REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 57 OF 2019

JACOB YAAH YERI..APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Being an appeal from the original conviction and sentence in the Senior Principal Magistrate Court

at Shanzu Criminal Case No. 1042 of 2015 by Hon. D. Mochache (SPM)

dated 14th September 2018)

Coram: Hon. Justice R. Nyakundi

The Appellant in Person

Mr. Muthomi for the Respondent

JUDGMENT

The Appellant was charged with 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 offence were that on 3rd September 2015 within Kisauni Sub-County of Mombasa County he intentionally caused his penis to penetrate the anus of WK a boy touched the vagina of KS a child aged 9 years with his hands.

At the end of the trial, the Appellant was convicted and sentenced to 10 years imprisonment. Aggrieved by the sentence and the conviction of the trial court, the Appellant lodged an appeal on the following amended grounds:

> **1. That the learned trial Magistrate erred in both law and fact by failing to establish that the complainant comprehended the nature of an oath before she could give sworn evidence.**
>
> **2. That the trial court failed in its duty to give reasons as to why it believed the evidence of the complainant which was devoid of corroboration.**
>
> **3. That the trial court failed to take into account the discrepancies in the prosecution side.**
>
> **4. That the learned trial Magistrate erred in both law and fact by failing to see the fact that I was not satisfactorily placed at the scene of the alleged incident.**
>
> **5. That the learned trial Magistrate erred in both law and fact by to appreciate that even if I had been convicted fairly, the sentence of the ten (10) years was harsh in the circumstances of the given matter.**

Background

PW1 DM, the victim's mother informed the court that on 3rd September 2016 the complainant informed her that a man had inserted his in

her vagina as she was squatting while assisting her sister to wear shoes. That on 10th September 2016 while in the house the complainant shouted that she had seen the said man but **PW1** was unable to see him as he had passed quickly.

PW1 further told the court that on a different day the complainant informed that while with **PW3** she had spotted the man in the company of some men and refused to pass where they were seated. That the said man ran away and **PW3** inquired from the other men whether they knew the alleged man. PW1 told the court that someone informed them that they knew the man and that they tracked him and arrested him and escorted him to the police station.

PW1 informed the court that the complaint was 9 years old having been born in February 2006 and that she had the complainant's clinic card.

In cross-examination by the Appellant, she stated that she took he child to hospital after he was arrested. She further stated that the complaint told her that the Appellant had referred to her as his wife.

PW2 KS, after voire dire examination was found intelligent enough to give sworn evidence. She told the court that one day as she was going to school she was assisting her sister to wear her shoe when the Appellant who she did not know inserted his fingers in her private parts. That she went home and told her father. That on a different day she was going to hospital with her neighbour when she met the Appellant who waylaid and chased her but she escaped to the neighbour's house. She told the court that some people arrested the Appellant and beat him up in her presence. That police officers came and arrested him. She stated that she was taken to hospital where she was examined.

In cross-examination, the complainant stated that she knew the Appellant but not her name and that he lived near the woman who sells omena. She further stated that when the Appellant saw her, he told some men that she was his wife and started chasing him.

PW3 Joyce Muthoni Maina told the court that on the morning of 10th September 2015 she was taking her child to hospital when the complainant offered to escort her to hospital. That on the way they saw a group of young men seated. The complainant was afraid of passing there and went around a house to avoid the men. When PW3 reached where the men were seated, the Appellant stood and went in the direction of the complainant. That when the complainant saw the Appellant she ran towards PW3.

PW3 inquired from the complainant why she did not want to pass near the men and the complainant informed her that the Appellant had inserted his fingers in her private parts. PW3 asked the other men if they knew the Appellant and informed them what the complainant had told her. The young men informed her that the Appellant was new in the area and they went in search of the Appellant. The Appellant was apprehended in a certain house having changed his clothes. The complainant identified him. That the crowd started beating the Appellant until he was rescued by police officers who rearrested him.

In cross-examination, **PW3** stated that she did not know the Appellant before the day and that it was the complainant who remembered him. She stated that as soon as she had passed the Appellant, he stood and followed the complainant. Further, she reiterated that when they got to his house, the Appellant and changed his clothes

PW4 No. 95767 PC Virginia Wanjiru of Nyali Police Station, gender office stated that on 10th September 2015 a group of people accompanied the complainant and reported that the complainant had been sexually assaulted by the Appellant who was in their custody. PW4 interrogated the complainant and recorded her statement. She later took the complainant to Coast General Hospital where it was ascertained that there was no penetration. PW4 also took the Appellant to hospital since he had been beaten by the crowd.

At the close of the prosecution case, the Appellant was placed on his defence and gave a sworn statement. He stated that he was a neighbour of PW1 and at the time he had a relationship with a lady and they had a child. That the lady's former husband threatened to ensure that the relationship did not work out.

The Appellant stated that on 9th September 2015 he was at a kiosk eating when he saw the complainant and a lady talking to some boys next to him and then left. That after some time the boys approached him and told him he was wanted. That a group of people together with PW1 arrived with crude weapons and started beating him and arrested him.

In cross-examination, the Appellant stated that he knew the complainant's parent but not the complainant. He further stated that he never had a conflict with the complainant's parents or PW3. He stated that he suspected his girlfriend's former husband had colluded with the complainant's parents to frame him

Submissions

<u>Appellant's written submissions</u>

On appeal, the Appellant relied on his written submissions filed on the 22nd May 2020. The Appellant submitted that the trial court had failed to ascertain whether the complainant fully comprehended the nature of an oath and that there was a difference between telling the truth and comprehending the nature of an oath. He submitted it was a superfluous exercise to swear in a minor who did not know the meaning of an oath. Further, he submitted that the complainant never knew why she was in court and therefore could not be trusted to know the reason she was being sworn in. He relied on the case of **Oyondi vs Rep HCCR App No. 404 of 2010** and **Patrick Kathurima vs Rep Nyeri Cr. App No. 137 of 2014.**

It was the Appellant's submission that the prosecution's evidence had discrepancies as to whether the complainant knew the Appellant or not. He further stated that it was not clear as to how he was arrested, whether people chased him or they looked for him. He also submitted that while the trial court could convict an accused person on the sole evidence of the complainant having recorded the reasons, the reasons must be above reproach and the truthfulness of the witness must be reasonable and acceptable. That if the evidence was questionable then the conviction would be unsound.

Finally, the Appellant submitted that the sentence of 10 years was excessive and harsh taking into consideration the circumstances and gravity of the offence as the term shall be liable. It was his submission that the term 'shall be liable' provides for a maximum sentence and therefore the court could impose a lesser sentence. He relied on the case of **Kichanjele c/o Ndamungu vs Rep [1941] 8 EACA 64** and **Opoya vs Uganda [1967] EA 752 at Page 754.**

Respondent's submissions

The Respondent relied on its written submissions dated 16th July 2020 and filed on the 17th July 2020 in opposition of the appeal. On the issue of the voir dire examination, the Respondent submitted that the court conducted a voir dire examination, observed the child's demeanour and found that the complainant was intelligent enough to give sworn evidence. It was submitted that it could not be said that the minor did not comprehend the nature of an oath and that this case was distinguishable from cases where voir dire was not conducted. Reliance was placed on **Salim Hamisi Kiswere vs Republic [2018] eKLT; SAmuell Warui Karimi vs Republic [2016] eKLR** and **Maripett Loonkomok vs Republic [2016] eKLR.**

On the issue of discrepancies, the Respondent relied on the case of **Philip Nzaka Watu vs Republic [2016] eKLR,** and submitted that there were no material contradictions and inconsistencies in the prosecution case to vitiate the conviction and sentence.

The Respondent also submitted that the learned magistrate gave reasons as to why she believed the complainant's evidence having found the complainant's testimony was consistent as it was the same from the time she narrated it to her mother, PW3, PW4 and when she testified in court. Additionally, it was submitted that the complainant's evidence was corroborated by the evidence of PW1, PW3 and PW4.

Further, on identification, the Respondent submitted that the Appellant was identified by recognition by the complainant. That the trial Magistrate satisfied herself that the evidence of the minor was consistent and there was nothing to suggest the complainant was misguided in her recognition.

Lastly, the Respondent submitted that courts had powers to impose appropriate sentences even where minimum sentences are prescribed in light of the Muruatetu case and the current constitutional dispensation. Quoting the case of **High Court of Kenya at Machakos Raphael Mutunga Mutinda vs Republic (2019) eKLR**, the Respondent conceded that the sentence of 10 years imprisonment was manifestly excessive for the offence and urged the court to interfere with the sentence and in its place impose a sentence of 5 years imprisonment.

Appellant's replying submissions

The Appellant filed further submissions on the 28th July 2020 in response to the Respondent's submission. He submitted that the prosecution had failed to summon the people involved in his arrest to shed light on the circumstance of his arrest as there were inconsistencies which made the evidence unsafe relied on **Court of Appeal ay Nyeri Cr. App 12 of 200 consolidated with 13 of 2000 Simon Mwangi Muchiri and Gidraf Thuo Dola vs Rep (UR)**. On sentence, it was the Appellant's further submission that in mitigation he informed the court that he had a young family with two children. He also submitted that it was evident that were it not for the mandatory nature of the sentence, the trial Magistrate would have passed a lesser sentence. He cited the case of **Fatuma Hassan Salo vs Rep Cr. App No. 429 of 2006 (2006) eKLR.**

Analysis and determination

This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusions. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanour of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. See **Okeno v R (1972) EA 32, Eric Onyango Odeng' v R [2014] eKLR.**

I have considered the grounds of appeal, the respective submissions, and the record and the issues for determination are whether the voir dire was properly conducted, whether the prosecution proved its case against the Appellant and whether the sentence was excessive.

On the first issue, the Appellant faults the trial Magistrate in swearing in the complainant when she did not understand the nature of an oath.

The conduct of voir dire examinations has been provided for under section 19 of the Oaths and Statutory Declarations Act cap 15 which provides that: -

> **1. Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.**

The Court of Appeal in the case of **Johnson Muiruri V. Republic [1983] KLR 447,** set out the proper procedure to be followed when

children are tendered as witnesses:

> "**In Peter Kariga Kiune, Criminal Appeal No 77 of 1982** *(unreported) we said:*

'Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which event his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth."

In **ANS v Republic [2019] eKLR** Mativo J on the purpose of a vior dire exam stated that: -

"The question that I propose to address at this stage is 'what is the purpose of voir dire examination? To my mind, a voir dire examination is conducted not to test the credibility of a minor witness, but to enable the court to satisfy itself whether the minor understands the nature of an oath. Upon being satisfied that the minor understands the nature of an oath or does not understand, the court ought to put it on record. The court ought to state clearly that it is satisfied that the child has sufficient appreciation of the solemnity of the occasion and the added responsibility of telling the truth, which is involved in an oath, over and above the duty to tell the truth which is an ordinary duty of social conduct. In such a case, the court can proceed to allow the child to be sworn. If it is not satisfied that the child understands the nature of oath, it should put it on record, and allow the child to give unsworn evidence."

In this case, a perusal of the record reveals that after conducting the voir dire the trial magistrate found that the complainant was intelligent enough to give a sworn statement. However, from the answers recorded in the voir dire there is no evidence that the complainant minor understood the nature of an oath. The fact that the complainant stated she knew lying was wrong did not necessarily mean that she knew the gravity of an oath. In the circumstance, I find that the Magistrate was misguided in taking the complainant's evidence on oath.

However, the fact that the complainant gave sworn evidence instead of unsworn evidence does not vitiate the judgement of the trial court. Section 124 of the Evidence Act requires that where evidence is admitted under section 19 of the Oaths and Statutory Declarations Act (Cap. 15), there is need for corroboration and; in the case of a sexual offence the court can convict on the sole evidence of a victim as long as the court is convinced the victim is telling the truth. See **Arthur Mshila Manga v Republic [2016] eKLR.**

The next issue is whether the prosecution proved its case to the required standard. Section 2 of the Sexual Offences Act (SOA) defines an indecent act as: -

> **an unlawful intentional act which causes—**
>
> > **(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;**
> >
> > **(b) exposure or display of any pornographic material to any person against his or her will;**

In the present case, the indecent act falls under the first category and the prosecution is required show that the Appellant unlawfully and intentionally made contact with the vagina of KS, the complainant but did not cause penetration.

The complainant gave the only evidence of the indecent act. She told the court that she was on her way to school with her younger sister when her sister's shoe came off. That while she was tying her sister's shoe, the Appellant inserted his fingers in her private parts.

Having earlier found that the complainant's evidence was supposed to be received unsworn, there was need for her evidence to be corroborated. The only other person who could corroborate the complainant's evidence was her younger sister, who for was unfortunately never called as a witness.

In the alternative of corroboration, there was need for the trial Magistrate in his judgment to record the reasons for believing that the complainant was telling the truth. I have gone through the judgement of the trial Magistrate where he stated that: -

> "The story of the complainant was very consistent in that it was the same from the time she reported to her mother, when she narrated to PW3 and the investigating officer and even at the time she was testifying in court. Her evidence was well corroborated by PW1, PW3 and PW4."

Thought the trial magistrate misdirected himself in finding that the complainant's evidence was corroborated, I am in agreement with him that the evidence of the complainant was consistent from the time she informed her mother PW1 on the 3rd September 2015; to the time she narrated her ordeal to PW3 and PW4 on 10th September 2015 to the time she testified in the trial court on 17th July 2016. Additionally, I note her testimony was unshaken during cross-examination by the Appellant. I find that the prosecution proved that the complainant genitals were touched.

The other question before the court is whether the Appellant was the one who assaulted the complainant. In reaching his judgement, the trial Magistrate unfortunately never addressed his mind on the issue of identification.

The evidence of identification surrounds the events of 10th September 2015 as reproduced above. The Respondent submitted that this was a case of recognition, however, the complainant stated that she did not know the Appellant but she knew she lived near the house of the

woman who sells omena. Identification was that of a stranger based on visual identification.

Where identification is based on visual identification, it is paramount that the court warns itself on the dangers of relying on visual identification the Court of Appeal in **Cleophas Otieno Wamunga vs Republic Court of Appeal Criminal Appeal No. 20 of 1989 KLR 424** held that:

> "Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification".

The Court of Appeal in **Suleiman Kamau Nyambura v Republic [2015] eKLR** cited **R V Turnbull, [1977] QB 224** where the court gave guidelines on identification and stated that: -

> "First, wherever the case depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for caution before convicting the accused and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Secondly the Judge should direct the jury to examine closely the circumstances in which the identification by such witnesses came to be made. How long did the witness have the accused under observation" At what distance" In what light" Was the observation impeded in any way, as for example by passing traffic or a press of people" Had the witness ever seen the accused before" How often" If only occasionally, had he any special reason for remembering the accused" How long elapsed between original observation and the subsequent identification to the police" Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance""

The identification of the Appellant is solely based on the evidence of the complainant and there is a need to scrutinize the evidence closely to avoid a miscarriage of justice. Having warned myself of the dangers of relying on the sole evidence of the complainant, what were the conditions by which the incident occurred?

According to the complainant, the incident occurred when she was heading to school which was during the day time denoting that the was sufficient light to identify the Appellant. However, there is no evidence on surrounding circumstances of the offences such as how long did the assault take? Did the Appellant say anything to the complainant? Did the Appellant attack the complainant from the back or the front considering that she was bending down at the time? These questions are important in assisting the court to decide the conditions under which the complainant observed the Appellant so as to identify her. Despite the Appellant chasing the complainant on 10th September 2015 there is no certainty that the Appellant was the same person who assaulted her earlier. I find that evidence is insufficient for the court to form an opinion that the complainant properly identified the Appellant.

Having found that the Appellant was not properly identified, I find that the prosecution failed to prove its case. I have no option but to resolve the issue in favour of the Appellant. In the final analysis, I find that the appeal is merited and thereby quash the conviction and set aside the sentence of the trial court is set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

Judgment delivered, dated and signed at Malindi this 9th day of December, 2020.

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R. NYAKUNDI

JUDGE

In the presence of:

The Appellant in person

Mwangeka for the Respondent