REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 32 OF 2016

GUNI MUSUNGU MWANDIA..…... APPELLANT

VERSUS

REPUBLIC…… RESPONDENT

(From original conviction and sentence in Criminal Case Number 678of 2015 in the Senior Principal Magistrate's Court at Voi delivered by Hon E. G. Nderitu(SPM) on 22nd April 2016

JUDGMENT

INTRODUCTION

1. The Appellant herein, Guni Musungu Mwandia, was tried and convicted by E. G. Nderitu, Senior Principal Magistrate for the offence of defilement of a girl contrary to Section 8 (1) as read with Section 8(2)of the Sexual Offences Act No 3 of 2006. He was sentenced to serve twenty (20) years imprisonment. He had also been charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.

2. The particulars of the main charge were that :-

> **"On diverse dates between the month of July 2015 and August 2015 at]particulars withheld] in Voi within Taita Taveta County, unlawfully and intentionally caused your male genital organ (penis) to penetrate the female genital organ (vagina) of JW a child aged 13 years."**

ALTERNATIVE CHARGE

> **"On diverse dates between the month of July 2015 and August 2015 at [particulars withheld]in Voi within Taita Taveta County, unlawfully and intentionally touched the female genital organ (vagina) of JW a child aged 13 years W."**

3. Being dissatisfied with the said judgment, on 29thJuly 2016, the Appellant filed a Notice of Motion application seeking leave to file an appeal out of time. The said application was allowed and the Petition of Appeal was deemed to have been duly filed and served. The Grounds of Appeal were as follows:-

> **1. THAT the honourable resident** (sic) **magistrate erred in law and fact by finding that the prosecution had established the appellants** (sic) **quilt** (sic) **beyond any reasonable doubt to warrant his conviction.**
>
> **1. THT the honourable resident** (sic) **magistrate erred in law and fact by believing the alleged**

medical offence relating to the broken hymen and hence penetration.

3. THAT the honourable resident (sic) **magistrate erred in law and fact by failing to appreciate whether the appellant had been medically examined at the hospital.**

4. On 1st December 2016, this court directed the Appellant to file his Written Submissions. Instead of doing so, on 13th January 2017, he filed Amended Grounds of Appeal and Written Submissions. The said Amended Grounds of Appeal were as follows:-

1. THAT the honourable trial magistrate erred in law and fact by believing the evidence of PW 1 which was unbelievable and unsatisfactory.

2. THAT the honourable trial magistrate erred in law and fact by relying on the medical evidence relating to the missing of hymen and hence penetration.

3. THAT the honourable trial magistrate erred in law and fact by not considering the importance of a (sic) **thorough investigation during conviction.**

4. The honourable trial magistrate erred in law and fact by not considering the appellant's personal and social circumstances.

5. The honourable trial magistrate erred in law and fact by not considering his defence submission.

5. His Further Written Submissions in response to the State's Written Submissions dated 20th February 2017 and filed on 22ndFebruary were filed on 1st March 2017.

6. While hearing the Appeal herein, it came to this court's attention the Appellant filed another Appeal to wit, HCCRA No 14 of 2016 on 8th May 2016. It would not have been necessary to have granted him leave to file the present appeal hereinas the said Appeal within the fourteen (14) days from the date of the decision of the Learned Trial Magistrate. However, at no time did the Appellant make any reference to the aforesaid Appeal. In view of the fact that the Amended Grounds of Appeal and Written Submissions were filed in this file, this court rendered its decision herein.

7. When the matter came up on 1st March 2017, both the Appellant and the State asked the court to rely on their respective Written Submissions in their entirety, which they did not highlight. The Judgment herein was therefore based on the said Written Submissions.

THE APPELLANT'S CASE

8. The Appellant's case was that the genesis of the difference between him and the Complainant herein, JW(hereinafter referred to as "PW 1") was the report he made to her teacher that she had received a letter from her boyfriend. He contended that she was not happy with him having been her guardian in the absence of her parents.

9. He pointed out that the Prosecution failed to demonstrate how far apart the houses in the compound were or how the human traffic was so as to support its assertion that no one would have heard or seen him defile PW 1. In particular, he questioned why his wife and his two (2) children who stayed with him and PW 1 in the same house belonging to her grandfather did not hear or see the said alleged defilement.

10. In fact questioned how PW 1 would have gone to her uncle's uninhabited house from 6.00pm – 10.00 pm without his wife worrying about his disappearance. He argued that PW 1 had all the opportunity to tell his wife what he was doing but she did not do so.

11. He also wondered why the Chair of "Sauti Ya Wanawake" and PW 1's auntie, were not called as a

witness in this case yet V L W (hereinafter referred to as "PW 3") testified that when PW 1 went to her house at around 8.00pm having escaped from him after he attempted to rape her, she reported the incident to the said Chair and also called PW 1's auntie to inform her what had happened.It was also his contention that PW 1's uncle ought to have been called as a witness as he was the one who was said to have called FW, PW 1's mother, (hereinafter referred to as "PW 4")rendering her evidence, heresay evidence.

12. He further contended that the evidence of Dr Stephen Katana (hereinafter referred to as "PW 5") who tendered in evidence the P3 Form was not conclusive to demonstrate that he was responsible for PW 1's missing hymen. He said that it was doubtful if the rape as had been alleged by PW 1 did really happen as PW 5 saw her on 21st August 2016 which was five (5) days after the alleged defilement.It was also his averment that it was not possible for specimen to have been found in PW 1's vagina after fourteen (14) days from the date of the alleged defilement

13. He added that the weapon that was used during the offence was not shown and that in the absence of clothing which could have proven that the rape occurred and scratches PW 1 told PW 3 had been caused by thorns as she was running away from him, the offence of defilement could not be said to have been proven.

14. It was therefore his contention that the State had failed to prove its case beyond reasonable doubt and urged this court to allow his Appeal as prayed.

THE STATE'S CASE

15. On its part, the State pointed out that although the Learned Trial Magistrate did not conduct a proper *voire dire* examination as required under Section 19 of the Oaths and Statutory Declarations Act Cap 15 (Laws of Kenya), the Appellant did not suffer any prejudice as he was given an opportunity to Cross-examine PW 1. Although it referred this court to **Criminal Appeal No 68 of 2015 Maripett Loonkomok vs Republic**(KLR citation not given) to buttress its argument, it did not expound what its argument was.

16. It submitted that although there was no eye witness to PW 1's defilement by the Appellant herein, the Trial Court could believe her evidence as a single witness as stipulated in the proviso to Section 124 of the Evidence Act Cap (80) Laws of Kenya) and that in any event, in the case herein, there was sufficient evidence to point to the Appellant as the perpetrator of the offence that PW 1 complained about.

17. It set out the evidence of all the Prosecution witnesses to demonstrate that their evidence was cogent and consistent and argued that PW 4 did show that PW 1 was staying with her aged grandfather who was seriously ill and she could not turn to anyone for help.

18. It was its further argument PW 3's evidence and that of PW 5 corroborated PW 1's evidence regarding her broken hymen. It submitted that PW 5 saw PW 1 five (5) days after the alleged defilement and consequently, bruises and lacerations to her private parts would not have been visible as they most probably would have healed by that time.

19. It pointed out that a Birth Certificate that was tendered in evidence by PW 4 showed that PW 1 was aged thirteen (13) years at the time of the defilement and consequently, the sentence of twenty (20) years the Learned Trial Magistrate meted upon the Appellant herein was legal and proper and urged this court to dismiss his Appeal.

LEGAL ANALYSIS

20. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

> "**On a first appeal, the court is mandated to look at the evidence adduced before the trial**

afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".

21. It appeared to this court that the only issue that was placed before this court was whether or not the Prosecution had proved its case beyond reasonable doubt. It therefore dealt with all the Amended Grounds of Appeal together as they were all related.Having said so, this court deemed it prudent to address its mind to the admissibility of PW 1's evidence as she was a child witness. It therefore addressed this two (2) issues under separate heads shown hereinbelow.

***I. VOIRE DIRE*EXAMINATION**

22. As was rightly pointed out by the State but never picked up by the Appellant, which was understandable because he was a lay man in matters of law, the Learned Trial Magistrate erred in law when she failed to conduct a proper*voire dire* examination as envisaged in Section 19 of the Oaths and Statutory Declarations Act.

23. The said Section provides as follows:-

"Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section."

24. This issue of adducing evidence by children of tender years was dealt with in great detail in the case of **Johnson Muiruri vs Republic [2013] eKLR**where the Court of Appeal rendered itself as follows:-

"We once again wish to draw attention of our courts as to the proper procedure to be followed when children are tendered as witnesses. In Peter Kariga Kiune, Criminal Appeal No 77 of 1982(unreported) we said:

"Where in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a *voire dire* examination , whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if it is the opinion of the court he is possessed of sufficient intelligence and understands the duty of talking the truth. In the latter event an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him (sec.19, Oaths and Statutory Declarations Act, cap 15. The Evidence Act (section 124, cap 80). It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided, and not be forced to make assumptions."…"

25. The importance of *voire dire* examination where there is single child witness in a case a person has been accused of a sexual offence cannot be underestimated as it has serious repercussions relating to curtailment of an accused person's liberty for long periods. Therefore, bearing in mind the consequences of relying on sworn evidence adduced by a child in convicting an accused person when such a child adduces evidence without confirming if he or she understands the meaning of taking an oath before he or she is sworn, this court treated PW 1's evidence with some amount of caution.

26. Be that as it may, it does not always follow that a convicted person will be acquitted merely because a

voire dire examination has not been conducted or properly conducted. This is because an appellate court has the power to order that a matter be referred for re-trial. Even so, a re-trial is also not automatic.

27. A re-trial must only be ordered where no prejudice would be occasioned to an appellant or where it will not give a party seeking a re-trial a second bite at the cherry by panel beating its case to fill gaps in a fresh trial. Indeed, an appellate court will not order that a re-trial be conducted where it finds that a conviction cannot be sustained based on the evidence that is currently before it at the time of hearing and determination of an appeal.

28. However, even without considering if the Appellant would be given a second bite at the cherry if a re-trial was to be ordered herein, this court agreed with the State's submission that this was not a good case to order a re-trial for the reason that he did not suffer any prejudice having Cross-examined PW 1.

II. PROOF OF THE PROSECUTION'S CASE

29. As was rightly submitted by the State, a trial court can rely on the evidence of a single witness as more often than not sexual offences are committed from the public eye. This was an issue that was addressed in the case of **Mohamed v Republic [2006] 2 KLR 138**,where it was stated that:-

> **"It is now settled that the Courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."**

30. This legal position in anchored on proviso of Section 124 of the Evidence Act that stipulates as follows:-

> **"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:**
>
> **Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.**

31. Evidently, the proviso to Section 124 of the Evidence Act is clear that where there are no eye witnesses other than a person who has been defiled, the trial court shall receive evidence of such alleged victim, if it is satisfied that such alleged victim is telling the truth. Such a trial court must record the reasons for believing that witness and not the alleged perpetrator.

32. Consequently, in trying to establish if this court could arrive at the same conclusion that the Learned Trial Magistrate did to sustain the charge of defilement against the Appellant herein, this court carefully combed through the evidence that was adduced by the Prosecution witnesses.

33. Having perused the proceedings of the Trial Court, this court noted that right at the outset,there were certain inconsistencies, contradictions and glaring gaps. The duty fell on this court to establish whether or not the said inconsistencies, contradictions or gaps were immaterial or irrelevant in the circumstances of the case herein.

34. One notable gap was that there was no particular date for the defilement that was alluded to. PW 1 was aged thirteen (13) years and was possessed of sufficient intelligence to have at least referred to some dates.Unfortunately, she did not allude to any particular date of the alleged defilement but merely stated that between July and August 2015, the Appellant, who was a farm hand in her grandfather's house, would accuse her that she "had done wrong when it was not true" and then take her to her uncles' house,

which was in the same compound with her grandfather's house, allegedly to discipline her but which would instead turn to defilement.

35. On her part, PW 5 said that she was a business lady based at Changamwe. She confirmed that the Appellant, his wife and children stayed in the same house with PW 1 and her father, who was PW 1's father. Shesaid her brother called her on 15th August 2015 and requested her to go home as PW 1 had been defiled three (3) times. She did not specify the dates on which these three (3) instances occurred.

36. She stated that she arrived at her place in Mbololo at 7.00 pm and that the Appellant was arrested the following morning. Her further testimony was that PW 1 was taken to Moi Referral Hospital where she was treated and a P3 Form filled. She did not mention any dates. Be that as it may, the P3 Form that was adduced by PW 5 showed that he examined PW 1 on 21st August 2015.

37. On her part, PW 3 testified that PW 1 went to her house on 14th August 2015at 8.00 pm when she said the Appellant had tried to rape her like previous times. She did not mention the dates when these rapes or defilement were said to have occurred.

38. Notably, the dates when the alleged offences took place were critical. Indeed, time is of the essence in sexual offences as it can make the difference between the evidence being documented and hence being credible or have the evidence rejected out rightly more so where the evidence is based on a single witness.

39. Appreciably, there was no plausible reason that was proffered by the Prosecution to explain what caused the delay in taking PW 1 to hospital. Indeed, PW 4 arrived home on 15th August 2015 and it was not until 21st August 2015 that PW 1 was examined.

40. If at all PW 1 was examined on a different day from when she was taken for the completion of the P3 Form, there was no documentary evidence that was placed before the Trial Court to demonstrate that PW 1 was taken to hospital for treatment. However, this court was not certain that any examination at the hospital would have yielded any tangible results as she had only alluded to attempted rape by the Appellant which could not have been detected by any medical evidence.

41. Be that as it may, this court made reference to treatment because the Appellant was charged with defilement and not attempted defilement. From PW 3's evidence, she was emphatic that PW 1 told her that the Appellant had wanted to rape her, a fact the State reiterated in their Written Submissions. The absence of treatment notes to prove defilement prior to 14th August 2015 was therefore critical to link the Appellant to the breaking of PW 1's hymen.

42. That notwithstanding, medical evidence is not the only evidence that can prove a case where a sexual offence had been alleged. Indeed, depending on the circumstances of each case, there is a possibility of there being no tears, bruises, lacerations or presence of spermatozoa in a sexual assault. Clothes are not necessarily proof that sexual assault has occurred. Medical evidence and state of clothing can assist a court in confirming that indeed a sexual offence such as rape or defilement has occurred.

43. If on the other hand as PW 1 and PW 3 testified that the Appellant had tried to rape PW 1 but she escaped on the night of 14th August 2015, unless there was evidence that supported PW 1's assertions that he had previously defiled her, then he ought to have been charged for attempted defilement and not defilement.

44. The circumstances of the case herein were that it was PW 1's word against that of the Appellant as there were no actual eye witnesses to the alleged incident. The Learned Trial Magistrate was perfectly entitled to rely on PW 1's evidence to sustain the charge against the Appellant herein as she warned herself of the dangers of relying on the evidence of a single witness and relied on several cases in this regard.

45. It was this court's considered view that although the Learned Trial Magistrate stated that she believed

PW 1 because she remained steadfast in her evidence even under Cross-examination by the Appellant, that she did not falter along the way, that there was no possibility of having been coached because she lived with her aged grandfather and that PW 3 confirmed having opened for PW 1 at night, that was not conclusive proof that the Appellant defiled her.

46. Since PW 1 did not allege that she was defiled on 14th August 2015, could she have been scratched by thorns as she was escaping from being disciplined? Could she also have run away to PW 3's house because the Appellant had attempted to rape her? Appreciably, the reasons for her running to PW 3 could be varied more so as PW 1 had confirmed that the Appellant had been given permission to discipline them.

47. This court could not make a conclusive determination that PW 1 was running from the Appellant to escape his attempts to rape her because there were other inconsistencies in the evidence that was tendered herein. Appreciably, PW 1 said she ran to Mrs M's house. She said that Mrs M was a teacher. Notably, the person who testified that PW 1 ran to her house was VLW.

48. In the mind of this court, Mrs M and VLW appeared to have been two (2) different people. If Mrs M and VLW were one and the same person, then the Prosecution ought to have led evidence to clarify that they referred to one and the same person.

49. Turning to PW 5, this court noted that the person who testified in court and said was PW 1's mother was FW. However, in the Birth Certificate that was tendered in evidence, PW 1's mother was shown to have been EW. Similarly, if FW and EW were one and the same person, then it was incumbent upon the Prosecution to have shown that they related to the same person.

50. As the Prosecution failed to tie the loose ends as far as the identity of PW 1's mother was concerned and no evidence was adduced to confirm that Mrs W was one and the same person as VLW, doubts were raised in the mind of this court making it to hesitate concluding that PW 1 ran to a teacher's home to escape from the Appellant as she had contended.

51. In addition, this court found that the reasons PW 1 gave PW 5 why she had a scar on her leg was different from PW 3 where she said PW 1 got the scratches from. According to the history that PW 1 gave PW 5 at the time of filling the P3 Form, PW 5 indicated that the**scar** (emphasis court) that was on the lower limb occurred after PW 1 was beaten by the Appellant herein. On her part, PW 3 stated that PW 1 had **scratches** (emphasis court) on her legs caused by thorns as she ran to her house to escape the Appellant from raping her.

52. It is important to point out that since PW 1 was seen for the completion of the P3 Form five (5) days after her running through the bushes and PW 3 had allegedly seen **scratches** (emphasis court), then it was reasonable to have expected PW 5 to have alluded to **scars**(emphasis court) and **not a scar**(emphasis court).Notably, these were the inconsistencies that made this court not accept PW 1's evidence hook, line and sinker.

53. It was the view of this court that PW 1's uncle was not such a critical witness and failure to call him as a witness was not fatal to the Prosecution's case. Indeed, the court is alive to the fact that Section 143 of the Evidence Act provides that no particular number of witnesses shall, in the absence of any provision of the law to the contrary, be required for the proof of any fact, an issue that was addressed in **Criminal Appeal No 31 of 2005 Julius Kalewa Mutunga v Republic**(unreported) in which theCourt of Appeal held that:

> **"As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."**

54. Accordingly, having carefully considered the submissions supported by the case law that was relied

upon by both the Appellant and the State, this court found that although the Trial Court was first seized of the matter and had the advantage of observing the demeanour of witnesses, it found difficultiesposition in believing PW 1's, PW 3's and PW 4's evidence due to unexplained inconsistencies in their testimonies shown hereinabove.

55. It was incumbent upon the Prosecution to have adduced sufficient and cogent evidence and presented its case diligently to prove that the Appellant herein had actually committed the alleged offence as had been contended by PW 1. Unfortunately, the proof that was adduced in the trial court was not to the standard required which in criminal cases, has to be beyond reasonable doubt so as to sustain the charge of defilement against the Appellant herein.

56. Indeed, great injustice will be occasioned to the Appellant herein if this court were to uphold the conviction and sentence that was meted to the Appellant based on the evidence that was presented before the trial court. To this court, it did appear that the case against the Appellant herein was determined on a balance of probability. Once doubt has been cast in the mind of the appellate court, it would be unsafe to uphold the Appellant's sentence.

57. In the absence of such evidence, this court found Amended Grounds of Appeal Nos (1), (2) and (3) of the Appellant's Petition of Appeal were merited and the same are hereby allowed.

CONCLUSION

58. In view of the seriousness of the sentences imposed on those convicted of having committed defilement cases and the eventuality of one's liberty being curtailed for long periods of time, a defilement case ought not and must not be decided on a balance of probability as that would be a travesty and great miscarriage of justice to an accused person.

59. In conclusion, as an *obiter*, the court wishes to point out that the duty of an appellate court is to uphold the rule of law and not cause miscarriage of justice irrespective of whether or not a particular offence is prevalent in a particular area. In this regard, the court wishes to emphasise that the Prosecution ought to present cases on Sexual Offences Act after thorough investigations and present water tight evidence. Indeed, perpetrators of defilement ought not to be allowedto get away with serious crimes if they are guilty merely because the Prosecution has not conducted its case diligently.

DISPOSITION

60. For the foregoing reasons, in view of the fact that the evidence that was adduced before the trial created doubt in mind of this court, this court found that the Appellant's Petition of Appeal filed on 29th July 2015 was merited and the same is hereby allowed.

61. The benefit of doubt leads it to quash the conviction and set aside sentence that was meted upon the Appellant by the Trial Court as it would be clearly unsafe to confirm the same. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

62. It is so ordered.

DATED and DELIVERED at VOI this 4th day of May 2017

J. KAMAU

JUDGE

In the presence of:-

Guni Musungu Mwandia- Appellant

Miss Anyumba - for State

Josephat Mavu– Court Clerk