REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 24 OF 2018

OMAR SAID OMAR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence in Malindi Criminal Case No. 222 of 2016

as presided over by Hon. S. R. Wewa (PM) at Malindi Law Courts dated 1st November 2018)

CORAM: Hon. Justice R. Nyakundi

Mr. Machuka for the appellant

Ms. Sombo for the State

JUDGMENT

The appellant initially charged and convicted with the offence of defilement contrary to Section 8 (1) of the Sexual Offences Act as read with Section 8 (2) and sentenced to life imprisonment has appealed against both conviction and sentence.

The brief particulars of the charge were that on the 25.3.2016 at[particulars withheld] village Kilifi – County, intentionally and unlawfully appellant caused his genitalia to penetrate **LAL** orifice namely the anus for purposes of sexual intercourse. As at the time of the offence, **LAL** was aged 9 years old.

The evidence in brief

NTThe complainant whose age was stated to be 9 years testified before the trial court starting with the physical features of the scene of crime on the incident. She told the court that on the night of 26.3.2016 which they had retired for the day, the appellant came to where she was sleeping, applied the oil to her anal orifice and convicted the sexual act. The complainant further stated that the appellant left shortly to his room but in the wee hours he came back applied coconut oil, undressed himself, hovelled the complainant clothes, to cause penetration to the genitalia. Act this happened with the source of light in the room on accompanied with threats of violence if the complainant attempted to report the matter to anybody or the mother. The complainant also in his testimony testified to the effect that A and S were in the same bedroom.

According to the complainant it was **(A)** who later informed their mother who at the trial testified as **PW3 (ZM)**. PW3 told the court that on the aforementioned night of 25/3/2016 she was at home with her children, including the complainant and **(PW2)** when she spent time together with the appellant her husband.

That on or about 10.30 p.m. she went to their room to sleep, leaving the appellant awake, chewing miraa which usually takes upto around

3.00-4.00 a.m. PW3 further testified that in the morning she woke up to prepare the children by doing the basics like bathing them to start the day. It was at the time that her daughter namely A who gave evidence as **(PW2)** told her that the complainant was defiled by the appellant in their bedroom. Thereafter **PW3** called **L** to confirm the allegations from (PW2) about the incident on sexual assault by the appellant. That is when the complainant stated that the appellant usually goes to their room while asleep applies some oil to his anal orifice and commits acts of penetration.

The mother (PW3), horrified with the information screamed to a level which got the attention of the appellant. When asked how he could have done such a thing by PW3, the appellant left the house in a hurry until at 5.30 a.m.

A little later PW3 decided to take the complainant to Malindi Hospital for a medical examination and treatment as supported with the treatment notes. PW2 – a minor by the name **AA.** aged 5 years and a sister to the complainant testified that in their house all her siblings including (PW2) share one room.

According to PW2, on the 26.3.2016 she was able to recognize their father, the appellant enter the bedroom, set his eyes on the complainant with whom he committed the sexual act of penetration. The witness stated that the appellant managed to notice that she was awake, but cautioned her to continue sleeping as he committed an act of penetration against the complainant. In the morning, PW2 told the court that she was forced to tell her mother PW3 about what the appellant did on the night with the complainant (PW1).

PW4, the sister to PW3 testified as having received a telephone call from PW3 with regard to incident of the appellant having had carnal knowledge with the complainant. The witness on discussing the matter with PW3 agreed that the complainant be taken out of school to visit Malindi Hospital for treatment. PW4 stated that in her presence, with PW3 and the complainant, the medical examination carried out revealed evidence of carnal knowledge through by anal orifice. With the medical evidence at the disposal of PW3 and PW4 they made a report to Malindi Police Station whereby a P3 Form was issued to initiate an investigation on the crime.

PW5 – The Clinical officer who had examined the complainant on 28/3/2016 had stated that he saw bruises at the lower position of the anus. The clinical officer formed an opinion that sodmiyace was highly possible though he was unable to confirm any presence of spermatozoa, or physical injuries or bleeding to the anal orifice. The P3 form was admitted as exhibit 3.

PW6 – was the police from Malindi Police Station who on 28/3/2016 was instructed by the incharge to investigate the report of the complainant said to have been sexually abused. PW6 thereafter told the court that he recorded witness statements and issued the P3 which PW5 factored to form the basis of the charge against the appellant. PW6, also gave evidence that the birth certificate of the complainant confirmed that he was 9 years old when the sex act took place.

At the close of the prosecution case, the appellant was placed on his defence. The appellant elected to give a sworn statement. He denied the charge of sexually abusing his child as alleged by the prosecution witnesses. He only recalled an incidence on 28.3.2016 with about 10 people went to his home, demanding that he accompany them to the police station. Since he did not suspect foul play anywhere at the time, he readily accepted to go to the police station. It was while at the police station the appellant was informed that there is already a report that he had defiled the complainant. He denied that at the night of 25th March 2016, 26th March 2016 he was able to leave his room to the children's bedroom to commit the sexual act with the complainant.

It is against this backdrop the Learned trial Magistrate convicted and sentenced the appellant. The grievances by the appellant through his counsel **Mr. Machuka** are based on the following grounds of appeal:

> ***1. That Honorable trial Magistrate erred in law and fact as she disregarded vital inconsistencies and serious factual contradictions in the evidence adduced by the prosecution witnesses and thereby arrived at a wrong finding.***
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> ***2. That the Honorable trial Magistrate failed to appreciate the entirety of the circumstances of the entire event and failed to interrogate the authenticity of the charges brought before Court and the quality of witnesses and their respective contradictory accounts.***
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> ***3. That the trial Magistrate failed to consider the substance/effect and entirety of the medical evidence given and in failing to arrive at the finding that there was no incriminating medical record/material placed before court as would corroborate contradictory witness accounts.***
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> ***4. That the trial Magistrate failed to grant the benefit of the doubt to the accused upon the inconsistencies of the evidence by the prosecution.***
>
> ***5. That the Hon. Learned trial Magistrate failed to apply her mind to or failed to appreciate the practicalities and impracticalities of the illogical allegations made visa vis relevant facts in view of the entirety of the circumstances.***
>
> ***6. That the Honorable trial failed to consider basic relevant facts, specifically failed to appreciate the fact that there was a grudge/hatred/bad blood existed between the complainant and the accused and the fact that kept prosecution contacts were sworn enemies of the accused who had threatened him previously.***
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> ***7. That the Hon. trial Magistrate failed to grant the appellant a fair hearing in view of the serious nature of the charge that he was faced with, the accused person/appellant was denied a fair hearing as he was compelled to close his case and thereby locking out vital evidence from being heard and taken into consideration.***
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> ***8. That the Hon. Learned trial Magistrate erred in law and fact in placing undue reliance and weight on a weak and unreliable***

medical account as the only corroborative source of the evidence of contradictory minor witnesses.

9. That the Hon. Learned trial Magistrate erred in ignoring glaring discrepancies and gaps in the entire prosecution case and records.

10. That the Hon. Learned trial Magistrate erred in law and fact in reliance on evidence that does not meet the threshold requirements set for convictions in such case.

11. That the Hon. Learned trial Magistrate erred in law and fact in failing to consider and appreciate the weight of the defence case and submissions and in holding that the evidence was corroborated when in fact there was no independent or any corroboration at all of the evidence.

12. That the Hon. Learned trial Magistrate erred in law and fact in relying on an inaccurate record and in arriving at a wrong finding and thereafter meeting out an excessive sentence under the circumstances.

Submissions by counsel on appeal

In the present case Learned counsel for the appellant filed written submissions divided on the category of the key issues raised in the Memorandum of Appeal. The appellant's counsel complained on the appraisal and application of medical evidence by the Learned trial Magistrate to convict the appellant. He took issue with the authencity and reliability of the treatment notes which failed to disclose better particulars on nature of injuries.

The name of the medical officer and positive diagnosis in opposing the probative value of the P3, Learned counsel submitted that it is quite plain that there were no indicators of penetration as alleged by the complainant in his testimony in court.

The next troubling issue for the appellant counsel was the glaring inconsistencies and contradictions with the prosecution witnesses more so he singled out the complainant testimony on whether there was source of light on the material night.

Learned counsel for the appellant turned to the fundamental issue on the standard of proof as to whether the case at the trial was proved beyond reasonable doubt. These was on the same elements of penetration, age and identification of the appellant being at the scene of the crime. On this issue Learned counsel proceeded to cite the principles in the case of **R V Lifchus [1997] 3 SCR 320.**

As regards the right to a fair trial under Article 50 (2) (c) of the constitution. Learned counsel contended that the appellant was denied the access to the OB extract which entails the intial report made to the police.

Learned counsel for the appellant argued and submitted that the trial court failed in its duty to appraise the evidence in a manner that the inconsistencies and contradictions were ignored. More specifically, the medical doctor did not state with certainty what caused the injuries. Learned counsel asserted the surrounding circumstances were that the offence was alleged to have been committed at night with no proper source of light in place.

He contended that the issue of positive identification was adversely resolved against the appellant Learned Counsel. Further counsel submitted that the complainant as a child of tender years was expected to be subjected to a thorough voire dire examination under Section 19 of the statutory oaths Act Cap 15 of the Laws of Kenya. According to Learned counsel the record lacks specifics that the procedure necessary to determine the competency and intelligence of the complainant was never complied with by the Learned trial Magistrate. Learned counsel submitted that the duty and importance of the voire examination as articulated in **Johnson Muiruri v R [1983] KLR 447** was not followed by Learned trial Magistrate. Learned counsel argued that the complainant was …… of coercion and duress from his mother as can be deduced from the record. Learned counsel further submitted that the entirety of the evidence put together on the elements and proof of the charge beyond reasonable doubt. Consideration on the failure to discharge the burden of proof Learned counsel cited the authorities of **Daniel Okeno v R Criminal Appeal No. 8 of 2015, Abee Manari Nyamunga v R Criminal Appeal No. 86 of 1994**.

On the right to a fair hearing under Article 50 of the Constitution, Learned Counsel submissions identifies the following issues to have had a likely impact against the appellant.

Although the appellant made an application to have the O.C.S. summoned to produce the O.B. ….. that opportunity was declined by the Learned trial Magistrate. That the failure to provide the appellant a chance to facilitate attendance of witness to challenge the prosecution case was an infringement of his right to a fair hearing.

At the hearing on appeal Ms. Sombo, prosecution counsel, submitted that the state vehemently opposes the appeal on grounds raised by the appellant. Ms. Sombo argued that the record is clear on appraisal of the prosecution witnesses. That the key elements on penetration and age were proved beyond reasonable doubt.

As to the importance of proof of age, counsel relied on the authorities of **Hudson Ali Mwachengo v R [2016] eKLR, Kaingu Elias Kasemo v R Criminal Appeal No. 504 of 2010 (Malindi).** On voire dire examination counsel brought the argument and submitted that the Learned trial Magistrate conducted a proper voire dire as required by the law. In support of this ground, counsel placed reliance on the cases of **Maripett Loonkomok v R [2016] eKLR, DWM v R [2016] eKLR,** it was reiterated that the appellant has not show which part of the voire dire resulted on the failure of justice.

It was further argued by counsel that there were no inconsistencies and contradictions from the prosecution witnesses which amounted to satisfactorily interfere with the decision of the trial court.

On this counsel cited the authorities of **Erick Onyango Ondeng' v R [2014] Eklr, Twehangane Alfred v Uganda Criminal Appeal No. 139 of 2001 (UGCA 6, 2003)**. It was argued therefore any such inconsistencies or contradictions identified by the appellant did not affect the substance of the charge.

Analysis and resolution

This being a first appeal, the duty of the court is to re-evaluate and scrutinize the evidence before the trial court and on subjecting it to a fresh analysis be able to come up with my own independent conclusion and decision. (**Okeno v R [1972] E. A. 531**) on first appeal. The court is also expected to bear in mind that it does not have the advantage on demeanor if witnesses and inferences drawn by the trial court.

In this respect, I have carefully read the record and the Judgment of the trial court which formed the basis of the conviction and sentence against the appellant. From the grounds raised in the memorandum of appeal at the heart of the appeal is the question whether the prosecution discharged the burden of proof of beyond reasonable doubt.

On the authority of the case of **Charles Karani R Criminal Appeal No. 72 of 2013,** the court in construing the provisions of Section 8 (1) of the Sexual Offences Act, stated that:

> ***"The critical ingredients forming the offence of defilement are age of the complainant, proof of penetration and positive identification of the assailant."***

The Act in Section 2 defines penetration as partial or complete penetration of child genitalia with that of a male for the act of carnal knowledge to be held to have taken place. It was argued that the encounters of the sex act allegedly could not have occurred in view of the fact that there were other children in the same room as confirmed by the complainant.

During the hearing of this appeal, counsel for the appellant submitted that the conditions were not favorable for the sexual intercourse against the complainant to take place. That the evidence was not sufficiently corroborated for the Learned trial Magistrate to find that the appellant committed the act of penetration.

As for the ingredient on penetration, its generally acceptable that medical evidence is not mandatory for the prosecution to satisfy this element to proof defilement. The case of **Kassim Ali v R Criminal Appeal No. 84 of 2005** in part the court held:

> ***"The absence of medical evidence to support the fact of rape is not a decision as to the fact of rape can be proved by oral evidence of a victim or circumstantial evidence."***

The court agrees with the above position of the Law in the case before the trial court there was evidence of **PW2 AA,** who testified that he was in the same room with the complainant **(PW1)** when the alleged defilement took place. The complainant in this case did not personally convey the incident to his mother **PW3** but it was PW2 AA who had to break occurrence of the sexual act to PW3 the following day. According to PW3 she sought the company of PW4 to escort the complainant to Malindi Hospital where he was examined by PW5. The clinical officer established bruises at the lower. Going by these evidence the trial court found it sufficiently corroborating that the complainant (PW1). That his father had sexual intercourse on the night of 25.3.2016.

In the case of **Uganda v George Witson Sumbwa SC Criminal Appeal No. 37 of 1995** the court stated as follows in corroboration:

> ***"Corroboration affects the accused by connecting or tending to connect him over the crime. In other words, it must be evidence which implicates him, which confirms in some material particular not only the evidence that the crime has been committed but also that the defendant committed it. The test applicable to determine the nature and extent of corroboration is the same whether it falls within the rule of practice at Common Law or within the class of offences for which corroboration is required."***

Though the medical evidence did not make any findings as to spermatozoa or bleeding from the orifice is not a ground to doubt the testimony of PW1 on penetration. The rationale for that is for a charge of defilement to be established. It is not necessary that there are existence of injuries to the genitalia. Therefore absence of bleeding or spermatozoa does not rule out penetration. This more so, under Section 2 of the Sexual Offences Act penetration is deemed to be complete even with partial insertion of ones genitalia with that of the victim. The evidence by the appellant that he forcibly left his room to go and have sexual intercourse has not been controverted with key credible defence. The explanation by PW1 as corroborated with the testimony of PW2 remains uncontested as to the act of penetration.

Further, (PW1) alluded to the fact that during the sex act the appellant had threatened him not to inform the mother (PW3) of what had taken place. This was possibly the reason why the information about the sexual intercourse came from (PW2) who was in the same room with the complainant. I find no reason to interfere with the findings of the trial court.

On the second element the victim in this appeal was a child below the age of 18 years stated to be 9 years old going by the birth certificate Exhibit 5 issued on 1.2.2007. In the case of **Francis Omuroni b Uganda Criminal Appeal No. 2 of 2000** the court stated as follows:

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

In response the appellant testimony failed to disapprove the age of the complainant. I also bear in mind that from the totality of the evidence

PW1, told the court graphically as to the opportunity, time and date when the incident of sexual intercourse took place. That cogent evidence on the act as supported with sheet of PW2 to prove that PW1 was a subject of intrusive sex with the complainant. Accordingly, I have no reason to distorts the finding of the Learned Magistrate that the complainant at the time of the defilement was aged 9 years.

The appellant though his counsels also challenged the evidence on identification of the appellant which in all aspects he submitted was doubtful.

According to appellant's counsel the conditions under which the complainant stated the crime took place were such that he could not have been able to identify the assailant. For the respondent it was submitted that there is very clear evidence that the appellant was personally identified by the complainant and PW3 who happened to be in the same room where the crime was committed on many occasions.

The Law on identification has been stated in several authorities and is now settled. The courts have been guided by the case of **R v Turnbull [1976] 3 ALL ER, Abdalla Bin Wendo & Another v R, Cleophas Otieno Wamunga v R Criminal Appeal No. 20 of 1989**

The points emphasized in the above cases as on testing with care the evidence of a single identifying witness and the circumstances with regard to identification when the prevailing conditions are presumed not to be favourable. As regards visual identification the Court of Appeal in **Charles Otieno Wamunga (supra)** emphasized as follows:

> ***"We now turn to the more troublesome part of the appeal the appellant's conviction on count 1 and 2 with respect to the testimony of PW1 and PW2 who testified that they recognized 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 v Turnbull** where he said:

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

In this appeal the prosecution relied on the testimony of PW1 and PW2; who claimed that the appellant moved from his bedroom to where they were sleeping and committed the sexual act against the complainant. From the record the complainant gave evidence that he recognized the appellant who even had a conversation with him with threats of keeping the matter under secrecy. The complainant referred to the nature of the incidents, such as application the conduct out before the defilement. Further, the complainant gave the description of the clothing of a kikoi which the appellant was wearing in the very night of the incident. He stated that normally they sleep with their lights on for fear of darkness. Therefore, the source of light available in the room made it possible for a positive identification to take place. PW2 also present in the same room gave a detailed account of all what happened and witnessed with his own eyes.

The appellant in his defence attributed to the fabrication of the allegations due to the grudge he has with PW3, the mother of the complainant. In his testimony though he slept in the same house but different rooms with the complainant and PW2 at no time did he visit their room that specific night.

The burden of proof is on the prosecution to establish that the appellant left his bedroom to that of the complainant to commit the act of defilement as narrated by PW1 and corroborated with the evidence of PW2.

The question which is of significance in this appeal on the issues raised is whether there was motive for the complainant to deliberately and dishonestly accused his stepfather of such serious immoral act.

From the case for the defence it all came about because of a misunderstanding and grudge he has with PW3 which possibly culminated in this fabrication taken on oath.

If upon inquiry, the court is of the opinion that and does not possess sufficient intelligence as to and appreciation of an oath and the duty to speak the truth, his or her evidence shall be received as unsworn. Having regard to this provision and the evidence of PW1, the appellant counsel submitted that the voire dire examination conducted justified the findings by the trial Magistrate. That the complainant was a truthful witness.

I have perused the record with regard to a voire dire examination which required the trial Magistrate comply with Section 19 of the Oaths and Statutory Declarations Act. The Learned trial Magistrate made reference to the inquiry and did exercise discretion to the effect that the victim was capable of giving evidence on oath. Considering therefore all these circumstances and the Judgment of the trial court there is no sufficient detail as to the nature of the grudge to warrant a sexual attack against the victim of such tender age. Certainly, none was explained to the trial court and even in this appeal. This ground of appeal fails.

The other subject features of this appeal was on the issue of a voire dire in terms of Section 19. The section provides that in any criminal or civil proceedings against any persons, and a witness summoned to testify is a child of tender years aged ten years and below, the court shall receive evidence either on oath once the court is satisfied that the child possess such sufficient knowledge and intelligence to have his or her

evidence. Whereas the questionnaire and answers administered by the Learned Magistrate did not constitute a detailed furuncle, she drew an inference that determined the witnesses possessed sufficient knowledge and intelligence for his evidence to be received on oath.

I agree fully with the Court of Appeal decision on the applicable procedure under Section 19 in the case of **Johnson Muiruri v R [1983] KLR 447.** However, from the outset it must be observed that there is no standard formal questionnaire or iron clad rules to be followed in taking voire direction. The trial court has to leverage though many issues before exercising discretion whether the clued witness of tender years can be allowed to give evidence on oath or unsworn.

The answer to the complaint raised by the appellant can be traced to the principles in the case of **Ruwala v R [1957] EA 570 and Pandya v R [1957] EA 336.** That as a first appellate court, I bear in mind that the Learned trial Magistrate had the advantage of hearing the witnesses and was able to draw certain inferences on this material issue to invite the complainant to give evidence on oath.

Having these principles in mind, there is no evidence of a new aspect that the Learned trial Magistrate misdirected herself on the approach taken to admit the testimony of the complainant on oath. This ground as a basis of the appeal also fails.

The real vexed question in this appeal is whether the prosecution discharged the burden of proof of beyond reasonable doubt that the appellant convicted the act of penetration. From the narrative on record, the crux of the element was considered by the complaint that the sexual act did take place perpetuated by the appellant. It is also trite the degree of penetration need not be complete. It suffice as a threshold issue to satisfy the ingredient even with a partial penetration.

Learned counsel for the appellant submitted and concluded that mandatory life imprisonment for the offence of defilement as prescribed under Section 8(2) of the Sexual Offences Act is unconstitutional for that proposition counsel relied on the land mark case in **Francis Kariako Muruatetu & Anor v R [2017] eKLR** Based on these, Learned counsel urged this court to allow the appeal by quashing the conviction and sentence.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 6TH DAY OF DECEMBER 2019.

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R. NYAKUNDI

JUDGE

In the presence of

1. Ms. Sombo for the respondent

2. Mr. Martini for the appellant

3. Mr. Salim watching brief for Wamoyo for the family