REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO 123 OF 2017

SWM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Thika Chief Magistrate's Court

Criminal Case No. 4725 of 2012 (Hon. A.M. Maina (SPM) dated 12th October 2017.)

JUDGMENT

1. The appellant, **SWM,** appeals against his conviction and sentence for the offence of defilement of a girl aged 11 years contrary to section 8(1) and (2) of the Sexual Offences Act. The particulars of the offence are that on the 24th day of October 2012 in Murang'a County within the republic of Kenya by use of his genital organ namely penis committed an act that caused penetration to the genital organ namely vagina of CM, a girl aged 11 years.

2. The appellant faced an alternative charge of committing an indecent act with a girl contrary to section 11(1) of the Sexual Offences Act. The particulars of the charge are that on the same date and place as in the main count, he committed an indecent act with CM, a child aged 11 years.

3. In the Amended Grounds of Appeal filed with his written submissions on 19th September 2018, the appellant raised 6 grounds of appeal. In ground 1, he argues that the tenets of a fair trial under Article 50(2) (c) and (j) of the Constitution were infringed as he failed to get copies of witness statements. He charges in his second ground that the proceedings against him were incurably defective for non-compliance with mandatory provisions of the Criminal Procedure Code namely section 200(3) of the CPC. It is his contention, thirdly, that the trial court erred in failing to find that the medical evidence did not conclusively prove penile penetration. His fourth ground is that he was sentenced to serve an illegal sentence while he contends in his fifth ground that crucial witnesses did not testify. His last ground is that the entire prosecution evidence was tainted by material contradiction, making it unsafe to base a conviction on. The appellant filed written submissions which he relied on entirely.

4. The state opposed the appeal through learned Prosecution Counsel Ms Nyamosi, who submitted that this was a case of a single identifying witness who had given evidence on how she was defiled. She submitted further that the evidence of the complainant was corroborated by the doctor. The trial magistrate had warned herself of the danger of convicting on the evidence of a single identifying witness and was aware of the provisions of section 124 of the evidence Act. The prosecution urged the court to find that the appeal lacked merit and to dismiss it.

5. Grounds 1 and 2 challenge the appellant's conviction on the basis of matters that do not touch on the evidence adduced against the appellant. They relate, at ground 1, to whether he was given witness statements in compliance with article 50(2) (c) and (j) and secondly, whether section 200(3) of the CPC was complied with.

6. I examine first the issue of statements as it emerges from the record. On 14th December 2012, Hon. K.W. Cheruiyot fixed the appellant's trial for hearing on 9th January 2013, then directed that witness statements be supplied. On 9th January 2013, the matter started before Hon. D.A. Orimba. The evidence of the complainant, PW1, and her mother, PW2, was taken and they were cross examined by the appellant. The matter was then adjourned and fixed for mention on 31st January 2013.

7. When it came up for mention before Hon. A.N. Ogonda on that day, the appellant raised the issue of witness statements. He stated that he had been given an order for supply of statements, but when his relatives went to the police station for the statements, they were informed that there were no witness statements. He informed the court that he could not proceed without witness statements and an order was made for him to be supplied with the documents before the next hearing.

8. Yet another order was made by Hon. G. Onsarigo on 2nd September 2014. On 23rd December 2014, the appellant again asked for witness statements, and Hon. E.N. Mburu made an order that he be supplied with the statements. Similar orders were again issued on 9th February 2015. There is a mention of copies of 'warrant summons' to be supplied to the accused on 20th July 2016 by Hon. C.A. Muchoki while on 3rd October 2016, C.A. Muchoki directed that the accused should obtain the remaining witness statements at his own costs.

9. At this point, all the prosecution witnesses save for the investigating officer and the doctor had testified. The Investigating Officer had then been recalled to produce the complainant's baptism card to prove her age. The matter was concluded on 27th September before A.M. Maina. The accused indicated that he did not have the proceedings and a copy of the charge sheet; and an order was made for him to be supplied with the proceedings and charge sheet at his cost. No mention was made of the witness statements again.

10. The question is whether the appellant was ever supplied with the witness statements. If he was not what is the effect of the failure to supply the statement? From the record, it appears to me that the trial court proceeded with the matter, certainly in so far as all the prosecution witnesses save for the investigating officer and the doctor were concerned without the appellant being given the witness statements.

11. The issue of failure to supply an accused person with witness statements, or rather the right of an accused person to be supplied with the statements, has been considered in various decisions in our courts. The first such decision was in **Thomas Patrick Gilbert Cholmondeley v Republic (2008) eKLR** in which the court stated:

> ***"We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under section 77 of our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items."***

12. It is also the law that failure to supply an accused person with witness statements is a violation of his right to a fair trial guaranteed under Article 50(2)(c) and (j). This right includes the right to be supplied with the charge sheet, witness statements and copies of any documents which the prosecution intends to rely on at the trial. In **Simon Githaka Malombe v R [2015] eKLR** the Court of Appeal held that the prosecution had a duty to supply an accused person with witness statements, and the failure to do so in that case reduced the trial to a farcical sham.

13. While it has been held that an accused person has a duty to bring to the attention of the Court that he has not been supplied with witness statements -see **Francis Muniu v Republic [2017] eKLR-** in my view, the appellant in this case discharged this duty, several times. Orders were made for him to be supplied with the statements again several times, but they were not.

14. The prosecution has a duty to furnish an accused person with statements and all other documents that it intends to rely on at the trial. In this case, despite the accused person making requests several times before different magistrates to be supplied with the statements, he was not, and eventually, he appears to have proceeded with the trial without having had the opportunity to see the witness statements and prepare before hand for his trial. This, I believe is a violation of the right to a fair trial guaranteed under Article 50(2) (c) and (j) of the Constitution. I will consider later in this judgment what the outcome of this finding should be.

15. First, however, I turn to consider the second technical issue raised by the appellant. This relates to compliance (or non-compliance) with section 200(3) of the Criminal Procedure Code. The appellant's trial commenced before Hon. D.A. Orimba (Ag SPM) on 9th January 2013. It was completed before Hon. A. M Maina (SPM) on 27th September 2017 and judgment rendered on 12th October 2017. Two witnesses testified before Hon. Orimba. On 20th May 2014, directions were taken before Hon. E.W. Mburu (RM) under section 200(3) that the matter starts afresh. The matter did not however proceed for a variety of reasons but predominantly because the prosecution did not produce witnesses on the dates scheduled for hearing of the matter.

16. On 20th May 2015 it was noted that Hon. Mburu had been transferred and directions under section 200(3) were again taken, with the accused asking for the matter to proceed from where 'court 7 had left it'. On 4th June 2015, directions under section 200(3) were again taken and the appellant stated *"I pray that the matter proceeds from where it had reached."* An order was then made for the proceedings to be typed and for the matter to proceed from where it had reached by Hon. C. Muchoki (RM). The investigating officer (PW3) testified before Hon. Muchoki on 30th November 2015 and the matter was adjourned to 28th March 2016 and summons issued for the doctor.

17. The matter then came up before A.M. Maina on 13th February 2017 when directions were taken under section 200(3). The appellant stated that he had elected that the case starts afresh, while the prosecutor indicated he needed time to peruse the file and confirm the availability of witnesses. The matter was then adjourned to 20th February 2017 when the prosecutor indicated his objection to the matter starting afresh, noting that the matter was a 2012 matter and only the investigating officer and the doctor remained. He prayed that the matter proceeds with the evidence on record. The appellant agreed, stating: *"We can proceed with the evidence on record. I will not recall any of the witnesses who have already testified*." Accordingly, the court directed that the matter proceeds from where it had reached and that the proceedings be typed.

18. I have noted the appellant's submissions with respect to non-compliance with section 200(3) of the Criminal Procedure Code. However, having examined the record as set out above, I am not satisfied that his allegations are borne out by the facts. He had requested at some point that the matter starts afresh but as is evident from his statement before Hon Maina on 20th February 2017, he abandoned this demand and elected to proceed with the matter from where it had reached without recalling any witnesses.

19. Grounds 3 and 4 relate to the evidence adduced before the trial court. Ground 3 is to the effect that the medical evidence was inconsistent with respect to penetration. As the first appellate court, I am under a duty to re-evaluate the evidence presented before the trial court and reach my own conclusion. In doing so, I must be alive to the fact that I have neither seen nor heard the witnesses, which the trial court has

had the advantage of doing-see **Okeno v R [1972] EA 32** and **Kariuki Karanja v R [1986] KLR**.

20. I have read and considered the medical evidence adduced by Dr Ngetich from Thika level 5 hospital. He produced the medical evidence on behalf of Dr Kiiri who had examined the complainant and produced the P3 form completed by Dr. Kiiri as well as the child's initial treatment notes. The medical evidence was that the hymen of the child, who was aged 11 and had been seen by the doctor 10 days after the incident, was perforated. It was Dr. Ngetich's evidence, on the basis of the medical examination by Dr. Kiiri, that the child had been defiled.

21. The evidence of the complainant, CMK, a child aged 11 who gave unsworn evidence after a *voire dire*, was that she was at home with her siblings at around 7.00 p.m. on 24th October 2012. The appellant, who was her uncle as he is married to her aunt, came to her home and called her. He held her hand and requested her to accompany him. She resisted but he pulled her, gagged her and took her to the bushes. He removed her inner wear and his trousers and inserted his penis into her vagina, and she felt pain. He had threatened her with death if she told anyone what had happened, so she went home and did not tell her mother for fear for her life.

22. On 26th October 2012, the appellant again went to the complainant's home, found her with other children, and took her to the bushes. Before he could do anything however, one Mwangi came and the appellant ran away. The complainant had told the said Mwangi what the appellant had done and she also told her mother. They reported the matter to the police and she was taken to hospital and treated.

23. The complainant's mother (PW2) stated that she had returned home from the market on 28th October 2013(sic) at about 8.00 p.m. to find the complainant looking fearful. (The reference to 2013 was clearly in error as she testified before the trial court on 9th January 2013.) She demanded to know what was wrong and the complainant told her that the appellant had defiled her and had attempted to defile her again, but that the second attempt did not succeed as they were found by another person. PW3 decided to report the matter to police. According to PW2, her child, the complainant, was born on 5th September 2001.

24. In my view, the evidence placed before the trial court by the complainant and the doctor was consistent and established the fact of defilement. The complainant was clear in her evidence about the manner and circumstances in which the appellant, a man she knew and referred to as uncle, took her from home and defiled her in the bush. She further testified about how he even attempted to do it again but was prevented by the presence of one Mwangi. However, even without the medical evidence which showed that the hymen of the complainant was perforated, the trial court was entitled to convict on the evidence of the complainant in accordance with the proviso to section 124 of the Evidence Act which states that:

> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth.***

25. In her judgment, the trial magistrate observed with respect to the evidence of the complainant that it was consistent and she had found no basis for supposing that she would falsify such a matter against the appellant.

26. The appellant complains that he was sentenced to an illegal sentence. The basis of this complaint is that since the child was born on 5 th September 2001, she was more than 11 years old when the offence occurred on 24th October 2012. According to the appellant, she was 11 years 1 month and 19 days old.

27. However, having considered the law on this point, in particular the decision of the Court of Appeal in **Hadson Ali Mwachongo v Republic [2016] eKLR**, I find no merit in this ground. In that case, the Court stated as follows with respect to the calculation of the age of a child:

> ***"Section 2 of the Interpretation and General Provisions Act defines "year" to mean a year reckoned according to the British Calendar. Under the British Calendar Act, 1751, a year means a period of 365 or 366 days. Thus a person who is, for example, 10 years and 6 months is deemed to be10 years old and not 11 years old. That approach entails not taking into account the period above the prescribed age so long as it does not amount to a year. Back to the Sexual Offences Act, a victim who is days or months above 11 years will be treated as 11 years old so long as he or she has not attained 12 years of age."[Emphasis added]***

28. Thus, even though the child was 11 years and a month and a few days old, she fell within the age bracket prescribed under section 8(1) and (2) of the Sexual Offences Act, and the sentence prescribed for defilement of a child within that age bracket is life imprisonment. The trial court therefore properly sentenced the appellant in accordance with section 8(1) as read with section 8(2) of the Sexual Offences Act.

29. The appellant complains that there was a crucial witness who did not testify. He refers to the person referred to as "Mwangi', whom the complainant testified came along just as the appellant had taken her to the bush and was about to defile her for the second time. The appellant relied on the decision in **Juma Ngodia vs Republic (1982-1988) KLR 454** to submit that had the said Mwangi been called as a witness, he may well have given evidence which was adverse to the prosecution case.

30. The law is that a court is entitled to draw an adverse inference against the prosecution if it fails to call a crucial witness-see **Bukenya & Others vs Uganda [1972] E.A 349**. However, such an inference will only be drawn where, as was observed in **Daniel Muhia Gicheru vs R Cr. App. No. 90 of 2007 (UR)**, ***"…the evidence tendered by the prosecution is "barely adequate".*** In this case, the evidence adduced before the trial court was, in my view, sufficient to found a conviction of the appellant. I accordingly find no merit in this ground of appeal.

31. The appellant has contended, finally, that there were contradictions in the prosecution evidence that rendered his conviction unsafe. These contradictions related to the date on which the offence occurred. It is indeed correct that the witnesses referred to different dates. The complainant spoke of 24th October 2012; PW2 mentioned 28th October 2013 while the investigating officer mentioned 21st October 2012. The trial court also noted this disparity in the dates, but found that it did not occasion any prejudice to the appellant. I agree with this

conclusion. I note that the appellant, in his defence, gave an unsworn statement in which he spoke about the date of his arrest, 2nd November 2012. He did not make any reference to the dates of the offence of defilement and the attempted defilement. I therefore find that this ground of appeal also lacks merit.

32. This brings me back to a consideration of what is the best course of action to take in a matter such as this, where I find that the constitutional rights of the appellant were violated by the failure to furnish him with witness statements.

33. The appellant was charged with commission of a heinous offence-the defilement of a child of 11 years, his niece by marriage. The evidence against him, as the analysis above illustrates, was strong, and but for the failure to supply him with witness statements, there would have been no basis to fault the decision of the lower court. I take the view therefore that the best option in circumstances such as are before me is to order a re-trial.

34. In reaching this decision, I have taken into account the principles that the court should consider in determining whether or not to order a re-trial. I am guided in this regard by the decision of the Court of Appeal in **Samuel Wahini Ngugi v. R (2012) eKLR** in which it stated as follows:

> ***"The law as regards what the Court should consider on whether to or not to order retrial is now well settled. In the case of Ahmed Sumar vs. Republic [1964] EA 481, at page 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."***
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> ***The Court continued in the same page at paragraph…….(sic) and stated further:-***
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> > ***"We are also referred to the judgment in PASCAL CREMENT BRAGANZA VS. R [1951] EA 152. 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."***
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> ***That decision was echoed in the case of Lolimo Ekimat v. R, Criminal Appeal No. 151 of 2004 (unreported) when this Court stated as follows:***
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> > ***"There are many decisions on the question of which appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where interests of justice require it."***

35. The appellant in this case was charged with the offence of defilement of his niece through marriage- the daughter of his wife's sister. All the witnesses were from the same locality, and there was no indication that it would be difficult for them to be traced for purposes of a retrial. Further, the offence with which the appellant was charged is a heinous offence that is likely to have a long term psychological impact on the victim. I find that the interests of justice demand that the matter is sent back for retrial.

36. Accordingly, the conviction and sentence are hereby set aside. The appellant shall be released to police custody and be charged before any court competent to try him.

Dated and Signed this 7th day of March 2019.

MUMBI NGUGI

JUDGE

Dated Delivered and Signed at Kiambu this 10th day of April 2019

C. MEOLI

JUDGE