REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO 58 OF 2016

NICHOLAS KALIMBO..APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(From original conviction and sentence in Criminal Case Number

222 of 2015 in the Senior Resident Magistrate's Court at Voi

delivered by Hon E. M. Kadima (RM) on 12th February 2016)

JUDGMENT

1. The Appellant herein, Nicholas Kalimbo, was tried and convicted by Hon E.M. Kadima, Resident Magistrate for the offence of defilement contrary to Section 8 (1) as read with Section 8(3) 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 alternative offence of committing an indecent act with a child contrary to Section 11(1) of the said Act.

2. The particulars of the main charges were as follows:-

> **"On the 17th day of August 2013 at [particulars withheld] in Mwatate Division within Taita Taveta County, intentionally caused yourmale genital organ (penis) to penetrate the female genital organ (vagina) of R M a child aged 14 years."**

ALTERNATIVE CHARGE

> **"On the 17th day of August 2013 at [particulars withheld] Location in Mwatate Division within Taita Taveta County, intentionally touched the female genital organ (vagina) of R M a child aged 14 years with your male genital organ (penis)."**

3. Being dissatisfied with the said judgment, on 14thNovember 2016, the Appellant filed a Notice of Motion application seeking leave to file his Appeal out of time which was allowed and the Petition deemed to have been duly filed and served. He relied on five (5) grounds of appeal and another four (4) Amended Grounds of Appeal which he filed along with his Written Submissions on 4th April 2017.

4. 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".**

5. Having considered the submissions that had been filed by both the State and the Appellant and the pleadings herein, this court found the only issue that had been placed before it for determination was whether or not the Prosecution proved its case beyond reasonable doubt. His assertion that the Learned Trial Magistrate did not consider his defence was neither here nor there as he opted to remain silent and not to call any witnesses.

6. The Prosecution's case was that on 17th August 2013, the Appellant broke into the house of the minor Complainant, R M (hereinafter referred to as "PW 1") at about 2.00 am and he had sex with her while threatening her with a knife. She then went to the residence of Bethuel Mwasaru Mwasumani (hereinafter referred to as "PW 6") and informed his wife that the Appellant, had touched her inappropriately. She slept in PW 6's house that day. She recognised the Appellant as there was moonlight on that particular night and that she had known him for about two (2) years.

7. On the same night, PW 1's father, L M (hereinafter referred to as "PW 2") had attended a funeral at Baghao together with the Appellant herein, who was his neighbour for over twenty (20) years, and one Nicholas Karama. When he returned home, he found the doors to his house open and PW 1 absent. He was re-united with her the following morning at 9.00 am after looking for her in the neighbour's houses. He noted that she had blood on her clothes and thighs.The Appellant escaped but was arrested by members in 2015 and taken to Mwatate Police Station whereafter he was charged with the present offence.

8. Dr Stephen Katana (hereinafter referred to as "PW 6") adduced in evidence the P3 Form which showed that although PW 1's genitalia was normal and that there was no presence of blood or discharge, her hymen was broken. The state of PW 1's clothes was not captured in the said P3 Form.

9. The Learned Trial Magistrate found that the Prosecution had established a *prima facie* case against the Appellant herein. On being placed on his defence, the Appellant opted to remain silent and not to call any witnesses.

10. In his Written Submissions, the Appellant argued that he was not accorded a fair trial since he was not assigned an advocate to represent him during the trial. On its part, the State relied on the case of **Cr Appeal No 497 of 2007 David Njoroge Macharia vs Republic** where it was held as follows:-

> **"Under the Constitution, state funded legal representation is a right in certain instances…We are of the considered view that in addition to situations where "substantial injustice would otherwise result", persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense."**

11. This issue of representation of accused persons was also dealt with in the case of **Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati vs Republic [2015] eKLR** and by this court in the case of **Paul Ngei Muiya vs Republic[2017] eKLR** that ensuring assigning an accused person representation by the State is a progressive right and that it is hoped that it will be achieved sooner than later.

12. Bearing the aforesaid cases in mind, this court was not persuaded to find and hold that the Appellant's rights under the Constitution of Kenya were infringed upon. The Appellant was at liberty to hire counsel to act for him during the trial.

13. Turning to the proof of the Prosecution's case, the Appellant pointed out that PW 1 was examined on 30th August 2013, which was thirteen (13) days after the alleged incident and thus questioned if the doctors could obtain a correct analysis of results.

14. The State did not respond to the Appellant's said assertion. It relied on the evidence of the Prosecution witnesses that pointed to the fact that the Appellant defiled PW 1 on the material date.

15. The Prosecution adduced in evidence a Post Rape Care Form dated 30th August 2013. It indicated that PW 1 was examined a day after being defiled and was found to have had a cut on the right knee. Her outer genitalia, vagina and anus were normal. However, the hymen was not intact. These findings were confirmed by the P3 Form that was also dated 30th August 2013.

16. A further perusal of the Post Rape Care Form showed that PW 1 had a bath and that clothes were not given to the police. This was a great anomaly considering that PW 2 had indicated that PW 1's clothes were blood stained and that she had blood on her thighs.

17. Be that as it may, this court was hesitant to accept PW 2's evidence regarding PW 1's bloodstained clothes and blood on her thighs, hook line and sinker, because the said clothes were not given to the police yet PW 1 was said to have been examined a day after the alleged offence. In particular, PW 6 who had the first contact with PW 1 after the alleged ordeal never made any reference to blood stained clothes and blood on PW 1's thighs.

18. Notably, there was no indication in the P3 Form if a high vaginal swab was done. However, this court noted that no discharge was noted on PW 1's body or genitalia. The absence of discharge concerned this court as PW 1 was said to have been defiled. However, assuming that it is not always necessary that there must be spermatozoa during sexual intercourse, it would have been reasonable to expect that PW 1 would have had bruises or lacerations due to forceful entry of her vagina by the Appellant herein. The absence of bruises, lacerations and discharge caused this court to entertain doubt as to whether really the alleged incident occurred as PW 1 had testified.

19. This court was concerned about the credibility of PW 1's evidence due to the fact that when she went to PW 6's house, she told PW 6 and his wife that the Appellant had touched her inappropriately. PW 6 also testified that she told them that the Appellant touched her inappropriately.

20. Clearly, inappropriate touching and defilement are two (2) very distinct offences that attract different penalties. From PW 1's evidence, it was not possible to establish whether she was actually defiled by the Appellant or he touched her inappropriately. If she had actually being defiled as she had alleged, there was no reason for her to have told PW 1 and PW 6 that the Appellant had touched her inappropriately. If she had been scared of telling them the truth, then the same ought to have come out in her evidence. In the absence of such clarification, her evidence appeared inconsistent.

21. Going further, the incident is said to have occurred at 2.00 am when there were no favourable lighting conditions. PW 1 was adamant that she saw the Appellant's face and knife because there was moonlight. Indeed, she did not explain whether the windows of her room were open so as to let in moonlight in her room. It is unlikely that one can clearly see another in a room that is dark just because there is moonlight outside.

22. Voice recognition in the dark can be very difficult to prove unless familiarity between a witness and an accused person can be demonstrated.Indeed, it is not uncommon even for persons who are familiar to each other to mistake each others voices.

23. In the case of **Karani vs Republic (1985) KLR 290**, the Court of Appeal held as follows:-

> **"Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were**

conditions in existence favouring safe identification."

24. In this case, PW 1 did not explain how frequently she had met the Appellant in the two (2) years that she said that she knew him so as to have recognised him in the dark or to have recognised his voice in the dark. It was thererfore the considered view of this court that the Appellant's identification or recognition by PW 1 was not foolproof and thus did not meet the threshold of identification and recognition.

25. This court was further skeptical of the Appellant's identification and recognition as the perpetrator of the alleged offence as PW 1's evidence was inconsistent and hazy. That of PW 2 appeared to have been exaggerated.

26. PW 1 said as follows:-

> **"It was around 2.00am. It was a Saturday. The accused had gone to a funeral in Bagao with my father. I slept around 10.00am. That day my father never came home straight. He had gone to work in someone else's farm. The next day when I met my father he told me he had gone for a funeral. At about 12.00 pm the accused came and knocked the door...That night he came and broke the door."**

27. On his part, PW 2 testified as follows:-

> **"On 17th August 2013 R was living in my house. I had gone with Nicholas Kalimbo to a funeral meeting of my in-law at a place called Baghao…I had strong feelings Nicholas Kalimbo had gone back to my house. I left the meeting at around midnight. I reached my home at 2.00am... There was moonlight…"**

28. It was evident that from PW 2's evidence, the alleged incident occurred on the 17th August 2013. However, it was not very clear from PW 1''s evidence when the Appellant broke into her house, whether the same was on 17th August 2013 at 2.00 am or if it was the following day when the Appellant knocked on the door at 12pm. However, it became clearer in her Cross-examination when she stated that it was on 17th August 2013. PW 1 was aged sixteen (16) years at the time she testified and consequently, it was expected that her evidence ought to have been cogent and consistent. However, her evidence was haphazard and difficult to follow.

29. The fact that PW 1's hymen was also not intact was not proof that the Appellant was the one who tore her hymen. The fact that the Appellant left the funeral meeting as had been contended by PW 2 was also not proof that it was the Appellant who defiled PW 1. The Prosecution failed to interrogate the distance between Baghao and PW 2's home with a view to establishing if indeed, the Appellant would have had an opportunity to commit the offence.

30. The evidence of how the Appellant came to be arrested was also missing as PW 2 had asserted that the Appellant went into hiding after the aforesaid defilement. His evidence ought to have been corroborated by persons who arrested the Appellant. Indeed, No 81058222 Corporal Sammy Maina Mwangi (hereinafter referred to as "PW 4") testified that they had received a warrant of arrest against the Appellant herein from OCS Voi Police Station and that he was brought in by members of the public in May. PW 4's evidence contradicted the evidence of No 56117 PC Danson Mugo (hereinafter referred to as "PW 5") who testified that he received evidence of the Appellant's arrest on 6th April 2015.

31. It was important to explain where the Appellant was arrested. This information was critical because of PW 2's assertions that the Appellant went into hiding after the alleged offence more so because he was actually arrested almost two (2) years later. Failure to call the Chief who PW 5 said told him that the Appellant resurfaced as a witness was fatal to the Prosecution's case as it was critical to establish if indeed the Appellant had disappeared and re-surfaced. This would have assisted the court in removing any doubt of there having been bad blood between the Appellant on the one hand and PW 1 and PW 2 on the other hand.

32. It was also the view of this court that Nicholas Karama who was said to have gone with the Appellant and PW 2 at the funeral at Baghao was also a crucial witness as he could have corroborated PW 2’s evidence that the Appellant left them at the funeral.

33. Notably, the option of an accused remaining silent after being put on his or her defence is a right guaranteed in Article 49(1)(a)(ii) the Constitution of Kenya, 2010. This means that the burden lies with the prosecution to prove its case beyond reasonable doubt. The Appellant herein exercised his constitutional right when he remained silent after being put on his defence and was therefore under no obligation to defend himself.

34. Accordingly, having considered the evidence that was adduced by the Prosecution, this court came to the firm conclusion that it had not adduced evidence to prove beyond reasonable doubt that the Appellant was really the perpetrator of the alleged offence and if at all the same occurred in the manner that was described by PW 1 and PW 2. There were glaring inconsistencies and gaps that remained unanswered and thereby raised doubt in the mind of this court on exactly what transpired on 17th August 2013. This court was thus not persuaded to find and hold that the Learned Trial Magistrate arrived at the correct conclusion.

DISPOSITION

35. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Appeal that was lodged on 14thNovember 2016 was successful and the same is hereby allowed.

36. This court hereby quashes the conviction and sets aside the 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.

37. It is so ordered.

DATED and **DELIVERED** at **VOI** this **20th** day of **July** 2017

J. KAMAU

JUDGE

In the presence of:-

Nicholas Kalimbo - Appellant

Miss Anyumba - for State

Josephat Mavu– Court Clerk