REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 12 OF 2017

WILSON KAMOTHO GIUTHI……..……..APPELLANT

VERSUS

REPUBLIC……..……..RESPONDENT

(Appeal from original conviction and sentence in Mukurweini Principal Magistrates' Court Criminal Case No. 195 of 2015(Hon. V.O. Chianda, Senior Resident Magistrate)

JUDGMENT

The appellant was charged in the magistrates' court at Mukurweini with the offence of defilement contrary to **section 8(1) (4)** of the **Sexual Offences Act No.3 of 2006**. The particulars were that on the 9th day of June 2015 within Nyeri County, he intentionally caused his penis to penetrate the vagina of C W K a child aged 16. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act and here it was alleged that on the 9th day of June, 2015 in Nyeri County he intentionally touched the vagina of C W K a child aged 16 with his penis.

At the conclusion of his trial, the appellant was found guilty of the principal count and convicted accordingly; he was sentenced to 15 years imprisonment. He has now appealed to this Honourable Court against the conviction and sentence and in his amended petition which he filed in person on 20th May, 2017, he raised several grounds against the decision of the trial court; I understand these grounds to be as follows:

1. The learned magistrate erred in law and in fact in convicting the appellant on the evidence of the complainant that he, the appellant, did what the complainant referred to as 'tabia mbaya' which in the appellant's view did not necessarily connote the insertion of his genital organs into the complainant's genital organs;

2. The learned trial magistrate erred in law in not warning himself against the danger of relying on the evidence of a single identification witness.

3. The learned magistrate erred in law in convicting the appellant on a defective charge.

4. The learned trial magistrate erred in law in relying on the evidence of a doctor who did not examine the complainant hence contravened sections 33 and 77 of the Evidence Act, cap.80.

5. The learned magistrate erred in law in convicting the appellant when the age of the complainant was not proved.

6. The learned magistrate erred in law in dismissing the appellant's defence despite the fact that it was not displaced by the prosecution and hence contravened section 212 of the Criminal Procedure Code, cap. 75.

As usual, it is mandatory for this Honourable Court, being the first appellate Court to evaluate and consider the evidence on record afresh and come to its own conclusions independent of those arrived at by the trial court. However, in doing so, this Court has to be cautious that it is only the trial court that had the advantage of seeing and hearing the witnesses first hand and thus was best placed to appreciate certain aspects of evidence better than this Court. (**See Okeno versus Republic (1975) E.A.35).**

To start with, the complainant stated that she was aged 15 as at 25th August, 2015 when she gave her testimony in court. On 9th June, 2015, at about 7PM, so she testified, she was returning home after seeing off a friend whom she identified as one B W when the appellant is alleged to have grabbed her, took her to his house and did 'tabia mbaya' to her. She screamed but the appellant warned her against it and even threatened her with death.

The complainant described the house in which she was taken and assaulted as a one-roomed timber house. It was her evidence that in that same house was the appellant's mother who, at some point, asked him to switch on the lights since it was dark. She spent the night there and left the following day at 11 AM. Curiously, the appellant's mother who spent the night in the same house as the appellant and the complainant was not aware of the complainant's presence.

When the complainant finally got home, she reported the incident to her mother (PW2) who in turn took up the complaint with the police at Kaharo police station. The mother also took her to hospital for examination. Since she did not know the appellant before and even then the appellant accosted her in darkness; for this reason, she was asked to identify him 'from a line-up'. I take this to mean that an identification parade out of which the appellant was picked out was conducted.

The complainant's mother, E W (PW2) testified that the complainant is her fourth child, born in 2001; she however produced the child's immunization card which showed that the complainant was born on 29th October, 1998. It was her evidence that she did not find her daughter home on 9th June, 2015 when she returned from work. She could also not locate her on that day despite her efforts to trace her; the complainant, however, showed up the following day at about 1 PM by which time she had reported the case to the police, the area chief and the school where her daughter learned. She also testified that she attended an identification parade in which the complainant identified the appellant.

The complainant's aunt, **G W (PW3)** and her uncle **M W (PW4)** also testified of the disappearance of the complainant; W (PW4) in particular testified that he helped the complainant's mother search for the complainant on the material evening she disappeared but their efforts bore no fruit.

Dr Michael Gachau (PW5) testified that he filled the complainant's P3 form on 11th June, 2015 though the complainant was examined and treated by other clinical officers. According to him, the complainant's hymen was broken and there were lacerations around the vagina. There were also traces of bleeding and a high vaginal swab revealed numerous blood cells.

The investigations officer, Corporal John Kisilu testified that one Corporal Kimutai went to Giathugu polytechnic to search for the appellant on 15th June, 2015. 'They' found the appellant and arrested him. The complainant later identified him as the person who had defiled her. He recovered a blood-stained trouser from the complainant.

When the appellant was put on his defence, his counsel informed the court that the appellant suffered from a mental or psychological problem and therefore sought the court's permission to have him treated and subjected to a medical assessment. The trial court not only allowed counsel's application but it also issued an order to the effect that the appellant be examined and treated.

Upon resumption of the trial on 9th June, 2016 a medical report was availed which showed that the appellant was mentally stable but could not stand the trial without hearing aids. The court noted the doctor's report and directed that the appellant be accorded the necessary treatment 'to enable him have a fair trial'. The record does not show whether the appellant was treated as directed. He however, gave sworn statement and stated that on 15th June, 2015 he was working as usual when some people, who identified themselves as policemen, asked him to accompany them. They later charged him with the offence of which he was convicted. He denied having committed any crime.

From what I gather, two important issues stand out in the trial against the appellant; of these issues, the first is whether the appellant was positively identified and the second is whether he was accorded a fair trial in any event.

On the first issue, the complainant testified that the appellant was a stranger and he allegedly defiled her in darkness. It came out clearly from her evidence and that of her mother that an identification parade was conducted from which she picked him out. The police must have found this parade necessary partly because of the conditions under which the appellant is alleged to have accosted the complainant and also because the appellant was not known to the complainant before.

What did not come out clearly from the entire prosecution evidence is whether the complainant had been asked to describe the appellant or whether she had informed the police that the appellant had left some impression on her mind to such an extent that she could identify him if she saw him again. In the absence of this evidence, it is difficult to tell the basis upon which the appellant was arrested and paraded in an identification parade.

Most crucially, however, is the fact that there is no evidence of whether an identification parade was conducted in accordance with police force standing orders or at all. All we heard about the parade was from the complainant who testified that she picked the appellant from 'a line-up' and her mother who testified that she attended an identification parade from which the appellant was identified. It is worth noting that the investigations officer never alluded to such a parade in his evidence; the much that was heard from him on this question of identification was that 'the complainant identified the accused' without providing any evidence as to the circumstances under which the appellant may have been identified. I also note that corporal Kimutai who is alleged to have arrested the appellant did not testify; his testimony would have shed some light on the basis of the appellant's arrest.

Identification of a suspect in any criminal offence is always a pivotal question and whenever it arises the trial court has to satisfy itself, before convicting him, that the question has been disposed of to such threshold as to leave no doubt that the suspect was positively identified. Where an identification parade, as part of the evidence of identification is in issue, it has been held that if the police force standing orders in respect of conduct of identification parades are flouted, the value of evidence of identification depreciates considerably. In **Nairobi Criminal Appeal No. 117 of 2005 David Mwita Wanja& others versus Republic (2007) eKLR** the Court of Appeal noted thus:

> ***The purpose for, and the manner in which, identification parades ought to be conducted have been the subject of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor to this Court emphasised that the value of identification as evidence would depreciate considerably unless an identification parade was held within the scrupulous fairness and in accordance with instructions contained in Police Force Standing Orders.***

The court proceeded to cite its own decision on this question in **Njihia versus Republic (1986) KLR 422** where it held at page 424:-

> ***It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the***

complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it would be difficult, if not impossible, for the witness to dissociate himself from his identification of the man in the parade, and reach back to his impression of the person who perpetrated the alleged crime.

In the trial against the appellant the question is not even whether an identification parade was conducted according to the police force standing orders; the question is whether such a parade was ever conducted in the first place. Suffice it to say, that if the state felt that the appellant could only be identified in an identification parade then it behoved it to demonstrate, beyond reasonable doubt, that it not only conducted the identification parade but also that such a parade was conducted in strict compliance with the police force standing orders. In the absence of this evidence, it could not be concluded that the appellant was properly or positively identified and therefore his conviction was not safe in so far as it was influenced by the complainant's evidence of her identification of the appellant.

Closely related to this issue of identification parades is the question of a single identification witness. It is apparent from the record that there was no eyewitness to the alleged assault of the complainant and the only evidence against the appellant was that of the complainant. Since she was a single identification witness, it was incumbent upon the trial court to warn itself of the danger of relying on the evidence of a single identification witness before relying on it to convict the appellant.

In **Wamunga versus Republic (1989) KLR 424** the Court of Appeal spoke of the evidence of identification generally in the following terms:

It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.

On the particular issue of the evidence of a single identification witness, the same court acknowledged in O**geto versus Republic (2004) KLR 19** that a fact can be proved by a single identification witness except that such evidence must be admitted with care where circumstances of identification are found to be difficult; it noted as follows:-

It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken.

The Court of Appeal for East Africa discussed the danger of relying on such evidence without warning in **Roria versus Republic (1967) EA 583 at page 584**. It stated:

A conviction resting entirely on identity invariably causes a degree of uneasiness…

That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification.

The court also cited its own decision in **Abdala bin Wendo & Another versus Republic (1953), 20 EACA 166** where it held:

Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest

care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.

The need for the trial court to warn itself of the dangers of relying on the evidence of visual identification by a single witness is an issue that was taken up in the Court of Appeal in **Kisumu Criminal Appeal No. 20 of 1989, Cleophas Otieno Wamunga versus Republic** where it noted that 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 minimise this danger. The court proceeded to state further that 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 alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant based on the evidence of the identification.

Again, in **Criminal Appeal No. 24 of 2000 Paul Etole& Reuben Ombima versus Republic**, the Court of Appeal reiterated the need for caution. It stated as follows;

The appeal of the 2nd appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriage of justice. But such a miscarriage of justice occurring can be much reduced if whenever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than the identification of a stranger; but even when witness is purporting to recognise someone who he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.

All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused's case the danger of mistaken identification is lessened, but the poorer the quality the greater the danger. In the present case, neither of the two courts below demonstrated any caution. This is a serious non-direction on their part. Nor did they examine the circumstances in which the identification was made. There was no enquiry as to the nature of the alleged moonlight or its brightness or whether it was a full moon or not or its intensity. It was essential that there should have been an enquiry as to the nature of the light available which assisted the witnesses in making recognition. What sort of light, its size and its position the vis-à-vis the accused would be relevant.

The Court here is candid that failure by the trial court to caution itself against the danger of relying on the evidence of a single identification witness is a serious non-direction on its part. Coming back to the appellant's trial, it is apparent that apart from the omission to warn itself, there was also a specific weakness in the evidence of identification in the sense that while the complainant and her mother testified that the appellant was picked out from an identification parade, there is absolutely no proof that such a parade was ever conducted.

Turning to the question of the fairness of the trial against the appellant, it is evident that the trial court misdirected itself on one but crucial aspect of the appellant's trial. It is clear from the record that the trial court itself acknowledged that the appellant suffered some medical handicap and for that reason directed that the appellant be examined and treated accordingly. An order to this effect dated 30th May, 2016 was duly extracted and is on record. A medical report subsequently prepared pursuant to this order was submitted to court and it is apparent that the prosecutor made reference to it when he admitted that the trial could not proceed if the appellant did not have hearing aids.

I have had the opportunity to peruse the medical report itself; it was dated 7th June, 2016 and was addressed to the trial court by Dr Mwenda Richu, who is described in the report as a consultant psychiatric at the Nyeri Provincial General Hospital. The report says that upon examination of the appellant, it was established that he has a hearing impairment, a condition that is described as a 'bilateral hearing loss'. It is explained in the report that the assessment was 'done without hearing aids and that the psychiatrist had to communicate loudly and by writing down questions'. The doctor recommended that the appellant needed a hearing aid.

With these findings, I understand the doctor's report to say that due to the hearing impairment and without the hearing aid, the appellant could not possibly follow the proceedings. And if that be the case, the appellant cannot be said to have enjoyed to the fullest extent possible the rights to a fair trial as enshrined in **Article 50** of the Constitution. I need not belabour the point on the wide range of rights to which the appellant is entitled under this particular Article and which he was certainly deprived of if the doctor's report is anything to go by.

For these reasons, I am satisfied that the appellant's appeal is merited and I hereby allow it. His conviction is quashed and sentence set aside. He shall be set at liberty forthwith unless he is lawfully held.

Dated, signed and delivered in open court this 6th April, 2018

Ngaah Jairus

JUDGE