REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 163 OF 2017

JOSEPH MULYUNGI MUNYITHYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction of sentence by Hon. V.J. Yator

delivered on 2nd October, 2014 in Mombasa Chief Magistrate's Court

Criminal Case No. 3571 of 2012).

JUDGMENT

1. The appellant was convicted for the charge of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 20th day of December, 2012 in Kisauni District within Coast Province intentionally caused his penis to penetrate the vagina of RM [name withheld] a child aged 6 years.

2. The Hon. Trial Magistrate after hearing prosecution witnesses and the defence case found the appellant guilty of the main charge. He was sentenced to life imprisonment. On 20th September, 2017, the appellant filed a petition and grounds of appeal. On 5th December, 2018, the appellant filed amended grounds of appeal, with leave of the court. He raised the following grounds of appeal:-

> (i) That the Hon. Learned Trial Magistrate erred in law and fact in convicting and sentencing him to life imprisonment without noting that Section 150 of the Criminal Procedure Code was not adhered to;
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> (ii) That the Hon. Learned Trial Magistrate erred by convicting and sentencing him to life imprisonment without noting that the findings of the Doctor as per the P3 form never indicated the specific date when the complainant was examined at Coast General Hospital and at Kongowea dispensary;
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> (iii) That the Hon. Learned Trial Magistrate erred by failing to find that the OB number on the charge sheet and the OB number given on the P3 form did not corroborate and support each other as a matter of fact.
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> (iv) That the Learned Trial Magistrate reached a wrong decision of convicting the appellant to serve life sentence without clear identification of the scene of crime;
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> (v) That the Learned Trial Magistrate erred in her findings by failing to examine the charges as required by the law and therefore failed to determine if the act of *rape* took place contrary to section 8(1) as read with 8(2) of Sexual Offences Act No. 3 of 2006;
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> (vi) That the Hon. Learned Trial Magistrate erred in fact and law by not considering contradictions in the case; and
>
> (vii) That the Hon. Learned Trial Magistrate erred in fact and law by convicting and sentencing the appellant to life imprisonment without corroboration of the prosecution evidence.

3. The appellant filed his written submissions on 5th December, 2018. He submitted that voir dire examination was not properly conducted on PW1 in accordance with the provisions of Section 19(1) of the Oaths and Statutory Declarations Act. He further submitted that the court found that PW1 was intelligent and understood the importance of telling the truth but did not understand the nature of an oath. He therefore submitted that failure to follow the right procedure in conducting voir dire examination rendered his trial in the court below a nullity.

4. He further stated that the foregoing notwithstanding, PW1 contradicted herself in court when she said she was playing with her friend Terry and in the same breath said that she was playing alone.

5. The appellant argued that the use of the word "rape" instead of defilement by PW2 when she stated that her daughter, PW1, was raped was indicative of the case against him having been fabricated.

6. The appellant submitted that a child by the name Terry who was said to have been playing with PW1 before she was defiled was not called as a witness. The appellant also stated that one Mama Muli in whose custody PW1 had been left when the incident happened, was also not called as a witness.

7. The appellant indicated that the P3 form did not specify the date when PW1 was examined at Coast Province General Hospital (CPGH) or at Kongowea dispensary.

8. The appellant contended that it was not possible for a 6 year old child to sustain the nature of injuries PW1 did and sit as she did on the day of the alleged offence. He also wondered why PW1's mother did not take the soiled pant to the Police.

9. The appellant stated that the OB No. on the P3 form differed from the OB No. on the charge sheet.

10. He also raised the issue of identification and stated that PW1 did not know him as he used to leave his house in the morning and return in the evening and it was therefore unlikely that PW1 who was a child, knew him. The appellant also stated that his defence was not considered. He prayed for his appeal to be allowed.

11. Ms Ogweno, Principal Prosecution Counsel, on 21st January, 2018 filed written submissions on behalf of the respondent. She stated that the charge sheet was drafted in accordance with Section 134 of the Criminal Procedure Code and even if there was a variance between the OB Number given on the charge sheet and the one on the P3 form, it did not occasion a miscarriage of justice against the appellant.

12. Ms Ogweno submitted that PW1 was taken to Hospital on 21st December, 2012 where she was examined by Dr. Abdile. She further stated that PW1's P3 form was filled on 4th January, 2013 by Dr. Wahome, whose findings were that PW1's hymen was broken and there was a foul smelling discharge from her vagina.

13. The Prosecution Counsel also submitted that PW1 led the Investigating Officer, PW4 and her mother (PW2) to the appellant's house. She further stated that there were no contradictions and that failure to call additional witnesses was not fatal to the prosecution's case.

14. It was submitted that the evidence of a child in a defilement case did not need corroboration and that the Trial Court found PW1 to be a truthful witness. With regard to the appellant's defence, Ms Ogweno stated that it was considered but Trial Court found it lacking in merit.

15. In his response to the respondent's submission, the appellant filed supplementary submissions on 4th February, 2019, which are almost similar to the submissions he filed on 29th November, 2018.

ANALYSIS AND DETERMINATION

16. The duty of the first appellate court is to analyze and re-evaluate the evidence adduced in the lower court bearing in mind that it has neither seen nor heard witnesses testify. In **Kiilu and Another vs Republic** [2005] 1 KLR 174, the Court of Appeal held as follows:-

> ***"1. An appellant on 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.***
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> ***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; 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."***

17. PW1, RM [name withheld] who was a minor was taken through voir dire examination. The Magistrate was of the view that she was intelligent and understood the importance of speaking the truth, but did not understand the nature of an oath. She gave evidence that there was a day she was playing *"Amidoli"* when the appellant asked her to go to the shop to buy a cigarette for him. She stated that he grabbed her and took her to his house where he removed *his thing* and put some saliva and *did bad things* to her. Her mother later took her to Hospital.

18. PW2 was GKW [name withheld], the mother to PW1. She recounted that on 20th December, 2012 she left for a clinic in Kongowea at around 11:00 a.m. She returned at 1:00p.m., and found PW1 at home sitting. She however looked unhappy. The following day PW2 noticed that PW1 was not walking properly and when she asked her about it, she said the appellant *raped* her. She took PW2 to a plot where the appellant used to live and showed her his house. On checking PW1's pant, she noticed it had some dirt.

19. PW2 took PW1 to a Clinic in Kongowea but they were referred to CPGH and then to the Police Station. PW2 identified PW1's P3 form and a copy of her birth certificate in court.

20. PW2 further testified that the appellant disappeared but was arrested after a week. She stated that she had known him for many years and they had no differences.

21. Dr. Ngone testified as PW3. He produced a P3 form which was filled by Dr. Wahome, whose signature he knew. He stated that the said Doctor examined PW1 who was 6 years old, following allegations of defilement on 20th December, 2012. PW3 testified that PW1 had been examined and the PRC form showed her hymen was broken, she had a foul smelling discharge from her vagina. Her P3 form was filled on 14th January, 2013 which was 15 days after the incident. The degree of injury was assessed as maim. PW3 produced the P3 and the PRC forms for PW1.

22. No. 91654 PC Margaret Nyawira of Nyali Police Station testified as PW4. She stated that on 22nd December, 2012 she reported to work at 8:00 a.m., and after perusing the OB she noted that she had been allocated this case to investigate. She indicated that soon thereafter, PW1 was taken to the Police Station by her mother. PW1 reported that she had been defiled by the appellant on 20th December, 2012. PW4 went with PW1 and PW2 to CPGH where she was given the PRC form and laboratory results. The P3 form was also filled.

23. It was PW4's evidence that accompanied by 2 other Police Officers, PW1 showed them the scene where the offence occurred. She further stated that the appellant was arrested on 28th December, 2012. She produced PW1's birth certificate showing that she was 6 years old, having been born on 30th September, 2006.

24. In his defence, the appellant denied having committed the offence and explained the circumstances leading to his arrest. His defence was to the effect that the case was fabricated against him by PW1's father, whom he had differences with after he threatened him and told him that he would make him suffer. He further stated that PW1's father had asked him for space to do business in but the appellant had denied him space as it would have led to removal of someone who was already carrying on business in that space.

25. The appellant also stated that the appellant's father had told him that if he met Dr. Ngone, it would be the end of his life. The appellant also claimed that PW1's father had threatened to have him charged with robbery with violence and that was the reason why the person who had been left with PW1 was not brought court. Likewise, the Doctor who examined PW1 was not brought to court.

26. The issue for determination are:-

(i) If voir dire examination was properly carried out;

(ii) If PW1 was defiled by the appellant;

(iii) If there were contradictions in the evidence of prosecution witnesses;

(iv) If failure to call some witness was fatal to the prosecution's case; and

(v) If the appellant's defence was considered.

If voir dire examination was properly carried out

27. In this court's considered view of the proceedings captured by the Trial Court, voir dire was conducted properly. The Hon. Magistrate put some questions to PW1 with the aim of ascertaining if she was intelligent enough, understood the importance of telling the truth and the meaning of an oath. In the Hon. Magistrate's assessment of the questions she put to PW1 and the answers she gave, she established that PW1 was intelligent enough and understood the importance of telling the truth. The only shortcoming was that the Hon. Magistrate did not indicate if PW1 gave sworn or unsworn evidence.

28. The said anomaly is curable under the provisions of Section 382 of the Criminal Procedure Code (CPC). The said provisions state as follows:-

> ***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."*** *(emphasis added).*

29. It is my finding that failure by the Trial Court to indicate if PW1 gave sworn or unsworn evidence did not prejudice the appellant as he was given an opportunity to cross-examine PW1. I can therefore not hold that the lower court proceedings were a nullity. That ground of appeal is therefore without basis and fails.

If PW1 was defiled by the appellant

30. The Hon. Magistrate relied on the evidence of PW1 to base her conviction. She found her to be a truthful witness. The provisions of Section 124 of the Evidence Act provide that in a Sexual Offence, the court can rely on the evidence of a minor, if it is satisfied that she/he is a truthful witness. The Hon. Magistrate had the advantage of to see PW1 testify and believed that PW1 was asked by the appellant to go to a shop to buy him a cigarette and he grabbed her and took her to his house where he defiled her. On the said date which was 20th December, 2012, PW2 noticed that her daughter (PW1) was looking unhappy. The following day, she saw that PW1 was not walking properly.

31. On taking her to CPGH it was confirmed that she had been defiled. PW1 was examined on 21st December, 2012 and a PRC form was filled. It shows that her hymen was broken, she had a foul smelling discharge from her vagina and she had a small vaginal laceration. A P3

form was produced alongside the PRC form. The appellant submitted that the date when PW1 was taken to hospital was not given on the P3 form. It is apparent that the P3 form is silent on the date that PW1 was sent to the Hospital by the Police. It is however evident that at the time when she was examined by Dr. Wahome, the approximate age of injuries was fifteen days. Regardless of the failure to indicate the date when PW1 was sent to Hospital, the date of filling the P3 form was 4th January, 2013 and working backwards, that adds up to 15 days since the commission of the offence. The date that PW1 was sent to Hospital can therefore be ascertained from the date on the stamp impression of CPGH on Section "B" of the P3 form. It was PW2's evidence that on 20th December, 2012, she noticed that her daughter's pant was soiled, which bears credence to the date the offence was committed.

32. As to the identity of the person who committed the offence, the evidence reveals that the appellant was known to PW1 whom he sent to buy for him a cigarette from the shop. He then grabbed her and took her to his house where he defiled her. PW1 took her mother to the said house and at a later date, she took PW4, PW1 and 2 other Police Officers to the appellant's house. The appellant in his defence stated that he had been neighbours with PW2 since the year 1976 to the time he was testifying in court. In her evidence, PW1 said that she knew the appellant whom she referred to by name as "Mulyuki". The offence also happened at daytime and therefore the issue of mistaken identity does not arise.

If failure to call some people to court as witnesses was fatal to the prosecution's case

33. The appellant raised the issue of the failure by the prosecution to call Mama Muli also known as Janet, under whose care she had left PW1, as a witness. He also challenged the fact that another child by the name Terry was not called a witness. In **Keter vs Republic** [2007] eKLR, the court held as follows with regard to failure by the prosecution to call some witnesses:-

> ***"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."***

34. The two persons mentioned by the appellant were not said to have been present at the appellant's house when he defiled PW1. Therefore failure to call them did not occasion a miscarriage of justice. The two did not play any pivotal role in this case.

If there were contradictions in the prosecution's case.

35. The appellant referred to the fact that PW2 referred to the defilement of PW1 by the use of the word "rape". In his view, it was contradictory for PW2 to refer to the incident as rape whereas the offence he had been charged with was one of defilement. This court notes that PW2 was not a legal expert with the knowhow of distinguishing the terminology to use when referring to the act perpetrated against her daughter. Secondly, the words that were said by PW2 were reduced into writing by the Hon. Magistrate. The so called contradiction is non-existent as legally, a child has no capacity to give sexual consent and the appellant was charged with the offence of defilement and not rape. The said submission, is therefore lacking in merit.

36. On the issue of the different OB numbers given on the charge sheet and the P3 form, the appellant failed to show the prejudice that was occasioned to him by the said fact. In any event, the 2 OB Numbers could relate to this case but would bear different numbers if reports were made on certain aspects of the case on different dates. The so called contradiction is a non-issue.

If the appellant's defence was considered.

37. The Hon. Magistrate did consider the appellant's defence but found that there was no sufficient evidence of malice or grudge between him and the family of PW1. The Hon. Magistrate further considered that even if there was an incident with one Corporal John Musyoka whom the appellant mentioned, he was totally unrelated to PW1's family to warrant him to frame the appellant for such a serious offence. The Hon. Magistrate found the appellant's defence unbelievable.

38. I have considered the said defence which in my view is farfetched and untruthful. The appellant stated that PW1's father had threatened that when the appellant would meet Dr. Ngone it would be the end of his life. In his submissions, the appellant dragged in irrelevant allegations against Dr. Ngone. This court notes that PW1 was examined by Dr. Wahome who filled the P3 form for PW1.

39. Dr. Ngone's main purpose in attending court was to produce the P3 and the PRC forms. He explained that Dr. Wahome had resigned from CPGH. Dr. Ngone did not examine PW1 and therefore he could not have made false findings on a P3 form to fix the appellant.

40. It is my finding that the prosecution proved its case beyond reasonable doubt. I therefore uphold the conviction against the appellant for the offence of defilement contrary to Section (8)(1) as read with Section 8(2) of the Sexual Offences Act.

41. The P3 form produced by PW4 indicated that PW1 was 6 years old as at the time she was defiled on 20th December, 2012. The age of PW1 as at the time when the offence was committed dictates that I should not interfere with the sentence imposed on the appellant. I therefore uphold the sentence of life imprisonment against the appellant.

42. The appeal against conviction and sentence is dismissed. The appellant has 14 days right of appeal.

DELIVERED, DATED and SIGNED at MOMBASA on this 14th day of June, 2019.

NJOKI MWANGI

JUDGE

In the presence of

Appellant present in person

Ms Ogweno, Principal Prosecution Counsel for the DPP

Mr. Oliver Musundi – Court Assistant