REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIM. APPEAL NO. 22 OF 2016

REPUBLIC……..... PROSECUTOR

VERSUS

FRANCIS MUNIU KARIUKI…….....APPELLANT

(Being an appeal from the conviction and sentence by Hon. M. W. Mutuku Ag Senior Principal Magistrate Thika PMCC 22 of 2016)

JUDGMENT

A. INTRODUCTION

1. Francis Muniu Kariuki ("Appellant") was presented before the Chief Magistrate's Court in Thika in Criminal Case NO. 5179 of 2011 charged with a single count of defiling JWM, a child of nine years contrary to section 8(1) and (2) of the Sexual Offences Act No. 3 of 2006. The allegations were that he had defiled the minor on 11/10/2011 at [particulars withheld] in Murang'a County by causing his penis to penetrate the vagina of JWM.

2. In the alternative, the Appellant faced a charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars are that on 11/10/2011 at [particulars withheld] in Murang'a County, he intentionally touched the vagina of JWM, a child aged nine (9) years with his penis.

3. The trial dragged on for more than 2 years and after all the witnesses had testified the Learned Trial Magistrate found that the Prosecution had proved the main charge beyond reasonable doubt and sentenced the Appellant to life imprisonment. The Appellant is aggrieved and has appealed to this Court.

4. I will, first, set out the standard of review and briefly rehash the facts of the case as it emerged from the lower court.

B. THE DUTY OF THE FIRST APPELLATE COURT

5. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. In doing so, I am to be guided by two principles. First, I must recall that I must make appropriate allowance for the fact that I did not have a chance to see or hear the witnesses. This means that I must give due deference to the findings of the Trial Court on certain aspects of the case. Second, in re-evaluating and re-considering all the evidence, I must consider the evidence on any issue in its totality and not any piece in isolation. This principle constrains me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings as a foil to endorse or reject its

findings. See ***Okeno v Republic*** **[1973] E.A. 32**; ***Pandya vs. R*** (1957) EA 336, ***Ruwala vs. R*** (1957) EA 570.

C. <u>THE EVIDENCE PRESENTED IN THE TRIAL COURT</u>

6. The evidence that emerged in the Trial Court was as follows. In the morning of 10/11/2011, JWM was sent by her mother to go to work in the shamba. That shamba was close to her grandmother's house. On her way there, JWM met the Appellant who was well known to her being a neighbour of the grandmother. The Appellant allegedly offered her tea. Upon accepting the invitation for tea, JWM allegedly accompanied the Appellant to their home. At that home, JWM was offered the tea – and found the Appellant's siblings – apparently her age-mates – and they go on playing apparently having forgotten her mission to go to the *shamba*. The play continued into the evening when the Appellant's mother came and sent JWM to the Appellant's house within the compound to go fetch a matchbox for her.

7. It would appear that was apparently a ruse – since the Appellant followed JWM into the house and prevented her from leaving. Eventually, the Appellant's mother came by bringing them two plates of dinner in an apparent confirmation that she was in on the plan. JWM testified that she wanted to go home but she was scared and frightened – and the Appellant's mother locked the house from the outside after brining the dinner.

8. In the course of the night, the Appellant removed her clothes and had both vaginal and anal sex with her. In the morning she was permitted to go home. Upon being questioned by her mother where she had been, she reported to her mother her ordeal. Her mother, then, decided to go report to the Police.

9. The mother, B W, testified as PW2. She picked up the story from the morning when JWM came home and reported that she had been defiled overnight by the Appellant. She apparently reported the matter to the Police and they were referred to hospital.

10. It is not clear to which Police Station the matter was reported. It would appear the first report was made to an Administration Police Camp. Sgt Eliud Songol of Makuyu Police Station apparently received a call from APC Kennedy Otieno on 13/11/2011 at 7:30am about a report by a lady (who turned out to be B W) who had reported that her daughter (who turned out to be JWM) had been defiled. Apparently, Sgt. Songol advised Beth and JWM to report the matter to Kabati Police Station and then go to the hospital. He also asked APC Otieno to issue summons for the Appellant who had been mentioned as the assailant. APC Otieno did this and Sgt Songol arrested the Appellant and escorted him to Kabati Police Station.

11. At Kabati Police Station, both parties – the mother-daughter duo and the Appellant – found PC Hassan Aden. PC Aden placed the Appellant in the Police cells and escorted JWM and her mother to the hospital for examination and treatment

12. The only other Prosecution evidence on record is that of Dr. Muyendo of Thika Level 5 Hospital. She testified as PW4 to produce the P3 Form and Treatment notes on behalf of Dr. Mwashua. She testified that she was familiar with Dr. Mwashua's handwriting and signature. She gave her testimony from the Treatment Notes and the P3 form filled by Dr. Mwachua since she did not examine or treat JWM. Her most pertinent oral testimony was thus:

> "The general body systems were normal. On the genitalia, she had tears on the vagina membrane. On HVS, she had pus cells, and evidence of sexually transmitted disease."

13. Placed on his defence, the Appellant delivered a simple denial in an unsworn statement: On the day he was arrested, he was summoned to Kabati Police Station and made to wait at the report office. The Complainant was then called from school and he was accused of defiling her. He denied and continues to deny that he ever defiled her. The Appellant did not call any witnesses.

14. The Learned Trial Magistrate was persuaded that the Prosecution evidence supported the defilement charges and that these were proved beyond reasonable doubt. She rejected the Defence, describing it as a

"mere denial" and found the Appellant guilty of the offence of defilement.

D. APPELLANT'S GROUNDS OF APPEAL

15. In well written "Amended Grounds of Appeal", theAppellant raised four grounds to attack the conviction and sentence:

a. First, he argued that the trial was conducted in violation of his fundamental constitutional rights to fair trial, and in particular Article 50(2)(c) and (j) of the Constitution since, he maintains, he was not availed copies of witness statements.

b. Second, the Appellant argues that the Learned Trial Magistrate was in error in admitting the evidence of the doctor who testified as PW4 since that was in contravention of section 50 as read together with section 33 of the Evidence Act.

c. Third, the Appellant is of the opinion that the evidence against him – and, in particular, the medical evidence – was insufficient to sustain a conviction.

d. Fourth, the Appellant argues that the age of the Complainant was not proved and hence, the Appellant argues, a necessary ingredient of the offence of defilement was not proved.

e. Fifth, the Appellant argues that the Learned Trial Magistrate erred in law and fact by not finding the entire Prosecution evidence as being tainted by material contradictions making it unsafe to sustain a conviction.

16. I will now analyse the evidence in light of the major complaints raised by the Appellants.

E. WERE THE FAIR TRIAL RIGHTS OF THE APPELLANT VIOLATED BY NOT PROVIDING HIM WITH WITNESS STATEMENTS?

17. The Appellant alleges that he was not provided with witness statements and that this was a violation of his fair trial rights. Both parties agree if true such a violation would vitiate the guilty verdict.

18. Our case law has now established without a doubt that it is the Prosecution's duty to provide the witness statements to an Accused Person and the Trial Court's duty to ensure compliance with the constitutional requirement. Article 50(2)(c) and (j) are quite clear and the Courts have said as much: the right to adequate time and facilities for the preparation of one's defence includes the right to receive beforehand the evidence that the Prosecution intends to adduce against the Accused. At a minimum, this right includes the right to receive a copy of the charge sheet, witness' statements and copies of any documents which will be relied on at the trial. The cited case, ***Simon Githaka Malombe v R [2015] eKLR (Court of Appeal Crim. App No. 314 of 2010 at Nyeri***), clearly enunciates this principle.

19. Here, the Appellant requested for copies of the witness statements on six occasions: 28/10/2011; 25/11/2011; 30/11/2011; 12/03/2011; 12/03/2012; 25/04/2012 and 08/05/2012. In each of these occasions, the Learned Trial Magistrate ordered that the witness statements should be supplied to the Appellant.

20. The Appellant says that the witness statements were never supplied to him. He says that he simply got tired of asking for them given the delay it was having on his case since he was in pre-trial detention all this time. He, therefore, he now says, chose to forego the statements and proceed with trial. As a result, he says he was prejudiced because he could not adequately prepare for the defence.

21. Mr. Kinyanjui, the Prosecuting Counsel who appeared for the State in this appeal, opposed this ground of appeal on the basis that the Appellant was granted the order to receive the witness statements but he did not follow it up. He also did not raise the issue at all during his trial including during his defence. Mr. Kinyanjui is of the view that it is likely that he must have received the witness statements

and now raises the issue as a fabrication to avoid the conviction.

22. The Trial Court did not record anywhere whether the Appellant had received the witness statements. It is salutary practice for the Court to do so when it has given orders. Indeed, it is salutary practice for the Trial Court to satisfy itself that an Accused Person has all the reasonable facilities for his defence and all the prosecution disclosure documents before commencement of trial.

23. However, an Accused Person has an obligation to bring it to the attention of the Court that he has not been supplied with the witness statements (or any other prosecution documents) as ordered by the Court. This minimum obligation on the Accused Person triggers the Court's duty to ensure the documents are supplied before commencement of the trial. It would appear that here the Appellant simply decided not to raise the issue again. This raises the spectre that it is possible that he received the documents as Mr. Kinyanjui claims. The Appellant appears to have participated in the trial by vigorously cross-examining the witnesses which – in opposition to the case in the ***Simon Githaka Malombe Case***– might indicate that he, indeed, adequately knew the case against him. Indeed, as I will point out below, his cross-examination appears to have been quite on point.

24. It is therefore my finding that the fair trial rights of the Appellant were not violated in this case: he either received the witness statements or failed to fulfill his minimal obligation to inform the Court that he did not have the statements.

F. <u>WAS</u> <u>THE EVIDENCE OF DR. MUYENDO PROPERLY RECEIVED?</u>

25. The next salvo that the Appellant unleashes regards the admissibility of the medical evidence received in the case. It is common point that the Complainant was examined and treated by Dr. Mwashua (the name recorded in the proceedings is "Dr. Mwachua" but the name in the P3 form appears to be "Dr. Mwashua". In this decision, I will use Dr. "Mwashua" which is the common spelling of the name.) It was Dr. Mwashua who authored the Treatment Notes and filled the P3 form. However, Dr. Mwashua was not available to testify. The Prosecution, therefore, called her colleague, Dr. Muyendo to testify on her behalf and to produce the two documents.

26. It would appear that at the time of the trial the Appellant did not raise any objection. On appeal, however, the Appellant argues that the evidence of Dr. Muyendo should never have been received. The Appellant makes two arguments in this regard.

27. First, the Appellant bases his argument on section 50 of the Evidence Act. That section provides as follows:

1. When the court has to form an opinion as to the person by whom any document was written or signed, *the opinion of any person acquainted with the handwriting of the person* by whom it is supposed to be written or signed that it was or was not written or signed by that person, is admissible.

2. For the purposes of subsection (1) of this section, and without prejudice to any other means of determining the question, a person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when in the ordinary course of business documents purporting to be written by that person have been habitually submitted to him.

28. The Appellant complains that while Dr. Muyendo said that she was familiar with the handwriting of Dr. Mwashua,

> "no clarification was made as to why the court should believe that [she] was conversant with the former doctor's handwriting. It was not proved that Dr. Munyendo had worked long enough [with Dr. Mwashua] to act on his behalf."

29. Hence, the Appellant argues that it was not enough for the doctor to say that the other doctor was her colleague and she was conversant with her handwriting. With due respect, I do not agree with this. Dr. Muyendo laid enough basis for her familiarity with the Dr. Mwashua's handwriting and signature. It was then up to the Appellant in his cross examination (or even before if he doubted the bona fides of Dr. Muyendo) to question her on the issue and urge the Court to reject the evidence. As it is, the Appellant said nothing until the matter came for appeal.

30. Similarly, nothing comes out of the Appellant's complaint that section 33 of the Evidence Act was not adhered to. That section provides:

Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable are themselves admissible –

> (a) ……
>
> (b) When the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty.

31. The Appellant complains that the Prosecution did not prove that Dr. Mwashua was not available or could only be procured with difficulty. This is an objection that the Appellant did not raise during the trial. If he doubted the Prosecution narrative, which is documented in the trial record (necessitating the Court to issue summons to the Officer in charge of the hospital before Dr. Muyendo could come to testify on behalf of Dr. Mwashua), then he should have raised the issue so that the Prosecution could respond. As it is, the issue was simply not preserved for appeal.

G. <u>WAS</u> <u>THE EVIDENCE ADDUCED AT THE TRIAL SUFFICIENT TO CONVICT?</u>

32. I will analyse the last three complaints by the Appellant together as they all relate to the sufficiency of the evidence or its contradictions.

33. It is trite that the Prosecution must prove its case beyond reasonable doubt and every reasonable doubt be resolved in favour of an Accused Person. After reviewing the Court record as I am obligated to do, I am unable to say that the evidence adduced pointed to the Appellant in a way that indubitably dissipated all reasonable doubts. In particular, there are three pieces of evidence that raise some doubts which I will focus on below.

34. First, Dr. Muyendo testified, as reproduced above, that

> "the general body systems were normal. On the genitalia, she had tears on the vagina membrane. On HVS, she had pus cells, and evidence of sexually transmitted disease." The Learned Trial Magistrate accepted this evidence and analysed it thus:

On the issue on the whether (sic) the minor was defiled, the medical report indicates that the vaginal membrane was torn. The hymen was perforated and or HVS (sic) there was pus cells which the doctor stated was a sign of sexually transmitted infection. This leaves no doubt that the minor was defiled.

35. There are several problems with the medical evidence in context. First, it is important to recall that the testifying doctor, Dr. Muyendo, did not examine or treat the Complainant. She was merely referring to the notes and P3 form signed by the treating doctor, Dr. Mwashua. It is instructive that in section "C" of the P3 form which is "to be completed in alleged sexual offences after completion of section "A" and "B"", in the section where the examining doctor is expected to describe in detail the physical state of and any injuries to genitalia with especial reference to labia majora, labia minora, vagina and cervix and conclusion, Dr. Mwashua simply filled out: "Vagina normal. Perforated hymen." In the next question

asking the examining doctor to note presence of discharge, blood or venereal infection from genitalia or body externally, the doctor filled out: “not documented.”

36. It is, therefore, quite interesting that in the very last question in the P3 form which asks for additional remarks the doctor, in a relatively copious manner, offers: “examination of the vaginal area reveals erythematous mucous membrane and whitish discharge.” It is also here that the doctor indicates that pus cells are present. Pus cells, as Dr. Muyendo testified later, are an indication that the person under examination has a venereal disease.

37. It does not help matters much when one realizes that the P3 form has a number of seemingly inconsistent dates. It purports that it was filled by the OCS on 13/10/2011 but that the Complainant was sent to the hospital on 17/10/2011. The P3 Form was signed on 28/10/2011. The treatment notes, on the other hand, indicates that the Complainant was seen on 13/10/2011.

38. There are other discrepancies: The P3 form says that the Complainant was alone (that is, she was not under the escort of everyone) – while the testimony of both PW2 and PW5 says that they accompany her to the doctor. This discrepancy is compounded by the fact that the alleged sexual assault occurred in the night of 10/11/2011 and 11/11/2011 according to the consistent evidence of PW1, PW2, PW3 and PW5. However, it turns out that the Complainant was actually examined on 13/11/2011. Dr. Muyendo did not make matters any better by claiming that the Complainant was examined 6 days after the assault.

39. This discrepancy is crucial: if the Complainant was actually seen on 13/11/2011, how does one explain the loss of one day since the sexual assault? The narrative is that she went home the following morning and immediately told her mother – so it is unlikely that the mother waited until the following day to take action. In any event, her testimony will be inconsistent with that theory. On this last question, a further question is what explains why the Complainant mother had not taken any action if her child aged nine (9) years had gone missing for a whole night. It seems odd that she stayed put until the girl showed up in the morning only for her to demand to know where she was.

40. The discrepancy is crucial in another sense: if the reporting and medical examination took place the very following day after the assault, it is unlikely that the Complainant would already have formed pus cells due to infection with a venereal disease from the sexual assault. It seems impossible that the incubation period for a venereal disease would take less than 24 hours. The more likely possibility is that the Complainant was examined a few days after the alleged assault (Dr. Muyendo says it was 6 days after). The apparent lack of visible injuries to her genitalia could be explained that way. The dates in the P3 form could also be explained this way. However, if that is the case, this throws into a spin the seemingly consistent narrative of the alleged assault and arrest by PW1, PW2, PW3 and PW5. It also introduces the possibility that the defilement was by a person other than the Appellant. In either case, reasonable doubts about the guilt of the Appellant are engendered.

41. Finally, if indeed, the conclusion was that the Complainant had been infected with a venereal disease from the sexual assault, it would have made sense to subject the Appellant to medical examination also. This did not happen in this case. This further impugns the Prosecution narrative and, certainly, reasonable doubts.

42. In my view, therefore, the medical evidence raises reasonable doubts about the guilt of the Appellant in this case. These doubts are intensified by the other contradictions regarding dates, what happened and who took what actions. They are further intensified by the consideration that the only direct evidence of the sexual assault was that of the Complainant who gave an unsworn statement by virtue of the fact that she was unable to understand the nature of the oath. When all this is taken into consideration, the only conclusion is that the conviction is not safe as it cannot be said that all the elements of the crime were proved beyond reasonable doubt. While it appears clear that the Complainant was defiled, the nexus between the offence and the Appellant is unacceptably weak to sustain a conviction in the circumstances.

43. Even though the above analysis disposes off this appeal, there is one last issue raised by the Appellant I should address before concluding even if in an abbreviated fashion. The Appellant took some time to

attack the conviction on the ground that the age of the Complainant was not conclusively proved. He rooted for a categorical judicially created rule that the age of the Complainant in a defilement case must be established by either scientific evidence or documentary evidence such as a birth certificate, birth notification, immunization card and the like. Here, the Appellant complained, the Prosecution sought to prove the age of theComplainant by the mother's word of mouth, which the Appellant felt could not conclusively prove the Complainant's age.

44. I would disagree with the Appellant on this. Like all the other elements of a crime, age can be proved in any way as long as the evidence available is credible. It is also important to note that the crime of defilement is defined in section 8(1) of the Sexual Offences Act: "A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

45. Hence, causing penetration with a child is an offence. Period. To obtain a conviction on a charge of defilement, the Prosecution needs to prove penetration with a child i.e. a person under eighteen years old. As to the exact age, the question is only relevant for purposes of determining sentence under subsequent sub-sections of section 8 of the Sexual Offences Act. The actual age of the child only becomes an issue in determining the exact sentence to be handed down to a convicted sexual assailant.

46. In any event, this does not change the outcome of the appeal as I had pointed out above.

H. CONCLUSION, DISPOSAL AND ORDERS

47. In the end, therefore, this Court, after re-considering and re-evaluating all the evidence and the entire trial court record concludes as follows:

a. For the reasons stated above, the appeal is allowed and the conviction of the Appellant in Thika CM Criminal Case No. 5179 of 2011 is hereby quashed.

b. The sentence imposed by the Trial Court of life imprisonment is hereby set aside.

c. Consequently, the Appellant shall be set free forthwith unless he is otherwise lawfully held in custody.

48. Orders accordingly.

Dated and delivered at Kiambu this20th day of January, 2017.

JOEL NGUGI

JUDGE