REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NUMBER 198 OF 2014

(From original conviction and sentence in Mombasa Chief Magistrate's

Court Criminal Case No. 868 of 2012, **R. Odenyo** SPM)

DAVID MASILA GITHUMU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Introduction

1. The appellant herein, **David Masila Githumu**, was charged in the Mombasa Chief Magistrate's Court Criminal Case No. 868 of 2012 with 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 this charge were that on 12th day of May, 2012 at about 12.00 noon at [particulars withheld] Village Bamburi Location in Kisauni District within Coast Province, the appellant intentionally caused his penis to penetrate the vagina of MS, a girl aged 6 years.

2. After hearing, the Learned Trial Magistrate found the appellant guilty of the offence of defilement, convicted him accordingly and sentenced him to life imprisonment.

3. Being dissatisfied with the conviction and sentence the appellant appeals based on the following grounds that:

> **1. That the Learned Trial Magistrate erred in law and in fact by convicting and sentencing him to life imprisonment without considering that the identification evidence alleged to have been done by the complainant to the appellant herein was not free from the possibility of error hence unreliable.**
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> **2. That the Learned Trial Magistrate erred in law and in fact by convicting and sentencing him to life imprisonment without considering that the offence of defilement was not proved beyond any reasonable doubt.**
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> **3. That the Learned Trial Magistrate erred in law and in fact in convicting him without seeing that the members of the public who purported to have arrested him never testified to clear the doubt about his arrest.**
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> **4. That the Learned Trial Magistrate erred in law and in fact by convicting and sentencing him without considering that the prosecution case was governed by mass contradictions.**
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> **5. That the Learned Trial Magistrate erred in law and in fact by convicting and sentencing him without considering that the owner of the house was nor called to testify and prove that indeed he was his employee and was living in the said house.**
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> **6. That the Learned Trial Magistrate erred in law and in fact by not finding that the mentioned children alleged to be together with the complainant in the appellant's house were never summoned to support this allegation thus hearsay evidence.**

4. At the hearing of the case the prosecution called four witnesses.

5. PW1, **S h S**, was the complainant's father. According to him, the complainant was at the time of his testimony aged 7 years old and was in

standard 1.It was his evidence that on 12th March, 2012 at about 7 am, he left home to go for work after taking the complainant to school. Upon his return at about noon he found the complainant at home with Kshs 10.00. This, according to him, was the third time the complainant was coming home with a similar amount and on two previous occasions the complainant had alleged that she had picked the money on the way. Being suspicious PW1, tricked the complainant that he would give her money if she disclosed who had given her the money. The complainant then offered to take PW1 to the person who had given her the money and took him to a house which was under construction though at an advanced stage of completion and they went upstairs at where the complainant pointed out a room that had household items as the door was not closed. PW1 then entered and upon looking for the details of the owner found a number which he called pretending to be looking for a house to rent.

6. After one hour of waiting the appellant appeared, apparently tipsy and the complainant pointed at him as the person who had given her the money all those times. Upon asking the complainant why she was being given the money, the complainant explained that the appellant was touching her private parts with his penis after which he would give her the money. PW1 then requested the appellant that they go to the village elder but though the appellant resisted, PW1 with the help of some members of the public compelled him to go to Kiembeni Police Station. He later took the complainant to Coast General Hospital where she was examined and both the P3 Form and PRC form filled. The complainant's age was also assessed.

7. According to PW1, he had not known the appellant but started seeing him about one month before the incident at the said construction where he learnt that the appellant was employed as a caretaker.

8. In cross-examination PW1 stated that the complainant used to leave school at 11.5 am and that the construction was between his house and the school though there were other buildings surrounding where the construction was though that was the only high building there. It was however his evidence that the complainant never said that he met the appellant along but that the appellant would call her as she was passing from the school. He however stated that since he was neither aware of nor suspected what had happened he did not examine the complainant and that the fact of defilement was disclosed to him by the doctor. While he could nolonger recall the appellant's telephone number, he stated that he also saw the appellant's ID Car bearing the name **David Musila**.

9. PW1 disclosed that along the way to the police station the appellant attempted to escape but was restrained by him with assistance of the members of the public.

10. After *voir dire*, the complainant was affirmed and testified as PW2. According to her on the date in question she went to school in the morning as her father had left home earlier. On her way back from school the appellant called her by her name to the storeyed house where he was and gave her Kshs 10/- after which she went home. The second time, the appellant once more called her to the house and when she went in, the appellant after making her to lie down and removing her inner wear as well as his own clothes, came on top of her, removed his organ for urinating and inserted it in her organ for urinating at which point she felt pain. The appellant would then give her Kshs 10.00 and tell her not to tell her father or anyone else.

11. However her father came to know and asked her to disclose to him the person who was giving her the money upon discovering that her story that she was picking the money was not true. She then took PW1 to the house where the appellant used to call her to do bad things to her and though the appellant was not in, PW1 looked for the appellant's telephone number and called the appellant. After the appellant came, the complainant identified him to PW1 who took the appellant to the police. On the way the appellant attempted to escape but PW1 struggled with him after which members of the public assisted PW1 and the appellant was taken to the police.

12. The complainant insisted that it was the appellant who did the act to her and that she was not confusing the appellant with other person.

13. In cross-examination the complainant stated that she was alone when the appellant called her from inside the house. She denied that they met on the way. However on the first day, the complainant was with three other children when they went to the said house. The complainant however stated that she walked without any help upon leaving the appellant's house and described the house as a house with a perimeter wall with a gate with other houses nearby. According to her, she did not scream. On the day they went with PW1, the gate as well as the house were open. She however stated that though one of the children she was with on the first day was her friend on the day of the incident, she was not present and the complainant went to the room aloe.

14. PW3 was **Dr Lawrence Ngone** who was working at Coast General Hospital. He disclosed that he had worked with **Dr Wahome**, who filled in the P3 form for seven year and knew his handwriting and signature. However, **Dr Wahome** had since retired from the government service and his whereabouts were unknown.

15. According to the P3 form, on examination, it was found that the complainant's hymen had been perforated and she had increased blood flow within the hymenal area and external vaginal opening a sign of recent trauma. The doctor therefore formed an opinion that the complainant had been defiled. The P3 form and the PRC were produced as exhibits.

16. In cross-examination by the appellant, PW3 stated that no spermatozoa was seen in the complainant's private parts and she had no venereal illness. The witness however did not know of the appellant's HIV status.

17. PW4, **PC James Wanyoike**, was on 13th March, 2012 at Kiembeni Police Station when he got a report from the complainant and PW1, the father that the complainant, who was 6 years old had been defiled the previous day by a person whom she knew by appearance. According to him, he noticed that the complainant was walking with difficulty. He then escorted the complainant to Coast General Hospital. He later issued her with a P3 form which was filled in confirming that she had been defiled. This information, according to him was also confirmed in the PRC Form.

18. It was his evidence that the previous day, PW1 had reported the incident to the members of the Community Policing who went and arrested the appellant and took him to Bamburi Police Station. PW4 then accompanied the complainant to Bamburi Police Station where the

complainant positively identified him as the assailant and also led PW4 to the house where she had been defiled. She showed him a room in the said house which was under construction that had a mattress on the floor as the place where she was defiled.

19. In cross-examination PW4 stated that none of the neighbours offered to be witnesses to the case. Neither did he treat the mother as a witness.

20. At the close of the prosecution case, the appellant was placed on his defence and he chose to give unsworn statement. According to the appellant, he was a mason and on 7th March, 202 at about 9am, PW1 went where he was working and asked for employment but since there was no vacancy as they were not employing people in the middle of the week, PW1 was unhappy and accused the appellant of selfishness and nepotism. PW1 thereafter threatened the appellant.

21. On 12th March, 2012, the appellant reported to work as usual and at about 3pm PW1 went with some 2 men and informed the appellant that he was required at the police station and on asking why, the men informed him that he would know upon reaching the police station. On arrival at the police station, the appellant was placed in police cells and after 3 days was arraigned in court.

22. In his judgement, the Learned Trial Magistrate identified only two issues for determination and these were whether the complainant was defiled and by whom. With due respect in offences of defilement of a child, these are not the only issues for determination. It is also necessary for the trial court to make a finding on the age of the complainant. In the case of **Kaingu Elias Kasomo vs. Republic Criminal Appeal No. 504 of 2010** the Court of Appeal appreciated that:

> **"Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."**

23. The Court quoted with approval its own decision in **Alfayo Gombe Okello vs. Republic (2010) eKLR** where again it commented on the age of the victim of a sexual assault; in that case it said:-

> **"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)…In this case, the age of the child was never medically assessed or proved through any documentation. The nearest the evidence came to proving the age was the statement by her mother M A when she testified on 16th October, 2007 that… "This child in court is mine aged 14 years born in 1992…The other piece of evidence on age was an estimate made in the P3 form dated 20th August, 2007 that she was 15 years old. We must therefore take the construction which is favourable to the appellant. In our view, there is a reasonable doubt over the actual age of the child was at the time of commission of the offence. The onus was on the prosecution to clear such doubts, failure to which the benefit would go to the appellant. We so find."**

24. The court concluded that *"prove 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***.**

25. I have considered the material placed before the Court. This being a first appeal, this Court is, as a matter of law, enjoined to analyse and re-evaluate afresh all the evidence adduced before the lower court and to draw own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** and **Kiilu & Another vs. Republic [2005]1 KLR 174.**

26. It has been held that in a first appeal the appellant is entitled to expect this Court to subject the evidence on record as a whole to an exhaustive re-examination and to this Court's decision on the evidence having given allowance to the fact that this court did not see the demeanour of witnesses. Further even where the appeal turns on a question of fact, the Court has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the trial Court with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it. See **Pandya vs. R [1957] EA. 336** and **Coghlan vs. Cumberland (3) [1898] 1 Ch. 704**.

27. However, it must be stated that there is no set format to which a re-evaluation of evidence by the first appellate court should conform. I adopt what was stated by the Supreme Court of Uganda in the case of **Uganda Breweries Ltd v. Uganda Railways Corporation [2002] 2 EA 634**, thus:

> **"The extent and manner in which evaluation may be done depends on the circumstances of each case and the style used by the first Appellate Court. In this regard, I shall refer to what this court said in two cases. In Sembuya v Alports Services Uganda Limited [1999] LLR 109 (SCU), Tsekooko JSC said at 11:**
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> > **'I would accept Mr. Byenkya's submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first Appellate court is expected to scrutinise and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial).'"**

28. In **Odongo and Another vs. Bonge Supreme Court Uganda Civil Appeal 10 of 1987 (UR), Odoki, JSC** (as he then was) said:

> **"While the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance."**

29. Therefore whereas I find that there was a misdirection by the Learned Trial Magistrate as regards the ingredients of the offence of defilement, that misdirection is not fatal to the conviction of the appellant since this Court is, itself, duty bound to re-evaluate the evidence placed before the Learned Trial Magistrate with a view to determining whether the said ingredient were proved.

30. The Learned Trial Magistrate however found that based on both oral and documentary evidence there was evidence of penetration. As regards the identification of the appellant, the Court found that the evidence adduced pointed to the appellant and no other person as the perpetrator.

31. It was submitted that though the prosecution was required to prove the three elements of age, penetration and identity of the accused, the only thing the prosecution attempted to prove was the age.

32. It was contended that the identification of the appellant was not free from possibilities of error since the complainant did not describe the appellant before the appellant arrived and pointed him out. However, in this case, the complainant's case was that she had on two previous occasions been called to the house by the appellant. This evidence was not challenged by the appellant. Accordingly I do not agree that there was a possibility of error in identification.

33. It was also contended that both the children who accompanied the complainant to the appellant's house and the owner of the house were never called as witnesses. On the failure to call some witnesses, I can do no more than reiterate what the Court of Appeal stated in **Benjamin Mbugua Gitau vs. Republic [2011] eKLR** that:

> **"It would have been clinical to call the two boys who first made the arrests to give evidence, but the two courts below accepted the evidence of PW2 and PW5 who also arrived at the scene and found the appellant and the complainant in a distressed state and reported immediately what had befallen her. This Court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – see *section 143* Evidence Act. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys."**

34. In **Mwangi vs. R, [1984] KLR 595** the Court of Appeal held that:

> **"Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive."**

35. In this case the evidence was that the complainant's companions were not present on the day of the defilement. Similarly, there was no evidence that the owner of the house would have thrown more light on the case. PW1's evidence was that he got the particulars of the appellant from the appellant's properties and that he called the appellant using the number he obtained therefrom. As regards the evidence of the mother, there is no evidence showing the role if any the mother played in the matter in order to make her a witness whose omission would draw adverse inference.

36. It was further submitted that penetration was not proved to the required standards in light of the contradictions in the prosecution evidence. According to the P3 form, upon examination of the complainant there was clear discharge, healed perforated hymen. The approximate age of the injuries was however indeterminate. However, PW3 who gave evidence on behalf of **Dr Wahome**, testified that not only was the complainant's hymen perforated but that she had increased blood flow within the hymenal area and external vaginal opening a sign of recent trauma. It is the last part that the appellant took issue with as there was no such evidence in the P3 form. The appellant also took issue with the fact that the complainant who was aged 6 years could walk after defilement. In this respect he relied on **Jon Cardon Wagner vs. Republic & 2 Others [2011] eKLR** where it was held that:

> **In this case PW1 Dr. Muhombe informed court that it would be surprising that the girls went shopping in Gikomba after the incident. That must have been a traumatic experience, emotionally and physically. The evidence on record is that the victims walked across town for 14 kilometres and the trial court did not factor the views expressed by the doctor in assessing or determining whether the complainants were truthful witnesses.**

37. The question that arises in this case is whether a child of 6 years who has just been defiled can comfortably walk home without any signs of such traumatic experience. PW1's evidence was that had the doctor not informed him that the complainant had been defiled he had no reason to suspect the same. In other words he did not notice any unusual behaviour in the complainant.

38. This therefore brings into question the issue whether the complainant was in fact defiled on the date which it is alleged that the defilement took place. This issue must be taken together with the medical evidence that the age of the defilement was indeterminate and that on examination it was found that she had a healed perforated hymen. PW3's oral evidence of recent trauma was however unsupported by the contents of the P3 form.

39. In my view the evidence relating to the penetration of the complainant on the day in question cannot be free from doubt.

40. It was the appellant's case that the arresting officers were not called to testify. While that is true, it is not in contention that the appellant was arrested and he admitted this in his evidence. In **Kiriungi vs. Rep (2009) KLR 638**, the court said:-

> **"...the effect of failure to call police officers involved in a criminal trial, including the investigating officer, is not fatal to the prosecution unless the circumstances of each particular case so demonstrate. We have examined the circumstances of this case and we are satisfied that the evidence of the investigating officer and the arresting officer would not have been prejudicial to the prosecution case as it was established beyond doubt that the appellant was involved in the crime with**

which he was charged."

41. In my view nothing turns on the failure to call the arresting officer and that ground fails.

42. With respect to the status of the complainant, there was no empirical evidence that where an HIV positive person has sex with HIV negative person, the latter must of necessity contract the disease. In any case the issue of the status of the appellant was not raised in his defence but only in mitigation.

43. Having considered the evidence presented before the trial court it is my view that the appellant was improperly convicted on the offence of defilement. However, the evidence of the complainant that the appellant had contact with the complainant's genital organs was not seriously contested by the appellant in his evidence. 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. From the evidence adduced it is my view that the evidence disclosed the commission of the offence of indecent act. Though that was not the offence with which the appellant was charged, it is my view that indecent act is a cognate offence to the offence of defilement. Section 179 of the ***Criminal Procedure Code*** provides that:

> ***(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.***
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> ***(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.***

44. As regards the power of the Court to convict the appellant of the cognate offence without affording the appellant an opportunity to address the issue, the Court of Appeal in **Robert Mutungi Muumbi vs. Republic [2015] eKLR** expressed itself as hereunder:

> **"The third issue in this appeal relates to appellant's alleged lack of opportunity to plead before he was convicted of the offence of indecent act with a child. If we understood the appellant right, his contention is that he should not have been convicted of the offence of indecent act with a child, which he was not charged with, before he was afforded an opportunity to plead to that offence. Mr. Monda's response was that the appellant could be properly convicted under section 179 of the Criminal Procedure Code without having to plead to the offence, so long as it was a minor and cognate offence to that charged…As is apparently clear, section 179 of the Criminal Procedure Code empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The court contemplated by section 179 can be either the trial court or the appellate court. The real question here is not whether the appellant was charged with indecent assault of NK for which the High Court convicted him. That was not necessary under section 179. The question is whether the special circumstances contemplated by section 179 were in existence to enable the court convict the appellant of an offence with which he was not charged. An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted. (See *ROBERT NDECHO & ANOTHER V. REX (1950-51) EA 171* and *WACHIRA S/O NJENGA V. REGINA (1954) EA 398*). *Spry, J*. explained the essence of the first consideration as follows in *ALI MOHAMMED HASSANI MPANDA V. REPUBLIC [1963] EA 294,* while construing the provision of the Tanzania Criminal Procedure Code equivalent to section 179 of the Kenya Criminal Procedure Code:**
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> > **"*Subsection (1) envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence (proved) and may then, in its discretion, convict of that offence."***
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> **That conclusion is reached at the stage of judgment when it is not practical to require the accused person to plead afresh to the minor offence. It is a decision premised on the discretion of the court based on the evidence adduced at the end of the trial."** [Underlining mine].

45. The Court proceeded:

> **"The second consideration arises, of necessity, precisely because the accused person is not charged with, and has not pleaded to, the minor cognate offence. The purpose of delving into this consideration is to satisfy the court that the accused person was not prejudiced, and that by being charged with the major offence, he had sufficient notice of all the elements that constitute the minor offence. (See *REPUBLIC V. CHEYA & ANOTHER [1973] EA 500).* In this case we are satisfied that committing an indecent act with a child is a minor and cognate offence of defilement with which the appellant was charged. The elements of the offence of committing an indecent act with a child are ingrained or subsumed in the elements of the offence of defilement. The former attracts a comparatively lesser sentence than the latter. Accordingly, we find that the appellant was properly convicted of indecent act with a child under section 179 of the Criminal Procedure Code even though he was not charged with that offence and had not pleaded to it. The requirements of section 179 were satisfied."**

46. 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.***

47. While I harbour reservations about the lawfulness of mandatory minimum sentences under the current constitutional dispensation, in his case, the appellant took advantage of the tender age of the complainant for his own selfish satisfaction.

48. In the premises I allow the appeal in so far as the conviction and sentence imposed on the appellant in respect of the offence of defilement is concerned, substitute therefor a conviction of the offence of indecent act and sentence the appellant to serve 10 years imprisonment to run from the date of is incarceration.

49. Right of appeal 14 days.

Judgement read, signed and delivered in open court at Mombasa this 6th day of September, 2018.

G V ODUNGA

JUDGE

In the presence of:

The Appellant in person

Ms Ogweno for the Respondent

CA Gladys