REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 8 OF 2014

GEDION MWATHI KITHOME…..……..……..……...……..….APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(An appeal arising out of the judgment and sentence of Hon. E.M Muiru RM in Criminal Case No. 989 of 2012 delivered on 24th January 2014 at the Principal Magistrate's Court at Makindu)

JUDGMENT

The Appellant has appealed against his conviction and sentence of life imprisonment by the original trial Court. The Appellant was charged in the said trial Court with the offence of defilement of a child contrary to section 8(1) as read together with section 8(2) of the Sexual Offences Act. The particulars of the offence were that on the 21st October 2012, at [particulars withheld] sub location, Mumela location in Mukaa district within Makueni County, the Appellant intentionally and unlawfully caused his male genital organs namely penis, to penetrate the female genital organ namely, vagina of M M, a child aged 3 years.

In the alternative the Appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars were that on 21st October 2012, at [particulars withheld] sub location, Mumela location in Mukaa district within Makueni County, the Appellant wilfully and unlawfully committed an act of indecency with M M a child aged 3 years by touching her vagina using his penis.

The Appellant was first arraigned in the trial court on 23rd October 2012 when he pleaded not guilty to the charge. He was tried, convicted of the offence and sentenced to life imprisonment. The Appellant is aggrieved by the judgment of the trial magistrate, and preferred this appeal against the conviction and sentence. The grounds of appeal are in a Memorandum of Appeal dated 4th December 2015 that the Appellant availed to the Court during the hearing of his appeal on 4th December 2015.

The main grounds of appeal are that the Appellant's fundamental rights enshrined in Article 25(c) of the Constitution were violated as he was denied an opportunity to cross examine PW2; that the evidence relied upon by the trial magistrate was not weighty enough to have sustained a conviction; that the prosecution's case contained material contradictions; that the provisions of section 169(1) of the C.P.C was not complied with as regard his defence statement; and that the age of the victim was not ascertained

The Appellant also availed written submissions to the Court during the hearing. He submitted therein while relying on the decisions in **Joseph Mutua Musyoka vs Republic, Cr. App No 342** and **Samuel Wahini Ngugi and Another vs R, Cr. Appeal No 218 of 2007** and on section 208(2) and (3) of the

Criminal Procedure Code, that he was prejudiced by being denied an opportunity to cross-examine the minor complainant, whom the trial Court had found understood the proceedings after conducting a voire dire examination. He contended that this vitiated the entire trial and his right to a fair trial, and asked the Court to consider granting him a retrial.

Mr. Shijenje, the learned Prosecution Counsel made oral submissions during the hearing of the appeal on 4/12/2015. The learned counsel conceded the first ground of appeal, since the Appellant had not been given the opportunity to cross examine PW2. The counsel however opposed the remaining grounds of appeal and stated that there were no material contradictions in the prosecution case, as the Appellant was given opportunity to cross examine the other witnesses. Further, that section 169 of the Criminal Procedure Code was complied with as the Appellant's defence was captured in the judgment of the trial magistrate. The prosecution requested for a retrial if the failure to cross-examine PW2 is found to be material, as the hearing had just been concluded the previous year.

A brief summary of the evidence adduced before the trial court is as follows. The prosecution called seven witnesses. PW1, J K M, testified that on 21/10/12 at about 7.00 pm she was in the her house, and that one of her children told her that the Appellant had taken the complainant outside. She stated that she did not worry at first since they normally played together. However, that after 15 minute her eldest child came and told her that the child had not been returned. She then proceeded outside and when she opened the door, she was met with the complainant crying and when she asked the complainant what had happened, the complainant told her that she had been touched on her private parts. Upon examining her she saw blood and white stuff coming out of her private parts.

PW1 then told her children to look for the Appellant, and her husband then took the Appellant to Sultan Hamud Police station. She stated that they obtained a P3 form at the police station which was filled the following day at Makindu district hospital. She stated that she lived with the Appellant who she treated like a son.

PW2 was M, the complainant, who gave an unsworn testimony after a *voire dire* examination was conducted by the trial magistrate. She stated that she knew the Appellant who she named as Mwathi, and that he had taken her outside and pushed her on the ground and touched her private parts. She said that he had put something in her private parts and she had felt pain and cried. PW2 testified that she told her mother who took her to hospital.

PW3 was J M M who testified that on 21/10/12 at about 7pm he was in his house preparing the bed for his children to sleep. He said that his older child M then came and asked where PW1 was, and he was told that she was in the sitting room. When he went and found that she was not there he came back and reported to them. He said that it was then that PW1 went to look for her outside. PW3 testified that PW1 came back and told him that the Appellant had raped M. It was his testimony that they had seen white stuff ooze from the child's private parts. They then took the Appellant to the police where they were issue with a P3 form. PW3 also stated that they took PW2 to hospital where she was treated.

PW4 was J M K who testified that on 21/10/12 at 6.30 pm he was at his cousin's (PW3's) home making chapatti, when PW1 came and looking for the complainant. He stated that PW1 found the complainant at the door crying, and when she was asked what had happened the child said that the Appellant had touched 'Kidonda'. PW4 stated that they then started looking for the Appellant said that they found him in the shamba and took him to the house and later to the police. PW5, Francis Kivuva, also testified that he was at PW3'S house with PW4, and collaborated the testimony given by PW4.

PW6 was Dr. Hannington Mibei testified that he had filled a P3 form for the complainant on 22.10.12. He indicated that the victim was 3 years old and had blood stains on her pants and a history of defilement. Further, that the approximate age of injury was one day. PW6 stated that upon examination he found that the complainant had a torn hymen and lacerations on the labia and around the perineum. He did a high vagina swab which had pus and that the HIV test was negative. He stated that PW2 was then put on antibiotics and medication to prevent her from contracting HIV. The witness produced the P3 form as exhibit 1.

The last prosecution witness (PW7) was PC Chrisantor Munyoro of Sultan Hamud police station. It was his testimony that on 21/10/12 he received a report from PW1 of defilement of their daughter by the Appellant. He stated that he recorded the report and escorted them to Sultan Hamud District Hospital and thereafter Makindu District hospital where their daughter was examined and a P3 form filled. He later recorded witness statements and charged the Appellant with the offence. He produced the panty the complainant was wearing as exhibit 2 in court.

After the close of the prosecution case the trial court found that the Appellant had a case to answer, and complied with section 211 of the Criminal Procedure Code. The Appellant gave unsworn testimony and called one witness. He stated that on 21/10/2012 he went to James Mutuku's house where he was drinking until 9pm. He then went out to the toilet and on coming back to the house he asked for his drink which he had left on the table, and that is when J M and his wife started beating him with a stick and later framed him with the case before the Court.

DW2 was Joel Muthoka Kyeva who testified that on 21/10/2012, he was headed home in the evening and decided to pass by the house of Mutuka Mutunga to take a calabash of *Karobo* (a local drink). Further, that while he was there, the Appellant came and told Mutuku that he wanted to see him and that Mutuku refused. According to DW2 the issue between the two was that the Appellant was owed four months' salary by Mutuku. DW2 testified that Mutuku and two other people who were in the house started beating the Appellant while telling him that he would never pay him the said money, and then took him to the police station. DW2 stated that later on that night Mutuku came to his house and asked him to assist in framing the Appellant for defiling his daughter. DW2 stated that he refused to do so.

The Issues and Determination

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

I have considered the grounds of appeal, submissions and evidence given in the trial court, and I find that the issues raised in this appeal are firstly, whether the Appellant's right to a fair trial was violated. If not, then the Court will proceed to consider the remaining two issues as to whether the age of the complainant was proved and whether the Appellant's conviction for the offence of defilement was based on sufficient and consistent evidence.

On the first issue, the Appellant claimed that his right to a fair trial as enshrined in Article 25 (c) the Constitution were violated, as he was not availed the opportunity to cross-examine the Appellant. Article 25**(c)** of the Constitution provides that the right to a fair trial shall not be limited. The elements of the right to fair trial, and particularly the right to cross-examine a witness in a criminal trial, is found in Article 50 (2)(k) of the Constitution which provides as follows;

"Every accused person has the right to a fair trial, which includes the right to:-….*k)* to adduce and challenge evidence"

In addition section 208 of the Criminal Procedure Code provides for the procedure to be followed by a trial Court upon entering a plea of not guilty as follows:

"(1) If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence (if any).

(2) The accused person or his advocate may put questions to each witness produced against him.

(3) If the accused person does not employ an advocate, the court shall, at

the close of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any questions to that witness and shall record his answer."

I have perused the record of the trial court, and note that on 9th November 2012, at page 13 of the typed record of the trial court, PW2 who was a minor gave her evidence-in-chief, and immediately thereafter PW3 then proceeded to give his evidence-in-chief. There is no indication on the record if the Appellant declined to ask PW2 any questions in cross-examination or if he was called upon by the trial Court to cross-examine PW2. It was incumbent upon the trial court to have informed the Appellant of the right of cross-examination, especially where he was not represented by a legal counsel, and if the Appellant did not have any question to put to the witness, it should have recorded that fact. Thus, the failure by the trial court to do so was an error. It is also my finding that this error that prejudiced the Appellant as the evidence of PW2 who was also the complainant was central in the Appellant's conviction,

In addition, the issue of cross-examination of children of tender years who give unsworn testimony was settled *by the Court of Appeal in* **Nicholas Mutula Wambua v Republic, MSA CRA No. 373 of 2006** *where it quoted with approval the decision of the Supreme Court of Uganda in* **Sula v Uganda [2001] 2 EA 556** *that:*

*"**The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross-examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined.... It would appear that misconception arises from a view that because accused persons are not cross-examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined".***

I am of the view that the ground of failure to afford the Appellant an opportunity to cross-examine PW2 is on its own is sufficient to dispose of the appeal. In addition, it will not be prudent for this Court to proceed with a determination of the outstanding issues, as the same will entail and evaluation of the evidence adduced in the trial Court, which would be prejudicial in the event that a retrial is ordered.

The only outstanding issue then is whether I should acquit the Appellant or order a retrial. The principles governing whether or not a retrial should be ordered were enunciated in **Fatehali Manji v Republic [1966] EA 343** by the East Africa Court of Appeal as follows:

"In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person."

In **Mwangi v Republic [1983] KLR 522** the Court of Appeal held that:

"**We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant."**

I have reviewed the evidence before the trial Court and it is my view that it raises the possibility of a conviction. In addition, it is my view that taking into account the time that has lapsed, the witnesses will not be difficult to secure and a retrial will therefore not be difficult.

I accordingly allow the appeal, and quash the conviction and sentence of the Appellant by the trial Court. I direct that the Appellant shall be retried by any other magistrate other than Hon. E.M Muiru at the Makindu Law Courts, and for that purpose he shall remain in custody and shall be taken before the Resident Magistrate at Makindu Law Courts on **8th February 2016** to plead to fresh charges.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 3RD FEBRUARY 2016.

P. NYAMWEYA

JUDGE