REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 109 OF 2014

SWALEH MWAWASI………..……..........………..……………………………... APPELLANT

VERSUS

REPUBLIC………………………………………………………………… RESPONDENT

(From original conviction and sentence in Criminal Case Number 365 of 2012 in the Senior Resident Magistrate's Court at Wundanyi delivered by Hon M. Chesang (RM) on 22nd October 2012)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Kitsau Karisa Mutheke, was tried and convicted by Hon C. Chesang, Resident Magistrate for the offence of attempted defilement of a boy contrary to Section 9 (1) as read with Section 9 (2) of the Sexual Offences Act No 3 of 2006. He was sentenced to twenty (20) years' imprisonment.

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

"On the 21st August 2012 in Taita Taveta County, intentionally and unlawfully attempted to cause his penis to penetrate the anus of TM a boy aged 15 years."

3. The particulars of the alternative charge were as follows:-

"On the 21st August 2012 in Taita Taveta County, intentionally and unlawfully touched the buttocks and the anus of TM a boy aged 15 years with his penis."

4.. Being dissatisfied with the judgment therein, on 2nd January 2013, the Appellant filed a Petition of Appeal. The grounds of appeal were as generally as follows:-

> **1. THAT the Learned Trial Magistrate erred in both law and fact by convicting him based on heresy** (sic) **evidence.**
>
> **2. THAT the Learned Trial Magistrate erred by not considering that there was no medical report P.3 Report present** (sic) **as an exhibit before convicting him.**
>
> **3. THAT the Learned Trial Magistrate erred by not considering that there was no high** (sic) **witness but that the evidence was a planet evidence** (sic).

4. THAT the Learned Trial Magistrate occasioned miscarriage of justice by not taking into account that his rights under the Constitution was (sic)**breached by the police as he was kept in the police cells for three (3) days.**

5. On 16th June 2016, the court directed him to file his Written Submission. However, in addition to the said Written Submissions, he filed Amended Grounds of Appeal on 16th June 2016. The same can generally be summarised as follows:-

1. THAT the trial magistrate erred in law and fact by relying on the evidence of PW 1 that was unsatisfactory and exaggerated.

2. THAT the trial magistrate erred in law and fact by finding that the evidence of PW 2corroborated that of PW 1.

3. THAT the trial magistrate erred in law and fact in relying on the evidence of the Investigation Officer, PW 4, which was not watertight and there was bad intention (sic)**.**

4. THAT the trial magistrate erred in law and fact in relying on circumstantial evidence to convict him.

5. THAT the trial magistrate erred in law and fact by not considering his defence submissions (sic) **and personal circumstancesin his sentencing.**

6. The State filed its Written Submissions dated 22nd June 2016 on 23rdJune 2016.When the matter was mentioned on 23rdJune 2016, both the Appellant and counsel for the State asked this court to give its decision based on their respective Written Submissions. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

7. 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”.

8. The court therefore addressed the issues that had been raised herein under the separate headings shown hereinbelow.

I.PROOF OF THE PROSECUTION’S CASE

9. All the Grounds of Appeal were interrelated and they will be dealt with under this head.

10. The Appellant argued that the evidence that was adduced by the Prosecution witnesses was either uncorroborated, exaggerated or not water tight. He admitted both in his evidence and Written Submissions that he did in fact sleep with the Complainant (hereinafter referred to as “PW 1”) in one bed but denied that he had any bad intentions when he slept with him.

11. He contended that if it was to be believed that he had tried to trick PW 1 with Kshs 50/- and he failed to convince him, he could have used another trick to convince him, which he did not do. He was adamant that he ought to have been given an opportunity to prove that he did not have any intentions of having slept with PW 1.

12. It was his further contention that the grand-child who told L S M, PW 1's grandmother and who is (hereinafter referred to as "PW 2") that he had tried to defile PW 1 ought to have recorded a statement but she did not. He further averred that Israel Nyali, a village elder, (hereinafter referred to as "PW 3) ought to have been "tricked" to test the veracity of "this grandmother's" evidence.

13. In addition, he argued that PC David Masinde, the Investigation Officer herein (hereinafter referred to as "PW 4") did not visit the scene of crime. He also castigated him for having told the Trial Court that PW 1 was a bit "mentally retarded" without having any treatment card or "paper" from a special school to prove his said assertion.

14. All in all, the crux of the Appellant's argument was that he did not have any bad intentions when he slept with PW 1, an assertion the State vehemently opposed.The State was emphatic that the Appellant did not dispute the fact that he slept with PW 1 on the material date and that there were two (2) beds in the room.

15. It pointed out that PW 1 told PW 2 exactly what the Appellant had tried to do to him and that PW 4 interrogated PW 1 who confirmed the commission of the said crime. It argued that this was not heresay evidence. It further submitted that since it had not been established that it was a common occurrence for both the Appellant and PW 1 to share a bed, the only conclusion that could be made was that the Appellant's assertion that he did not have any bad intentions was not true.

16. PW 1, adduced evidence after a proper *voire dire* enquiry was conducted. He gave a blow to blow account of what the Appellant tried to do to him. He said that the Appellant called him to sleep in his bed because the Appellant was feeling cold. When he innocently went to his bed, he said that the Appellant tried to forcibly remove his underwear and tried to sodomise him.

17. He told the Trial Court that he rejected the Appellant's offer of a sum of Kshs 50/= for him to engage in the unlawful act. When he refused, the Appellant still tried to offer him the said sum of money so that he could keep quiet about the incident.

18. It was his evidence that the next morning, he told PW 2 exactly what had happened by whispering into her ear. PW 2 then reported the matter to PW 3 who arrested the Appellant and took him to the police station. PW 3 said he had known the Appellant from when he was a child. He confirmed having made the arrest. It was correct as the State submitted that PW 1 told PW 4 exactly of what had happened.

19. As was rightly pointed by the State, the Learned Trial Magistrate was empowered by the provisions of Section 124 of the Evidence Act Cap 80 (Laws of Kenya) to exercise her discretion judiciously and opt to rely on the sole evidence of PW 1. The said provision provides 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.

20. In believing PW 1, the Learned Trial Magistrate opined as follows:-

"…I examined the complainant before taking down his evidence on oath and observed demeanour and reached a conclusion that he was capable of giving evidence on oath. Furthermore, most of his evidence was corroborated by that of the accused as to what transpired on the 21/8/12 that is, that the complainant and the accused shared a bed. The complainant was also lucid enough to accurately state his date of birth

which was corroborated by PW 2 and PW 4. I have therefore reached a conclusion that the evidence adduced by the complainant is good is law (sic) as the evidence of any other witness without disability.. Furthermore, I observed the demeanour of the complainant and there was nothing to show that he was telling a lie.”

21. The Appellant did not proffer a plausible explanation to demonstrate why he was sleeping with PW 1 in the same bed when there were two (2) beds in the room more so as he had only worked at PW 1’s home for about a week. His unsworn had very little or no probative value. His evidence was not sufficient to satisfy this court that he had good intentions to sleep with PW 1. It was not necessary for PW 4 to have visited the scene of crime as no evidence would have been collected from there, the offence facing him having been one of attempted defilement.

22. Being a case of one person’s word one against the other, the Learned Trial Magistrate recorded the reasons why she believed PW 1’s testimony. She had the privilege of observing PW 1 and came to the conclusion he had no reason to lie about what the Appellant had done to him. This court therefore found no fault in the finding by the Learned Trial Magistrate in this regard.

23. In any event, PW 1’s evidence was corroborated by the evidence of PW 2, PW 3 and PW 4. It was not necessary for PW 2’s granddaughter to have recorded a statement and/or testified as PW 1 told PW 2 exactly what the Appellant had wanted to do to him

24. Having carefully considered and analysed the evidence that was adduced by the Prosecution witnesses vis-a vis the unsworn evidence that was given by the Appellant herein, this court came to the firm conclusion that that the Prosecution had proven its case against the Appellant beyond reasonable doubt. The evidence that was adduced by the Prosecution witnesses was indeed cogent, believable and not exaggerated.

25. In that regard, this court found that Grounds Nos 1, 2, 3, 4 and 5 of the Appellant’s Grounds of Appeal were not merited and the same are hereby dismissed.

II. <u>SENTENCE</u>

26. The boy child the Appellant had attempted to defile was aged fourteen (14) years. The penalty for such an offence is to be found in Section 9(2) of the Sexual Offences Act that provides as follows:-

“A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.”

27. Against that backdrop, while sentencing him, the Learned Trial Magistrate rendered herself as follows:-

“However, since the alleged offence was not committed in totality ...I must hold that it was proper for the accused to be charged under the main charge…as opposed to the alternative charge.. I therefore find the accused guilty as charged on the main charge and I convict him accordingly…the complainant is a child suffering disability and the commission of this offence points to the fact that the accused who was trusted by the complainants (sic) guardian to share a room with him breached the trust to take advantage of the complainants (sic) diminished mental capacity. For these reasons, the accused is sentenced to serve 20 (twenty years) (sic) imprisonment…”

28. Once the Appellant was convicted, the Learned Trial Magistrate was mandated to impose on him a minimum sentence of ten (10) years imprisonment. She had the discretion of handing him a more severe sentence. In view of the extraneous circumstances of PW 1’s mental condition, she exercised her discretion judiciously and imposedtwenty (20) years” imprisonment, a fact that was rightly pointed out by the State herein.

29. In making a determination as to whether or not the sentence that was handed down to the Appellant

by the Learned Trial Magistrate, this court had due regard to the provisions of Section 8(3) of the Sexual Offences Act that provides as follows:-

"A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

30. Bearing in mind that the minimum sentence that the Learned Trial Magistrate would have given the Appellant was ten (10) years for attempted defilement and not less than twenty (20) years for actual defilement, it did appear that term of imprisonment of fifteen (15) years be fair and proportionate to an offence of attempted defilement. However, this would only be so if there are no aggravated circumstances.

31. In this case, the Appellant attempted to take advantage of a child with mental disability, a fact that was aptly captured by the Learned Trial Magistrate. The Appellant did not provide any evidence to demonstrate that the Learned Trial Magistrate meted out to him a sentence that was illegal or unlawful or that she exercised her discretion wrongly. The court was thus in agreement with the State that the sentence was proper and proportionate and accordingly, the same ought not to be disturbed as the Learned Trial Magistrate was within her discretion to enhance the sentence from the minimum prescribed sentence.

32. The aspect of the harshness of the sentence that was set out in Ground No 3 of against the Appellant's Grounds of Appeal was therefore not merited and the is hereby dismissed.

DISPOSITION

33. The upshot of this court's judgment, therefore, is that the Appellant's Appeal filed on 2nd January 2013 was not merited and the same is hereby dismissed.

34. It is so ordered.

DATED and **DELIVERED** at **VOI** this **18TH** day of **JULY 2016**

J. KAMAU

JUDGE

In the presence of:-

Swaleh Mwawasi……………………….. Appellant

Sirima………….…………………………..for the State

Simon Tsehlo– Court Clerk