REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 135 OF 2018

DAVID WAWERU GITHII.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Being Appeal arising from the judgement and sentence by Hon. L. Kassan, (SPM) in ***Mavoko Senior Principal Magistrate's Court in Criminal Case SOA No. 31 of 2014*** *delivered on 25.9.2017)*

JUDGEMENT

1. This is an appeal from the judgment and sentence of Hon. L. Kassan SPM, in **Criminal Case S.O.A No. 31 of 2014** delivered on 25.9.2017. The Appellant was charged with the offence of defilement contrary to Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.

2. The appellant's case is seven-fold. Firstly that the court erred in its conviction on the basis of a case not proved beyond reasonable doubt; Secondly that the learned trial magistrate erred in law and fact in failing to afford the appellant an opportunity to cross-examine the victim M M and Mr. Stephen Njihia as well as the clinical officer who in their evidence appeared to have been laying blame upon the Appellant; Thirdly the learned trial magistrate erred in law and facts in sentencing the appellant herein despite overwhelming evidence against the occurrence of the alleged incident; Fourthly the trial magistrate erred in law in failing to follow the laid down procedure in writing and pronouncing the judgment and Fifthly, the learned trial magistrate erred in not notifying the appellant of his inherent right to representation by an advocate of his choice and Sixthly that the trial court erred in law and fact in failing to offer the appellant an opportunity to mitigate during sentencing and Finally that the trial court erred in failing to consider the victim's unsworn evidence in chief on 2nd July, 2015 at page 52 and 53 on the record of appeal before she was recalled. On the first ground of appeal, counsel submitted that there were inconsistencies on the date of commission of the offence because Pw2 testified that it was committed on 30.10.2014 while Pw4 testified that it was committed on 30.11.2014 and further that the charge sheet states that it was committed between 10.10.2014 and 30.11.2014. Learned counsel cited the case of **Peter Kinyua Mwai v R (2016) eKLR** where the court observed that contradictions on the date of offence created doubt on the commission of the offence. Counsel submitted that the treatment notes being alluded to by Pw2 were not produced in court hence Pw2's evidence was unreliable. On the 2nd ground of appeal, counsel submitted that the right to cross-examine a witness is a right of the appellant under Article 50(2) that was breached and hence an injustice to the appellant. He cited the case of **Tedium Roger Leneni Mzungu & Another v R (2017) EKLR**. On the 3rd ground, counsel submitted that the trial court was fixated on the broken hymen and failed to consider other evidence that was not even called by the prosecution for example Mr Njoro and Miss Njeri. They urged the court to draw an adverse inference as per the case of **Bukenya v Uganda (1972) EA 549.** On the 4th ground, learned counsel faulted the court for failing to make a finding on the alternative count and submitted that this was a breach of Section 169 of the Criminal Procedure Code. On the 5th ground, counsel submitted that there was breach of Article 50(2) (h) of the Constitution because the appellant was not afforded legal representation. On the 6th ground, counsel submitted that the appellant was not offered an opportunity to mitigate during sentencing and cited the case of **Joseph Kaberia Kahinga & 11 Others v A.G (2016) eKLR** as well as the provisions of Section 329 of the Criminal Procedure Code and hence the court should find the sentence ineffective. On the 7th ground, counsel submitted that the trial court failed to consider the victim's earlier evidence so as to come up with a conclusive reasoning of the occurrence and breached Section 34(1)(b) and (c) of the Evidence Act that provided for their admissibility.

3. The state conceded to the appeal and submitted that the court erred in denying the appellant a right to cross-examine the witness who gave unsworn statement and therefore this was in breach of his constitutional right to a fair trial as encapsulated in Article 25 of the constitution and therefore there was no sufficient evidence of defilement hence the conviction was unsafe. Counsel cited the case of **Sula v Uganda (2001) 2 EA**. Counsel submitted that the failure to give the appellant a chance to mitigate was a breach of the element of a fair trial and relied on the case of **Sango Mohammed Sango & Another v R (2016) eKLR.** He urged the court to quash the conviction and set aside the sentence.

4. This is the first appeal and this court has to evaluate the evidence afresh and make its own conclusion. PW1 initially was the victim who

testified that she did not know the appellant and that she had never gone to his house. However one Njoro called her to the house of the teacher who defiled her and that she was wearing a trouser at the time and that she removed her trousers and that the appellant used his clothes to urinate on her. She testified that her mother promised to buy her a bicycle and that she was taken to hospital but did not tell the police about what happened.

5. The matter started de novo and Pw1 was M M, a clinical officer based at Athi River Health Centre and who testified that she was at the Hospital on 1/12/14 when MM was brought and she examined her and observed that her vagina was broken and her hymen broken though it was not fresh, the labia was red and there were bruises. She testified that the child was aged three years old and that she could not give her drugs but it was clear that the child had been defiled. She testified that a penis was probably used and the child did not know what had been done to her; she produced the P3 form and testified that it was possible for an HIV positive person not to infect a person that is HIV negative. There was no cross-examination.

6. PW2 was DK who testified that on 30/10/2014 her child called M got rashes on her private parts and she took her to Maria Goretti where she was given drugs but there was no relief. She testified that on the same day she was with her husband and her child in the bedroom when the said child started holding her father on the groin region and told them that her teacher used to make her lie on the chair and pee on her. It was then that she reported the issue and it could not be established how long the defilement continued. She produced a copy of the birth certificate of the child indicating that she was born in 2011 and testified that the child was given drugs to swallow plus an ointment. She testified that the appellant used to live upstairs and had a child who was a teacher. She testified that she and her family used to stay downstairs and that the appellant had taken the victim to hospital on 30.11.14 and that the appellant went to the police on 31.10.14. On cross-examination, she testified that the victim told her that the appellant fingered her vagina and ejaculated on her private parts. She testified that her husband used to be a taxi man and that the appellant was vying for MCA in Makuyu. However she denied knowledge that the appellant and her husband differed over dollar exchange and further that on 1/12/15 she met the appellant at the police station. She testified that she used to bathe the victim and she used to cry whenever she was being bathed and that the appellant used to buy sweets for the children but denied that she promised the child sweets if she testified. On cross-examination, she testified further that she had a clinic card but she did not testify to its contents.

7. PW3 was the victim and a voire dire examination revealed that she was in class one. However the court was of the view that she was scared and did not know her age or the name of her church and was thus not capable of taking oath. She gave an unsworn statement that she knew the appellant who on an unknown date told her to lie on a chair in his house in the presence of Njeri and then removed her skirt and removed his trouser and placed it in her groin region. She testified that she felt pain and she cried and started bleeding and later told her father after which she was taken to the hospital. There was no cross-examination.

8. PW4 DN testified that the victim is his daughter and that on 30.11.2015, a Sunday he was in his bedroom when the victim came and lied on his chest and held his private parts and did an act of sexual intercourse and told him that teacher did it to her She testified that the child had pimples in her vagina when she was taken to hospital and that he reported to Mlolongo Police station on an unknown day and confronted the appellant the same day but however the appellant denied the allegations. He testified that the child was taken to Nairobi Women's Hospital on an unknown day and examined and defilement was confirmed and the victim was given ARV's and a form was filled. He testified that the appellant went to the police station from where he was arrested. On cross-examination, he testified that he had South Korea Currency that he wanted the appellant to change but the same was not done. He testified that he differed with the appellant but he denied telling him that he would die of AIDS. He testified that the PRC form was not stamped and the date of birth is indicated as 19.1.2011 whereas the birth certificate indicates 14.1.2011 because he did not take the birth certificate to Nairobi Women's Hospital. He admitted having worked for Jimcab for six months. On re-examination, he testified that he never sat down with the appellant to settle the matter.

9. PW5 Griffin Wagura working with Kajiado Referral hospital testified that he had a PRC form that was filled in by Dr. Kinyanjui on 30.11.2014 and he sought to produce the same. He testified that the findings were a torn hymen but not fresh and that the child told him that a neighbor had inserted his finger inside her vagina. On cross-examination, he testified that the PRC form was not stamped and it had no security mark but however maintained that it came from his clinic because it had a reference number that could be traced to the hospital. He testified that the hymen could be broken by many things/objects and that he last saw the child in 2015. On re-examination, he testified that the PRC form says that a finger broke the vagina but admitted that the PRC form was not stamped.

10. PW6 No xxxxx PC Veronica Nthambo who testified that the case was reported to the police on 30.11.2015 and she started investigations on 1.12.14. She testified that the victim came to the office with her mother and that the child was treated at Nairobi Women's Hospital Kitengela and as per the documents she was defiled. She testified that she saw the PRC and P3 form and that the child told her that the appellant defiled her. She testified that the appellant came to the police station after the child had been taken to hospital and the matter reported. On cross-examination, she testified that the exact day of defilement was not known and that the child was used to the defilement and that the child could not explain herself well at the police station however her mother saw her caressing her father and suspected something. She testified that it was a mistake that the PRC form was not filled, and that the doctor who testified worked at Nairobi Women's Hospital that is under Kajiado. On re-examination, she testified that she relied on the PRC form and evidence to charge the appellant and that she knew the doctor who testified as working at Nairobi Women's Hospital. The court found that the appellant had a case to answer and put him on his defence.

11. The appellant gave an unsworn defence. He testified that on 31.11.2013, DN came to his place and told him that it was payback time. He testified that they had differed and recalled that in August, 2013 the said D had stolen a bag from a Korean Customer having been employed with Jimcab at the Airport. He testified that he reported the matter to the airport but however he had taken some money from the bag and shared it out with some people but had not informed D the exact amount and this was why they differed. He testified that he was sacked because of the stolen bag and that the said D made insinuations of defilement of his daughter and on 1.12.2013 he went to the police station and a policeman told him that he was used to eating alone then as he waited for the OCS the complainant came with her mother. It was his testimony that the OCS told him that he had David's 100,000/- to which he admitted and told the OCS that he shared out the same when the OCS slapped him and demanded for money which the appellant refused and he was detained but later released on bond. He came to find out that he was facing defilement charges and that the PRC form he saw was different from the one that he was later given. He testified that the child was coached because the matter kept on being adjourned and the child initially testified that she did not know the appellant however in the adjournment period, she was taught to mark the face of the appellant. It was his testimony that the child changed her testimony and that the police at Mlolongo differed because the OCS wanted a bribe. He also testified that he used to picket for DN and had plans to stand as

MCA. He testified that he got infected with Aids after he was involved in an accident in 1997 and had a blood transfusion and that he did not defile the victim and has never met her. He testified that the teacher was not him but his daughter.

12. The court vide judgement delivered on 25.9.2019 agreed with the evidence of the prosecution that the victim was defiled and declined to believe that there was a disagreement over money between the appellant and Pw4. He opined that a parent could not conspire to have his 3½ year old daughter's vagina to be penetrated so as to fix an adversary. He observed that the appellant did not call his wife, son or daughter to corroborate his evidence and he declined to read the victims earlier testimony and found that the appellant committed the offence and proceeded to convict him on the main count and sentenced him to life imprisonment.

13. In as much as the prosecution has conceded to the appeal, the substantial issues to be addressed are: whether the prosecution proved its case against the appellant beyond the reasonable doubt in respect of all the counts, whether there was breach of the constitutional rights of the appellant to amount to a mistrial and what orders the court may grant.

14. The appellant's counsel submitted that the date of the offence is not clear in the evidence and there are contradictions on the same. This issue was part of the appellant's defence. The appellant stated that he was not allowed to cross examine PW3 and Pw1 and that there was a brawl over a loot from a Korean Customer. There is evidence of penetration as per the evidence of the doctor and the P3 form that was filled on 1st December, 2014 that indicated that the injuries are not fresh. The doctor concluded that the offence was defilement. The age of the victim is not disputed for there is a birth certificate. The prosecution evidence does not come out clearly as to when the offence was committed, for example the victim does not state a date in her testimony, Pw4 did not tell the court when he reported the mater. The appellant appears well known to the victim, however, given the evidence on record, I do find that the evidence is very weak. It is not corroborated because all the witnesses material to the case are members of the same family. The only independent evidence is that of the doctor who proved penetration while the investigating officer relied on the P3 form and a PRC form that is not before the court. I have noted other inconsistencies for instance Pw2 testified that the minor was treated at Maria Goretti and no treatment notes were produced; Pw4 testified that the victim was treated at Nairobi Women's Hospital and no treatment notes were produced thus creating doubt as to whether there was any such incident. No doctor from Nairobi Women's Hospital testified thus creating further doubt that the child visited there. Further, Pw6 the investigating officer testified that Pw5 was from Nairobi Women's Hospital and the said Pw5 testified that he worked at Kajiado referral. The evidence is jumbled, unclear and does not point to the commission of the offence and in this regard, I make a finding that doubt was created in the case of the prosecution and that the prosecution did not establish that the offence was committed.

15. The appellant challenged the fact that his constitutional rights were violated for he was not allowed to cross-examine the complainant. Article 50(K) of the constitution provides for the righty of an accused to adduce and challenge evidence. The Trial Court conducted Voire Dire on PW1 and made the following remarks:-

> ***Court –She shall proceed by unsworn evidence.***

16. Pw1 then testified, but was not cross examined. That was incorrect procedure. Every witness whether minor or adult is supposed to be cross-examined by the accused person. It is a right accorded to the accused and it is upon the accused to decide either to cross-examine or not. There is a difference between an unsworn witness and the unsworn evidence of an accused person.

17. In the case of **Sula V. Uganda (2001) 2: E.A**, the **Supreme Court Of Uganda** held as follows:-

> ***"Although an accused person is not liable to cross-examination if he chooses to give unsworn testimony, the law does not prohibit the cross-examination of a child witness who has not given sworn testimony because she did not understand the nature of oath. A child witness who gives evidence not on oath is liable to cross-examination to test the veracity of his/her evidence.***

18. Similarly, In the case of **Nicholas Mutula Wambua v Republic, Mombasa Criminal Appeal No. 373 of 2006 (C.A)**, It was held:-

> ***"The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross-examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined….. It would appear that misconception arises from a view that because accused persons are not cross-examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is obvious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined."***
>
> ***That thinking is expressed in Section 208 of the CPC which govern hearing of Criminal proceedings in the Magistrate's courts. It provides that during the hearing, the accused persons or his advocate may put questions to each witness produced against him. Accordingly, all prosecution witnesses are liable to be cross-examined in order to test the credibility and the veracity of the witness. The Trial Courts should always observe that requirement of the law in criminal trials to obviate an otherwise stable case from being lost on that omission."***

19. The issues which arises is whether the prosecution case was prejudiced as a result of failure by the trial court to allow a witness who gives unsworn evidence be cross examined. It is true there is violation of the appellant's constitutional right to challenge the evidence of the minor witness and the evidence of Pw1. My view is that the court has to evaluate the other evidence independently without that of the minor and Pw1 who were not cross examined and make its own finding. The issue is whether the court can still convict the appellant without the evidence of the witness who was not cross examined. As observed earlier, the date of commission of the offence is not clear. In as much as the appellant was a neighbour to the victim there was need for more evidence to show that the appellant committed the offence and the only direct evidence is that of the victim who did not give a date in her testimony, did not call another eye witness and in light of the inconsistency in evidence at the initial trial and after the trial began denovo, I am unable to rely on her evidence. I wonder why she would initially testify that she did not know the appellant and later say that she knew him. The evidence that the child went and laid on top of her father to demonstrate a sexual act is not conceivable and the child did not appear to be a person traumatized by the occurrence, neither did her parents

appear traumatized. Therefore I find it is doubtful whether the offence was committed as alleged.

20. In the case of **Joseph Lekulaya Lelantile & another v Republic [2002] eKLR; Criminal Appeal No. 33 of 2000 (Nyeri)**, the court quashed the conviction of the appellant who did not cross examine a witness because the evidence of identification was not sufficient to sustain the conviction and I agree with the finding and find it applicable to the instant case.

21. On the issue of the orders that the court could make, the inclination would be to make an order for retrial. However the test to be met was stated **in the case of Ahmed Ali Dharmsi Sumar vs Republic 1964 E.A 481** and restated in **Fatehali Manji vs The Republic 1966 E.A. 343**:-

> **"In general a re-trial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the Prosecution to fill up gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial Court for which the Prosecution is not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to the accused person."**

22. The Court of Appeal in the case of **Mwangi vs. Republic [1983] KLR 522** held as follows;

> ***"…several factors have therefore to be considered. These include:***
>
> ***1. A retrial will not be ordered if the conviction was set aside because of insufficient evidence.***
>
> ***2. A retrial should not be ordered to enable the prosecution to fill up the gaps in its evidence at the first trial.***
>
> ***3. A retrial should not be ordered where it is likely to cause an injustice to the accused person.***
>
> ***4. A retrial should be ordered where the interest of justice so demand.***

Each case should be decided on its own merits."

23. I am satisfied that the prosecution evidence had not proved the case beyond reasonable doubt, and I will not make an order for retrial. This is not a fit case to order for a retrial as to do so will be giving the prosecution an opportunity to fill up gaps in their case which will unduly prejudice the appellant. Suffice to add that the prosecution had key witnesses but had opted not to call them to testify and that giving them another bite at the cherry will defeat the interest of justice as far as the appellant is concerned.

24. In the result I find the appellant's appeal has merit. The same is allowed. The trial court's conviction is hereby quashed and the sentence is set aside. The appellant is ordered set at liberty unless otherwise lawfully held.

It is so ordered.

Dated and delivered at Machakos this **22nd** day of **July, 2019.**

D.K. KEMEI

JUDGE