REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NUMBER 84 OF 2016

ANTHONY MUTINDA NGANDA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Machakos SO No. 42 of 2015, Hon I. M. Kahuya, SRM on 24th November, 2016)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

ANTHONY MUTINDA NGANDA.....APPELLANT

JUDGEMENT

1. The appellant herein, **Anthony Mutinda Nganda**, was charged in the Machakos Chief Magistrate's Court Criminal (SO) Case No. 42 of 2015 with the offence of Indecent Act with a Child Contrary to Section 11(1) of the ***Sexual Offences Act, No. 3 of 2006***. The particulars were that on diverse dates between 9th and 10th December, 2015 within Machakos County, the appellant intentionally and unlawfully touched the vagina of BNM, a child aged 7 years with his finger.

2. Upon hearing the evidence on record, the Learned Trial Magistrate, found the appellant not guilty of the said offence, convicted him accordingly and sentenced him to 12 years' imprisonment. Being dissatisfied with the conviction and sentence the appellant has lodged the instant appeal based on the following grounds:

> **1) That the learned trial magistrate erred in both law and fact when reaching the decision to convict, while failing to observe that the evidence adduced in support of the charges that were levelled against me were contradictory and inconsistent hence could not sustain a conviction of any kind.**
>
> **2) That the learned magistrate grossly erred in point of law and fact when basing the conviction and failing to note that there was no any medical evidence tendered before the honourable court to ascertain whether the same had really taken place.**
>
> **3) That the learned magistrate grossly erred in law and fact when basing the conviction and failing to note that there was no any medical evidences that was tendered before the honourable court to ascertain whether the same had taken place.**
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> **4) That the trial magistrate gravely erred in points of law and fact when not finding that the prosecution side did not prove their case beyond all shadows of doubts as is required of them by the law before reaching the verdict to convict.**
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> **5) That the learned magistrate further faulted the law and fact when rejecting my defence of alibi without giving any cogent reason for so doing hence breaching the law under Section 169(1) of the CPC.**
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> **6) That since I cannot recall all that had transpired at the trial court, I humbly pray to the honourable court to furnish me with the trial records so as to enable me prepare more concrete grounds during the hearing of this appeal of which I would**

also wish to be present.

3. The prosecution called 6 witnesses in its endeavour to prove its case.

4. According to PW1, **JMM**, the complainant's mother, on 12th December, 2015 she was in her business when she received a phone call from her housegirl who informed her that another housegirl had informed her that the complainant had been indecently touched by the appellant. Upon speaking to the complainant on phone, the complainant informed her that during the school break, the appellant helped her to get up the swing and in the process started touching her private parts. When another pupil wanted to use the swing, the appellant took her into the Principal's house, stood her between 2 beds and inserted his fingers inside her vagina. However, the other pupil, one S, who was using the swing came and called out the appellant who stopped what he was doing and released the complainant who took off and sought refuge at a neighbour's home. According to PW1, the complainant reported this to PW2 who relayed the information to her housegirl who reported the matter to her on 12th December, 2015 though the incident took place days earlier.

5. PW1 testified that she then proceeded to Machakos Police Station and reported the matter and then availed the complainant and the witnesses. They then took the complainant to Machakos Level 5 Hospital where she was found not to have been defiled. Thereafter the appellant was arrested with the help of the two housegirls from the school premises though the appellant denied having committed the act. According to PW1, she did not know the appellant prior to the incident.

6. In cross-examination, PW1 stated that the appellant let them in when she went with police officers to the resident of the Principal where he was residing. It was her evidence that the complainant was not studying at the school but only went to play with the administrator's children since they were all in the same location.

7. PW2, **MM**, a housegirl, testified that on 9th December, 2015 they were playing with the complainant at a nearby school when the complainant disclosed to her that someone had touched her private parts and that the person was within the school premises. Upon being asked by PW2 to point out the person, the complainant pointed out the appellant. According to PW2, the complainant disclosed that the appellant had done this twice. PW2 then informed the complainant's house girl and days later she was asked to record her statement at Machakos Police Station. PW2 disclosed that she knew the appellant as a person of the locality. It was her evidence that they stayed in the same plot as PW1 hence the reason why the complainant went to play with them and ended up disclosing the incident.

8. In cross-examination, PW2 denied that she fabricated the case so that she could take up the complainant's housegirl's job.

9. PW3, the complainant testified that she was a class two pupil and that on 9th December, 2015, she had gone to swing and play at [particulars withheld] Academy when she asked the appellant to help her up the swing and the appellant accepted to do so after touching her vagina. After playing she went back home and returned the following day to play. According to the complainant once again the appellant turned up at the swing, took the complainant into the master's bedroom and touched her vagina as she stood between 2 beds. Fortunately, the appellant was interrupted by the said S who was in the sitting room by his coming over. According to the complainant the same day, the appellant took her to the shop and asked the complainant to love him but the complainant did not respond. The complainant instead rushed to PW2's home and informed her about the incident. PW2 asked her to return with her to the school and point out the perpetrator and the complainant complied and pointed out the appellant.

10. PW4, **JA**, a housegirl, was on 10th December, 2015 in the house with the complainant and after taking lunch, the complainant left to go and play. After one hour the complainant returned and upon being asked why she did so hurriedly, the complainant said that she had been chased after by her friends. PW4 ignored her and decided to bathe her after which they went to sleep. The following day a neighbour who used to help informed her that the complainant had disclosed to her that the appellant had inserted his finger into her vagina while they were playing. Upon interrogating the complainant, the complainant confirmed the same and the next day PW4 informed PW1 what had happened after confronting the appellant over the issue. It was her evidence that it was the complainant who identified the appellant. In cross-examination, PW4 stated that at the time she was bathing the complainant, she smelt funny.

11. PW5, **PC Akumu**, testified that on 12th December, 2015, at noon, he was told to investigate the case. She then interrogated the complainant and recorded statements from the witness and issued the complainant with a P3 form.

12. Upon being placed on his defence, the appellant opted to give sworn evidence. According to him, he is a businessman at Mungige Market selling second hand clothes and other items. On the material day, he had gone to Nairobi for business and returned back late in the evening. He accordingly produced bundles of transport receipts as exhibits. On 12th December, he was arrested at his place of work for no reason though he thought at that time that it had to do with his business. He therefore denied committing the offence. He also denied knowing either the complainant or her mother and further denied that he was working for anyone. In cross-examination he however admitted that his exhibits were not in respect of the month of December though he said there were others for the said moth though they did not indicate the time he was in Nairobi. It was his evidence that he did not know why the case was fabricated against him.

13. In his submissions, the appellant contends that the evidence was inconsistent and uncorroborated and therefore inconclusive to sustain a conviction. It was further submitted that there was lack of proof of indecent act hence the prosecution failed to prove its case. It was submitted that crucial evidence from the doctor or the said Solo was not adduced. The appellant submitted that having adduced the evidence of alibi, it was upon the prosecution to disprove the same.

14. In her submissions, **Miss Mogoi**, the learned prosecution counsel submitted that since the offence with which the appellant was charged was one of sexual in nature, the appellant could be convicted based only on the evidence of the victim hence the omission to call the other children was not fatal. In any case the said children were not there when the appellant touched the complainant's vagina hence they did not witness anything. It was submitted that since the appellant was charged with the offence of indecent act, there was no need for medical evidence. It was submitted that there was no mistake as to the identity of the appellant since the offence took place during the day on both occasions and the appellant was well known to the complainant.

15. It was submitted that the appellant's defence was a mere denial and the introduction of an alibi at the defence stage was a lie aimed at evading justice. Since the appellant stated that he neither knew the complainant nor her mother, there was no reason why they should fabricate the case against him.

16. It was therefore submitted that the defence by the appellant did not create any doubt in the prosecution's case and as such the case was proved beyond any reasonable doubt.

Determination

17. I have considered the submissions made by the parties herein. This is a first appellate court, as expected, this court is obliged to analyse and evaluate afresh all the evidence adduced before the lower court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). 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 finding and conclusion; it must make its own findings and draw its own 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, see Peters vs. Sunday Post [1958] E.A 424."**

18. Similarly, in **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

> **1. An Appellant on a 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.**

19. Section 11(1) of the ***Sexual Offences Act*** provides that:

> ***Any person who commits an indecent act with a child is guilty an offence and is liable upon conviction to imprisonment for a term of not less than ten years.***

20. Section 2 of the ***Sexual Offences Act*** provides that "indecent act" means an unlawful intentional act which cause 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.

21. It therefore follows that for an offence of indecent act to be proved the ingredients necessary to be established by the prosecution are that the victim must be a child within the meaning of the provisions of the Children Act; there must an unlawful intentional act which cause any contact between any part of the body of a person with the genital organs, breasts or buttocks of another; and that the said act must have been committed by the accused.

22. The importance of proving the age of the complainant in sexual offences was emphasized in **Alfayo Gombe Okello vs. Republic (2010) eKLR** where the Court stated that:

> **"In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)…proof of age of a victim is a crucial factor in cases of defilement under Sexual Offences Act. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars."**

23. In **Dominic Kibet vs. Republic Criminal Appeal No. 155 of 2011** it was held that:

> **"…while the Court may in certain circumstances rely on evidence other than an age assessment report, the onus of proving the age of the victim resides with the prosecution and a simple statement by the complainant as to their age does not in my view constitute such proof."**

24. In this case, none of the prosecution witnesses testified as regards the age of the complainant. To compound the problem, though the charge sheet indicates that the complainant was 7 years old, no *voir dire* examination was conducted by the court before her sworn evidence was taken. Whereas, that may not necessarily be fatal, the said examination would have probably revealed the age of the complainant. It is not just enough that the complainant stated that she was a pupil in standard 2. The age of a person does not necessarily depend on the level of education of a person. Each ingredient of an offence must be proved beyond reasonable doubt if a conviction is to result. In her judgement, the learned trial magistrate was of the view that the main issue for determination is whether the accused used his fingers to intentionally touch the genital organs of PW3. The Court however failed to addrss its mind to the issue whether or not the complainant was child under the

Children Act, an issue that constitutes an ingredient under section 11 of the ***Sexual Offences Act***.

25. Had there been evidence on record to support that fact this court, in the exercise of its first appellate jurisdiction would have proceeded to make a finding thereon. However, there was no attempt at all to prove the age of the complainant. Neither oral nor documentary evidence was adduced in that regard.

26. In the case of **Francis Omuroni vs. Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000,** it was observed as follows:

> **"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."**

27. In **Chipala vs. Rep. [1993] 16 (2) MLR 498** the Malawian High Court held at 499 that:

> **"It seems to me that other than a certificate of a medical practitioner, or his oral testimony, to the effect that, in his opinion, such a person has or has not attained a specified age, or other documentary proof, or the testimony of a person who has personal knowledge gained at the time of such person's birth, such as parents, no other evidence is receivable as proof of the age of such a person."**

28. In this case, the only evidence connecting the appellant with the offence was that of the complainant, a child aged 7 years according to the charge sheet. On the issue of whether the evidence of a minor requires corroboration, the law is quite clear: it does. The Court of Appeal sitting in Mombasa in **Sahali Omar vs. Republic [2017] eKLR** held that:

> **"On the first issue, the appellant took issue with lack of corroboration of the complainants' evidence, which he said ran afoul of section 124 of the Evidence Act…The import of that provision is that ideally, the evidence of a child of tender years in criminal proceedings should always be corroborated; notwithstanding the voir dire examination of the child under section 19 of the Oaths and Statutory Declarations Act. In short, that even though the court is satisfied that the child is competent to tell the truth, their testimony should nonetheless be corroborated by independent evidence. However, the section also allows for an exception. Under the proviso thereto, the court is allowed to solely rely on the evidence of a child of tender years if the child is the victim, provided the court first satisfies itself on reasons to be recorded, that the child is being truthful…It is a well established rule of law that the unsworn testimony of a child of tender years must be corroborated. However, where a child of tender years gives sworn testimony or is affirmed, corroboration is unnecessary. (See. Patrick Kathurima v. R (supra) and Johnson Muiruri v. Republic, (1983) KLR 445 and also John Otieno Oloo v. Republic [2009] eKLR)…In addition, the proviso to section 124 of the Evidence Act affords an exception to this general rule in cases of sexual assault where the child in question is not only the sole witness but also the alleged victim. So that as far as PW1 was concerned, even though neither PWs 2, 3, 4 or even 5 (the medical practitioner) could directly support her testimony, the court could nonetheless rely on it provided it recorded its reasons. In this case, the trial court is seen to have addressed itself thus:**
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> ***"…The complainant did not mention anyone else. The offences were committed during the day. The accused was well known to PW1, PW2, PW3 and PW4."***
>
> **The appellant has not taken any issue with the reasons recorded by the trial court. This, in addition to the fact that PW1 and PW2 gave evidence under affirmation, the ground on corroboration should fail."**

29. In sexual offences, however, where the minor is the victim of the offence, the evidence of that minor, if believed by the trial court, can, without corroboration, found a conviction. Section 124 of the ***Evidence Act*** makes this quite clear:

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***
>
> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."*** [Emphasis added]

30. Dealing with a similar issue in the case of **Mohamed vs. R, (2008) 1 KLR G&F 1175,** this Court held that:

> **"It is now well settled that the courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that he child is truthful."**

31. Therefore, what is required of the trial court is to be satisfied that the victim is telling the truth.

32. In this case however, it was the learned trial magistrate's finding that there was corroboration by the prosecution witnesses and sufficient proof that the offence occurred. The learned trial magistrate however did not identify what the corroborating evidence or material was. The meaning of corroboration as defined or stated in the Nigerian case of **Igbine vs. The State {1997} 9 NWLR (Pt.519) 101 (a), 108** is thus:-

"Corroboration means confirmation, ratification, verification or validation of existing evidence coming from another independent witness or witnesses".

33. In **Mukungu vs. Republic [2002] 2 EA 482**, the Court of Appeal citing **Mutonyi vs. Republic [1982] KLR 2003**, held that:

> **"An important element in the definition of corroboration is that it affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it: See Republic vs. Manilal Ishwerlal Purohit [1942] 9 EACA 58, 61."**

34. In **Omuroni vs. Republic (2002) 2 EA 508** it was held:

> **"Trial courts can decide cases one way or the other on the basis of demeanour of a witness or witnesses particularly where the issue of credibility of such witness is decisive. In such a case the trial judge must point out instances of demeanour which he noted and upon which he relies. The trial court must point out what constituted the demeanour which influenced the trial judge to make favourable or unfavourable impression about the credibility of a particular witness."**

35. This decision was relied upon by **Warsame, J** (as he then was) in **Jon Cardon Wagner vs. Republic & 2 Others [2011] eKLR** when he stated that:

> **"It is required, which is of paramount of importance, that a trial court must indicate or point out instances of demeanour which he noted and which he relies upon as a basis of accepting the evidence of a particular witness. The trial court can only be influenced to make a favourable impression about the credibility of a particular witness after establishing the instances as to why and how he thinks that particular witness is a witness of truth. In this case the trial court did not pay any regard to this elementary principle of law in arriving at the decision as to whether the three complainants were witnesses of truth. In the absence of any basis for establishing whether the three witnesses were witnesses of truth, the trial court was wrong in its decision."**

36. In this case, it would seem that the learned trial magistrate proceeded on the premise that there was corroboration rather than that she was satisfied that the complainant was telling the truth. She therefore did not deal with the truthfulness or otherwise of the complainant's evidence. In my view the evidence adduced by the prosecution witnesses fell short of what is legally required to constitute corroboration. In the absence of an express finding that the complainant was telling the truth, it is clear that the conviction of the appellant fell short of the standard of proof required to convict the appellant.

37. As regards the sentence I associate myself with the opinion of the Court of Appeal in **Jared Koita Injiri vs. Republic [2019] eKLR** where it held that:

> **"In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by *section 8 (1)* of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy. Needless to say, pursuant to the Supreme Court decision in *Francis Karioko Muruatetu & Another vs Republic* *(supra)*, we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."**

38. Therefore, the finding that the sentence meted against the appellant was mandatory in nature can no longer hold. However, nothing turns on that issue in light of my finding that the prosecution failed to prove the ingredients of the offence.

39. In the premises this appeal succeeds, the appellant's conviction is hereby set aside, his sentence quashed and he is at liberty unless otherwise lawfully held.

40. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 3rd day of October, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Appellant in person

Miss Mogoi for the Respondent

CA Geoffrey