REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 68 OF 2019

MWANZIA NDIVO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the Senior Resident Magistrate Honourable C.A Mayamba

dated 31/10/2018 in Kilungu SRMCR No. 54 of 2018.)

JUDGMENT

1. **Mwanzia Ndivo** the Appellant herein was charged with the two offences namely:

Main count: Defilement contrary to section 8(1) of Sexual Offences Act No. 3 of 2006. The particulars being that the Appellant on the 25th and 26th day of August 2018 in Kilungu sub-county within Makueni county intentionally caused his penis to penetrate the vagina of **Y.N.E** a child aged 12 years.

2. **Alternative count:** Committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars being that on the 25th and 26th day of August 2018 in Kilungu sub-county within Makueni county intentionally touched the buttocks/breasts/anus/vagina of **Y.N.E** a child aged 12 years with your hands.

3. The Appellant pleaded not guilty and the case proceeded to full hearing. He was thereafter found guilty, convicted of the main count and sentenced to serve twenty (20) years imprisonment.

4. He was dissatisfied with the judgment and filed this appeal raising the following grounds: -

i. **That,** the learned trial Magistrate erred in law and in failing to appreciate that the Appellant was not dully informed of his rights as enshrined in the Constitution of Kenya 2010 contrary to Article 49(1) (a) and 50(1) (2), (a) (b) (c)(g)(h)(i) and (3) of the Constitution causing a serious dereliction of justice.

ii. **That,** the learned trial Magistrate erred in law and in fact by convicting him on overly contradictory uncorroborated and unreliable evidence in breach of provisions of section 163(1)(2) of the Criminal Procedure Code hence insufficient and inclusive to sustain the conviction occasioning a serious miscarriage of justice.

iii. **That,** the prosecution failed to prove its case beyond reasonable doubt and shifted the burden of prove on the Appellant's contravening the law.

iv. **That,** the learned trial Magistrate erred in law and fact in shifting the burden of proof to the Appellant's defense contrary to the rules of natural justice and section 169 of the Criminal Procedure Code.

5. The case before the court was that the complainant (Y.N) who was born on 7th September 2006 and who testified as Pw1 was with her grandmother cutting firewood in August 2018. The grandmother left to call Stella (Pw3) to assist in carrying the firewood. The Appellant summoned her and directed her to the stream. While there he asked to remove her trousers. He then had sex with her. She then went home.

6. The next day she was swinging while playing. The Appellant again found her and asked her to enter his house. He asked her to remove her clothes and lie on the bed. He again had sex with her. On her way home, she met Pw3 with whom she shared her ordeal at the hands of the

Appellant who is their neighbor. Pw3 in turn told Pw2's brother who reported to her mother.

7. **Pw3 (S.K)** stated that on 26th August 2018, at 6:00 pm she had gone to collect their animals which had been tied behind the Appellant's house. She noticed Pw2 coming from behind the said house. She inquired as to where she was from. Pw2 explained to her what the Appellant had done to her. She informed Peter who told Pw2's mother.

8. Pw4 **SME** is Pw2's mother. She testified that on 26th August, 2018 at around 5:00 pm she saw Pw2 passing through the farm and she was without her skirt. She ran away in the direction of the Appellant's house. She came back with the skirt and behind her was Pw3. She explained to her how the Appellant has a very big thing which he inserted in her.

9. This was after Pw2 told her how the Appellant had summoned her to his house and both of them had removed clothes. Villagers arrested the Appellant as she took Pw2 to hospital. At the hospital it was confirmed that Pw2 had been sexually defiled. She produced Pw2's birth certificate (EXB5).

10. **Pw1 Hannington Wambua Masoo** the clinical officer confirmed examining Pw2 on 26th August, 2018, after she was brought to Kilungu sub-county hospital. The following were his findings: -

- Underwear was wet with fluid.

- Pain in her private parts.

- Perforated hymen.

- Intratus was swollen

- Mucoud discharge from the vagina.

- Lab tests revealed yeast infection, pus cells and epithelial cells.

11. He said Pw2 had indicated that her perpetrator had an unusual mark on the shaft. On checking he noted that the Appellant had vitiligo on his shaft. Pw2 was treated for Urinary Tract Infection (UTI). He produced Pw2's treatment notes as EXB 1, P3 form as EXB2. Upon examination, it was found that the Appellant's penis organ had an abnormality around the gland and he had vitiligo. The urinalysis revealed U.T.I. He therefore linked these results to those of the complainant (Pw2).

12. **Pw5 No. 107610 PC Mollent Achieng** investigated the case. She took Pw2 and the Appellant to the hospital for examination. The medical report confirmed that Pw2 had been defiled. She then preferred the charges against him.

13. When placed on his defence the Appellant elected to give sworn testimony, saying that the case was fabricated. That Pw2's father is his cousin and they have a land dispute. He accuses his cousin of taking away his title deed.

14. In cross examination he denied seeing Pw2 on 25th August, 2018. He however admitted that she was at his house on 26th August which according to him which was a set-up.

15. The Appellant filed written submissions which he relied on in arguing his appeal. His first ground was contravention of Articles 49 and 50 of the Constitution. He complains of not being provided with an advocate by the State. He also contends that witness statements were never supplied to him. He further submits that his right to a fair trial was violated.

16. In ground two he argues that there were inconsistencies, and contradictions which could not sustain a conviction. He says the evidence of Pw1 failed to link him to the offence. Further that the absence of a hymen was not conclusive proof of penetration.

17. It is his submissions that Pw2 failed to give graphic details of how the episodes she is complaining about were carried out and how she felt. That the evidence of Pw2 – Pw4 should not have been relied on as it required corroboration which was lacking.

18. On the 3rd and 4th grounds he submits that the prosecution failed to discharge its burden of proof as required by law.

19. The appeal was opposed by the Respondent through Mrs. Owenga who submitted that the evidence on record confirmed all the ingredients required in a case of this kind. She contended that age and penetration were proved and the Appellant was properly identified as the culprit. She submitted that the Appellant's rights under Articles 49 and 50 were violated. That the Appellant fully participated in the trial and never raised any of what he is saying during the trial.

Analysis and determination

20. This being a first appeal, this court has a duty to analyze and re-evaluate the evidence and arrive at its own conclusion. It should bear in mind that it did not see or hear the witnesses and give an allowance for that. See **Okeno –v- R 1972 E.A 32; Simiyu & Another (2005) 1 KLR 192.**

21. I have duly considered the evidence on record, grounds of appeal, the rival submissions and the cited authorities. I find the main issue for determination to be whether the prosecution proved the case of defilement against the Appellant. The core elements to be established are:

· Proof of complainant's age

· Proof of penetration of the complainant's genital organs.

· Identification of the person responsible for the penetration.

22. Before I deal with the above issues, I wish to deal with an issue on violation of Articles 49(1) (c) and Article 50 (1) (2) and (3) of the constitution as raised by the Appellant. One of the issues raised is lack of provision of an advocate at State expense to represent him. He cites Article 49 (1) (c) and Article 50(2) (h) of the constitution to support his claim.

23. Under Article 49(1) (c) the court is only supposed to ensure that an arrested person is given an opportunity to communicate with an advocate (assuming he has one) and other persons for purposes of assistance. This is infact at the police station.

24. Further Article 50(2) (h) of the constitution provides:

(2) Every accused person has the right to a fair trial, which includes the right –

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

25. The Appellant was charged with an offence under the Sexual Offences Act and sentenced to 20 years' imprisonment upon conviction. It is nowhere indicated that any substantial injustice would result if the Appellant was not represented. Secondly, it's not for every offence that an advocate paid for by the State is provided.

26. The only known cases are murder cases and funds for such advocates holding pauper briefs are provided for. I have also considered the evidence and I find nothing so unique about this case that would call for the assignment of such an advocate for the Appellant when funds have not been made available.

27. The other issue he raises is in respect to Article 50 (2) (j) of the Constitution which provides:

(2) Every accused person has the right to a fair trial, which includes the right –

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.

28. The Appellant claims that no witness statements were provided to him. A perusal of the record shows that the Appellant was arrested on 26th August, 2018 and arraigned in court on 27th August, 2018 when plea was taken and he pleaded not guilty. He was given a bond of Kshs.300,000/= with a surety in similar sum. There is no indication that he was released on bond. A hearing date was fixed for 17th September, 2018 with a mention on 3rd September, 2018.

29. When the matter came for mention the Appellant was not produced, and there was no order for his production. On 17th September, 2018 he was produced and the matter proceeded to hearing. The Appellant had indicated that he too was ready to proceed.

30. My major concern is on the role the court plays in ensuring compliance with Article 50(2)(j) of the Constitution. The record shows that as at 17th September, 2018 the Appellant did not have any witness statements. It means he did not know what the prosecution was going to rely on, in respect to the case against him.

31. The issuance of witness statements and any other documents and /or exhibits which the prosecution intends to rely on for its case, forms part of pre-trial conferencing, which is an exercise spearheaded by the court.

32. In the instant case the court never gave any direction in respect to the requirement under Article 50 (2) (j) of the Constitution. It is true that the Appellant never asked for the said documents. He could only be guided by the court which has the duty to ensure that no party is ambushed before it with evidence unknown to it. The supply of such documents is to enable the accused person prepare his defence in good time.

33. I am therefore satisfied that there was a violation of the Appellant's right as set out in Article 50(2) (j) of the Constitution. The result is two thronged. Either to release the Appellant or order for a retrial.

34. The record shows that the alleged offence took place on the 25th and 26th August, 2018 and the suspect charged on 27th August, 2018. The case was heard and finalized on 31st October, 2018.

35. In the case of **Opicho –vs- R (2009) KLR 369** the Court of Appeal held as follows:

> ***"In general a retrial 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 trial should be ordered. Each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it"***

36. Guided by the above cited authority, I have perused the record herein, and I am satisfied that the instant case was heard and determined expeditiously. Secondly the mistake was by the trial court through an omission and has to be corrected.

37. The Appellant shall not be prejudiced at all if the matter is heard afresh. On the other hand, the interests of justice shall be met if the same is done.

38. The upshot is that the appeal is allowed, and both the conviction and sentence set aside. There shall be an order for a retrial before Kilungu court before a Magistrate with competent jurisdiction other than Hon. C.A Mayamba Principal Magistrate. The hearing must be concluded within 12 months.

39. **The Appellant shall be arraigned before the Principal Magistrate – Kilungu law courts on 18th December, 2019 for implementation of these orders.**

Orders accordingly.

Delivered, signed & dated this 11th day of December 2019, in open court at Makueni.

Hon. H. I. Ong'udi

Judge