminal cases can cause miscarriage of justice and should be carefully tested.

The court in **Wamunga –vs- Republic (1989) KLR 424 at 426** has this to say:

“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 possibility of error before it can safely make it the basis of a conviction.”

8. In Nzaro –vs- Republic (1991) KAR 212 the Court of appeal held that evidence of identification by recognition at night must be absolutely watertight to justify conviction.”

27. Mr. Ondimu has also referred to the contradictory evidence of EWW and Pw4 on the condition of the perpetrator's clothes and even what he wore. Blood samples allegedly taken to the government chemist yielded no results and even no exhibit memo was produced in court. It was therefore not certain that the person whom EWW saw on 30th June 2018 is the same person who was arrested on the night of 30th June 2018 at around midnight.

28. The other loophole is failure by the investigating officer (Pw4) to produce evidence from Cussons lodging despite having visited the place. Counsel has also submitted that the Appellant's *alibi* defence was not considered.

29. Mr. Ondimu while referring to the case of **Anthony Musee Matinge –vs- Republic (2012) eKLR** and section 200(3) Criminal Procedure Code submits that when Mr. M.N Munyendo SRM took over the case on 9th October 2018 he did not fully comply with section 200 CPC as it is not the Appellant who responded in terms of section 200(3) CPC.

30. On the issue of failure by the trial court to conduct a *voire dire* examination on E.W.W aged 13 years counsel has submitted that it was not fatal to the prosecution case. He relied on the case of **Maripett Loonkomok –vs- Republic (2016) eKLR**. Finally he conceded the appeal.

Analysis and determination

31. The duty of the first appellate court is to re-analyse and re-consider the evidence tendered before the trial court with a view to arriving at its own independent conclusion. See **Okeno –vs- Republic (1972) E.A 32**.

32. In **Kiilu & Another –vs- Republic (2005) 1 KLR 174** the Court of appeal stated that:

“1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw

its own conclusions.

2. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses".

33. The same was reiterated in **David Njuguna Wairimu –vs- Republic (2010) eKLR** where the Court of Appeal stated

“That the duty of the 1st appellate court is to analyze and re-evaluate 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 appellate court may, depending on the circumstances of the case come to the same conclusions as those of the lower court. It may rehash those conclusions as those of the lower court. We do not think that 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 decision.”

34. Having considered the evidence on record, grounds of appeal, both submissions and case law, I find the issues falling for determination to be:

- i. Whether failure to conduct a voir dire examination for E.W.W vitiated the prosecution case.
- ii. Whether the prosecution proved a case of defilement against the Appellant.
- iii. Whether the sentence was harsh and excessive.

Issue no.(i) Whether failure to conduct a voir dire examination for EWW vitiated the prosecution case.

35. The age of EWW was given as 13 years in the charge sheet. Both E.W.W and Pw2 stated the same. A birth certificate (EXB1) in respect of E.W.W shows that she was born on 11th June 2015. The date of commission of the offence was 30th June 2018. Age was therefore proved to be 13 years. Section 19 of the Oaths and Statutory Declarations Act is concerned with the reception and admissibility of evidence of a child of tender years.

36. The Court of Appeal in the case of **Patrick Kathurima –vs- Republic (2015) eKLR** among others held that a child of tender years is a child under the age of fourteen (14) years. It is therefore clear that EWW being a child aged 13 years ought to have been taken through a *voir dire* examination to determine her suitability to testify.

37. Mr. Wahome for the Appellant has contended that failure to conduct a *voir dire* examination by the trial court was fatal to the prosecution case. As was stated in the case of **John Ndachu Ng'ang'a –vs- Republic (2017) eKLR** by the Court of Appeal at paragraph 18:

“The question that begs an answer therefore is “what is the effect of the failure by the trial court to conduct a *voir dire* examination of Pw1. In seeking an answer we find guidance in the case of **Maripett Loonkomok –vs- Republic (2016) eKLR** this court stated as follows:

“It is firmly settled that not in all cases that voir dire is not administered or is not administered properly the entire trial would be vitiated. This court sitting at Nyeri has recently reiterated what has been said many times before that question will depend on the peculiar circumstances and particular facts of each case. See James Mwangi Muriithi –vs- Republic, Criminal appeal No. 10 of 2014”

The court went on to state as follows:

“It follows from a long time of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this court recently found that;

“In appropriate case where voir dire is not conducted, but there is sufficient independent evidence to support charge ... the court may still be able to uphold the conviction.”

38. In view of the decision in **Maripett Loonkomok** (supra) I do find that failure by the trial court to conduct a *voir dire* examination did not render the prosecution case fatal. The trial court took sworn evidence from EWW and she was subjected to cross examination and later recalled for further cross examination and re-examination. Hers was not the only evidence for consideration by the court in respect to this offence.

Issue no. (ii) Whether the prosecution proved a case of defilement against the Appellant.

39. As has already been indicated above the age of the complainant which is an ingredient of a charge of defilement was proved to have been 13 years. Section 2 of the Sexual Offences Act defines **penetration** as:

“The partial or complete insertion of the genital organs of a person into the genital organs of another person;

The evidence of EWW, Pw2 and the medical evidence by Pw3 confirmed that EWW had been penetrated.

40. The only other issue for determination is whether the Appellant was identified as the perpetrator of this offence. As properly stated by both counsel for the Appellant and Respondent the evidence of EWW was key in the identification of the perpetrator. The narrative by EWW was to the effect that while at a petrol station within Othaya town a stranger approached and demanded she follows him. After issuing threats to her she obliged and followed him.

41. A petrol station is a public place. She said as they walked through Othaya town to [ParticularsWithheld] in a tea and coffee plantation they met many people. But even as she carried the flour from the posho mill she told no one about this. At the tea and coffee plantation she was defiled by this man for about 30 minutes.

42. Thereafter both of them dressed up and left for [ParticularsWithheld] lodge about two kilometres away. She was still carrying the flour and she was bleeding. She was however able to walk upto [ParticularsWithheld] lodge where she was again defiled. At this lodging there were people but she never screamed. After he was through they again left the place walking and the perpetrator gave her KShs.200/= his phone number (which were never produced and he showed her his house. She again walked upto her home and even to hospital.

43. This was a 13 year old child and if what she was narrating was true then she could have had a black out for sure. These are things to be done to a child of that age and she continues walking and walking for kilometers on end.

44. Secondly, the issue that arises is how the investigating officer (Pw4) was sure that the Appellant was the person who committed this act. Yes it may be that the perpetrator showed her the house that she took the police to. The issue is the identification of the perpetrator. What Pw4 should have done was to arrest the Appellant in the absence of E.W.W since she had shown her the house. Thereafter an identification parade should have been conducted for E.W.W to identify him. This was never done. The perpetrator was not a person known to E WW prior to this incident.

45. In the case of **Anjononi & Others –vs- Republic (1976) -1980) KLR 1556 at 1568** the Court of Appeals stated as follows:

“The recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.”

46. In the recent case of **Eric Oduor Odhiambo & Another –vs- Republic (2019) eKLR** the Court of appeal clarified that:

“Of importance is the caution in Anjononi & Others –vs- Republic (1976 – 1980) 1 KLR 1556, that although recognition of an assailant is more satisfactory than identification of a stranger the possibility of someone making a genuine mistake even in recognition of someone known to him particularly in circumstances that are not favourable for identification cannot be ruled out and therefore there is need to test and weigh the evidence of identification.”

47. In **Francis Kariuki Njiru & 7 Others –vs- Republic (2001) eKLR** the Court of Appeal stated thus:

“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 carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and from the possibility of error. The surrounding circumstances must be considered. Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all”.

48. A lot more needed to be laid before the court to confirm that indeed the person who defiled EWW was the real owner of the Appellant’s house. The perpetrator may have shown the Appellant’s house in order to escape liability and place the owner of the house in problems.

49. Another blunder made by the investigating officer (Pw4) was her failure to have produced the allegedly blood stained clothes, the exhibit memo and the government analyst’s report to support the prosecution case.

50. The Appellant gave a sworn defence and was cross examined. He called three (3) witnesses. The Appellant raised an *alibi* defence. It was the duty of the prosecution to displace the alibi. The Appellant and his witnesses explained in their evidence where the Appellant was on the material day at the alleged time. Had the learned trial Magistrate considered the evidence on record in totality she could have arrived at a different decision.

51. Mr. Ondimu for the Respondent rightfully conceded this appeal and clearly pointed out the loopholes in the prosecution case. I am convinced that if proper investigations had been carried out the perpetrator of this heinous crime could have been brought to book.

52. The upshot is that the appeal is meritorious and is allowed. The conviction is quashed and the sentence set aside. The Appellant to be released unless otherwise lawfully held under a separate warrant.

Orders accordingly.

Dated and signed this 11th day of November 2020, in open court at Makeni.

.....

H. I. Ong'udi

Judge