REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 183 OF 2014

SIMON MULI MBITHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence by Hon. Odenyo, Senior Principal Magistrate

delivered on 10th December, 2014 in Mombasa Chief Magistrate's Court

Criminal Case No. 1349 of 2012).

JUDGMENT

1. The appellant was convicted for the offence 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 16th and 17th day of April, 2012 at Bombolulu area in Kisauni District within Coast Province, unlawfully and intentionally caused his penis to penetrate the vagina of one MM [name withheld] a girl aged 4 years. The appellant was sentenced to life imprisonment.

2. He was dissatisfied with the said decision and filed a petition and grounds of appeal on 30th December, 2014. On 21st February, 2019 the appellant filed amended grounds of appeal, with leave of the court. He raised the following issues in his amended grounds of appeal:-

(i) That the Learned Trial Court Magistrate erred in law and fact by failing to comply with the ingredients of voire dire examination thereby contravening Section 19(1) of the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya;

(ii) That the Learned Trial Court Magistrate erred in law and fact in convicting and sentencing the appellant to life imprisonment without proper finding that the age of the complainant was not proved;

(iii) That the Trial Court Magistrate erred in law and fact in basing his conviction and sentence in reliance on dock identification evidence tendered in court by the complainant when given other facts that:-

(a) The complainant had seen the appellant after his arrest when she failed to identify him before the parade;

(b) The Police Officer who conducted the alleged identification parade was unreasonably left out of the prosecution's case;

(c) The source of light and duration under observation at the scene was not brought within measurable margin for the court to rely on it safely to sustain a conviction.

(iv) That the Learned Trial Court Magistrate erred in law and fact by failing to find that the charge of defilement was not proved to the required standard of law;

(v) That the Learned Trial Court Magistrate erred in law and fact by failing to consider the discrepancies and the uncorroborated testimonies of the prosecution witnesses; and

(vi) That the Learned Trial Court Magistrate erred in law and fact by merely dismissing his defence as out of hand which amounted to a serious error on the part of the Trial Court.

3. In his submissions filed on 21st February, 2019, the appellant contended that voir dire examination which is a requirement under Section 19 of the Oaths and Statutory Declarations Act, was not carried out on the complainant (PW2). He cited the case of **Johnson Muiruri vs Republic** [1983] KLR 445 on how voir dire examination should be conducted. He stated that failure to comply with the said procedure was fatal to the prosecution's case. He also cited the case of **Albert Oyondi vs Republic,** Mombasa High Court Criminal Appeal No. 404 of 2010, on the same issue.

4. The appellant challenged the prosecution's failure to produce documentary evidence to prove PW2's age. He said that whereas the charge sheet gave PW2's age as 4 years, her mother (PW1) said she was 5 years old. He stated that failure to prove PW2's age would not support a charge of defilement. He relied on the case of **Kaingu Elias Kasomo vs Republic**, Malindi Court of Appeal Criminal Appeal No. 504 of 2010.

5. The appellant also submitted that PW2 could have been mistaken about his identity as the perpetrator of the offence. He claimed that she failed to identify him after he was arrested but later on allegedly identified him at an identification parade. He also submitted that the Police Officer who conducted the identification parade was not called to testify. He cited the decision in **Eliud Kamau Njuguna vs Republic,** Mombasa Court of Appeal Criminal Appeal No 82 of 2010. The appellant also contended that PW2 in her evidence did not say she was defiled but said that the appellant tore her dress. He also argued that the P3 form could not be relied on as it stated that PW2 was defiled and sodomised yet PW2 did not speak of such things having happened to her.

6. The appellant pointed out discrepancies in the charge sheet as to the dates when the offence occurred which was indicated as 16th and 17th April, 2012. He submitted that PW4 talked of the offence having occurred on 11th and 12th April, 2012, yet the P3 form showed that PW2 was taken to Hospital on 2nd April, 2012. He relied on the case of **Kazungu Mramba Mueni vs Republic**, Mombasa High Court Criminal Appeal No. 220 of 2007 to show that the discrepancy he had pointed out should be resolved in his favour. He submitted that the prosecution failed to prove its case beyond reasonable doubt. He prayed for his appeal to be allowed.

7. The Office of Director of Public Prosecutions filed submissions through Ms Ogweno, Principal Prosecution Counsel. She conceded that no voir dire examination was conducted on PW2 but submitted the Trial Magistrate noted that she was of very tender age and allowed her to give unsworn evidence. She relied on the case of **Maripett Loonkrmok vs Republic** [2016] eKLR to emphasize her submission that the court can convict even in a case where voir dire has not been conducted if there is other independent evidence to support the charge.

8. With regard to the age of PW2, Ms Ogweno submitted that the evidence of PW2's mother to the effect that PW2 was 5 years old was supported by the age given in PW2's P3 form. She therefore stated that the said information was sufficient to prove PW2's age. She cited the case of **Francis Omuroni vs Uganda**, Court of Appeal Criminal Appeal No. 2 of 2000 in Uganda. She also cited the case of **Richard Wahome Chege vs Republic**, Criminal Appeal No. 61 of 2014, to support her assertion that the age of PW2 had been proved.

9. The Prosecution Counsel was of the view that the appellant was properly identified by PW2 who could not talk for some days after being defiled. After she regained her voice, she took her mother to the scene of crime where they recovered her torn uniform. She pointed to a man who was passing near a salon as the one who tore her clothes on the day she was defiled. It was submitted for the prosecution that the court can convict on the evidence of a single identifying witness after warning itself of the inherent risk of so doing.

10. With regard to appellant's defence, Ms Ogweno submitted that the appellant failed to give a reasonable account of where he was on 12th April, 2012 at 8:00pm. She said that his defence did not shake the prosecution's case and the same ought to be rejected. She prayed for the conviction and sentence to be upheld.

11. In the Trial Court, the prosecution's case as adduced through PW1, MM [name withheld], was that her child (PW2) was 5 years old as at the time she testified in court on 10th September, 2012. She narrated that on 11th April, 2012 she was at her vegetable kiosk with her daughter [MM], who went to play with other children. At 8:00p.m., she realized that her daughter was missing and became alarmed. She closed her shop and mobilized her neighbours and they started looking for MM but the search yielded nought. She reported about her missing child to Frere Town Police Base.

12. It was PW1's evidence that about 2:00a.m., she heard an announcement through a loudspeaker at a place where there was a funeral, to the effect that the child who had been reported missing had been found. She went to that place and asked the man who made the announcement to take her to the place where the child was. She was taken to the house of a lady who told PW1 that she had washed MM and given her new clothes. She advised PW1 to take MM to Hospital.

13. PW1 further stated that she went back to the Police Post. She checked MM's private parts and found that they were raptured. She was advised to take her to Coast Province General Hospital (CPGH) where she was examined and treated.

14. PW1's evidence was that MM was unable to talk for 3 days. When she managed to speak, she explained to PW1 what had happened. MM took PW1 to the place where she had been defiled. PW1 collected the dress that MM was wearing on the day of the incident. It was a dark blue and white dress which was her uniform. It was marked in Court as MFI - 1.

15. PW1 recounted that a few days later, she took PW2 to have her hair plaited and while at that place, MM pointed to a man who was passing by and said that he was the one who had tore her clothes on the day of the incident. Members of the public arrested the man, who was the appellant. He was handed over to the Police at Frere Town. PW1 indicated that she had seen the appellant about a month earlier, pass by the place where he was arrested. She did not know him before the day of his arrest.

16. PW2, MM [name withheld] was a child of whom the Trial Magistrate referred to as of being of very tender age. The said Magistrate directed her to give unsworn evidence. Her evidence was that she was a pupil in KG 2 at Bombolulu where she stayed with her mother, PW1. PW2 stated that she did not know her age. She indicated that apart from her mother, the only other person in court she had seen before was the appellant. It was her evidence that he was the one who tore her school dress which she identified as MFI -1. PW2 testified that after he

tore her dress, he lay her on the grass and lied to her that he would give her yoghurt, she then slept. She later on felt cold and went to another lady's house who took her home. She stated that her dress remained at the scene.

17. PW3 was Dr. Lawrence Ngone of Coast Province General Hospital. He produced the P3 form for PW2. He said that she was 4 years old in the year 2012. He testified that PW2 was taken to CPGH on 12th April, 2012 for medical examination. He found out that she had a cut wound on her lower lip and her hymen had been perforated. He also found lacerations on PW2's vaginal orifice and her vaginal walls were hypodermis (bloody after trauma). He further stated that her anus had lacerations. He formed the opinion that PW2 was defiled both vaginally and through sodomy. He assessed the degree of injury as maim. P3 further stated that in filling the P3 form, he relied on the Post Rape Care (PRC) form which had been taken to him.

18. PW4 was No. 79032 PC Sugal Omar attached to the CID Mombasa. He stated that he investigated this case while working at Nyali Police Station. His evidence was to the effect that an initial report had been made at Frere Town Police Patrol Base about a missing child. Later on, PW1 reported that her child had been defiled. He stated that on 22nd April, 2012 the appellant was taken to the Police Station.

19. On 24th April, 2012 PW4 escorted PW2 to CPGH, where she was examined and a PRC form filled. It showed that PW2 had been defiled. PW3 further testified that PW2 told him that she was led to a forest and defiled. Later, she identified the appellant. PW3 stated that an identification parade was done on 24th April, 2012.

20. PW4 testified that PW2 led him to the scene of the incident. Her mother took to him PW1's school dress which was said to have been recovered at the scene of crime.

21. In his defence, the appellant denied having committed the offence. He stated that he had earlier on been arrested on similar allegations as in this case but was released without being brought to court. He stated that after about 3 weeks, the same people went and arrested him again saying that he had defiled PW2.

ANALYSIS AND DETERMINATION

22. The duty of the first appellant court is to analyze and re-evaluate the evidence adduced and come to its own independent conclusion. In **Kiilu and Another vs Republic** [2005] 1 KLR 174, the Court of Appeal stated thus:-

> ***"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.***
>
> ***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."***

23. The issues for determination are:-

> **(i) If the appellant was positively identified as the perpetrator of the offence of defilement;**
>
> **(ii) If voir dire examination was conducted;**
>
> **(iii) If there was evidence of penetration; and**
>
> **(iv) If the prosecution proved its case beyond reasonable doubt.**

If the appellant was identified as the perpetrator of the offence of defilement.

24. PW1, on 11th April, 2012, was selling at her vegetable kiosk as her daughter, PW2, was playing with other children. At 8:00pm, she realized that PW2 was missing. She and her neighbours looked for PW2 in vain. She was found at 2:00 a.m. She took her daughter to Frere Town Police Patrol Base where she had earlier in the night made a report that PW2 had gone missing.

25. The evidence of PW2, a child who was 4 years old when the offence occurred, was to the effect that the appellant is the one who tore her dress, lay her on the grass and told her that he would give her yoghurt, which he never did. She stated that she then slept and later on got up when she felt cold.

26. It was her evidence that she did not know the appellant before the day he tore her dress. On being cross-examined by the appellant, PW2 said that she did not know his name. She said the appellant did bad things to her and that he tore her dress. She indicated that the time of the incident was 8:00 pm., and the scene was in a thicket. She further said that she saw him for the first time on the day he tore her dress.

27. The evidence discloses that the offence took place at night when circumstances were difficult for positive identification. This court must therefore be satisfied that the appellant was positively identified before upholding the conviction and sentence imposed against him.

28. In **Cleophas Otieno Wamunga vs Republic,** Court of Appeal Criminal Appeal No. 20 of 1989 at Kisumu, the court stated as follows:-

"We now turn to the more troublesome part of this appeal, namely the appellant's conviction on counts 1 and 2 charging him with the robbery of Indakwa (PW1) and Lilian Adhiambo Wagude (PW3). Both these witnesses testified that they recognized the appellant among the robbers who attacked and robbed them ..... What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about a 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 alleged 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 way to approach the evidence of visual identification was succinctly stated by Lord Widgery, CJ in the well-known case of R vs Turnbull [1976] 3 ALL ER 549 at page 552 where he said:-

> ***"Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone who he know, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

29. In the present case, PW2 did not disclose specific features of the appellant that made her to recollect him as the one who defiled her when she saw him walking close to the place that she and PW1 were in, at Bombolulu. PW2 did not give evidence on the source of light at the scene of crime which enabled her to see the appellant on the night of the incident and thereafter to recall him when she saw him passing close to the place she was in. In the said circumstances, the possibility of mistaken identity cannot be ruled out.

If voir dire examination was conducted.

30. The Hon. Trial Magistrate looked at PW2 and said that she was a child of very tender age and ruled that she should give unsworn evidence. Failure to conduct voir dire examination on a 5 year old child contravened the provisions of Section 19 of the Oaths and Statutory Declarations Act.

31. On the issue of voir dire examination, the Court of Appeal in the case **Maripett Loonkomok vs Republic** [2015] eKLR had the following to say on the origin and importance of voir dire examination:-

"But the origin of the rule on voir dire examination of a child witness as we know it today was first applied in the ancient yet landmark English case of R v Braisier (1779) 1 Leach Vol. 1, case XC VIII, PP 199-200, which incidentally was a case involving sexual assault on a girl under 7 years of age. The twelve Judges in that case stated, in part, that;

> ***" ..an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, <u>on strict examination</u> by the court, to possess a sufficient knowledge of the nature and consequences of an oath ... for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence".*** (emphasis added).

32. In his Judgment, the Trial Magistrate held that PW2 was possessed of enough intelligence to recall the scene of crime. That may well have been the case but it does not sanitize the Hon. Magistrate's failure to conduct a voir dire examination. The said Magistrate was required to conduct voir dire examination to gauge if PW2 was intelligent enough to give evidence, if she understood the importance of telling the truth and to establish if she understood the meaning of an oath. Failure to do so weakened the case against the appellant as the circumstances of this case fall outside the exception where a conviction can hold even in the absence of voir dire examination, as elucidated in the case of **Maripett Loonkomok vs Republic** (supra).

If there was evidence of penetration

33. PW2 in her evidence stated that the appellant tore her dress and laid her down. She then slept. On being cross-examined by the appellant, PW2 said that he did bad things to her. PW3's evidence proved that PW2 had been defiled. He observed lacerations on her vaginal orifice and anus. PW2's hymen was perforated. He classified the injuries as maim. The foregoing shows that PW2 was indeed defiled.

If the prosecution proved its case beyond reasonable doubt.

34. In my considered view, the Prosecutor botched the prosecution's case by failing to lead PW2 in her evidence-in-chief to state the source of light that was at the scene where the offence of defilement took place.

35. The Prosecutor also failed to find out from PW2 in her examination-in-chief if she had explained to the Police of any peculiarity about the appellant's appearance that made her to identify him as the man who defiled her. Although PW4 talked of an identification parade having been done, it was superfluous to hold one as it was PW2 who pointed out the appellant, after which he was arrested by members of the public. I therefore hold that due to the doubtful identification of the appellant, he should have been given the benefit of the doubt by the Trial Court. In light of the foregoing, it is not necessary to consider if the age of PW2 was ascertained or if there were discrepancies in the prosecution's case.

36. It is my finding that the prosecution failed to prove its case beyond reasonable doubt. I have considered if I should order a retrial but in the circumstances of this case, it would only aid the prosecution to fill the gaps in its case.

37. I therefore quash the conviction against the appellant and set aside the sentence of life imprisonment. His appeal is hereby allowed. He shall be set at liberty forthwith unless otherwise lawfully held.

DELIVERED, DATED and SIGNED at MOMBASA on this 16th day of July, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Ms Marindah, Prosecution Counsel

Mr. Oliver Musundi - Court Assistant