REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 3 OF 2016

PAUL MWAKIO MWASHUMBE…….……... APPELLANT

VERSUS

REPUBLIC…… RESPONDENT

(From original conviction and sentence in Criminal Case Number 465 of 2014 in the Senior Resident Magistrate's Court at Wundanyi delivered by Hon K.I. Orenge(SRM) on 23rd October 2015)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Paul Mwakio Mwashumbe, was tried and convicted by Hon K.I. Orenge, Senior Resident Magistrate for the offence of defilement 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 years (30) years imprisonment.

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

> **"On the 21st day of September 2014 at about 9.00 am at** [particulars withheld] **within Taita Taveta County unlawfully and intentionally caused his penis to penetrate the anus of J W M a girl aged 9 years."**

3. Being dissatisfied with the said judgment, on 8th January 2013, the Appellant filed Memorandum Grounds of Appeal which stated inter alia:-

> **1. THAT the honourable magistrate erred in law and fact basing on the circumstantial evidence** (sic)**.**
>
> **2. THAT the evidence of pw 1 and pw 2 were not enough for him to get the harsh sentence.**
>
> **3. THAT the Honourable Magistrate erred by basing on the evidence of the medical report which was not corroborated** (sic)**.**
>
> **4. THAT the magistrate took no doubt according to the prosecution side** (sic)**.**
>
> **5. THAT the magistrate erred in fact by not considering his defence as the fact** (sic)**.**

4. On 8th June 2016, the court directed the Appellant to file his Written Submissions. On 22nd June 2016,

he filed the said Written Submissions in addition to Amended Grounds of Appeal.His new grounds of appealcould be summarised as shown hereunder:-

> **1. THAT the Learned Trial Magistrate failed to consider his defence submission to find that he was an innocent person.**
>
> **2. THAT the Learned Trial Magistrate erred in law and fact by considering the evidence of the teacher PW 3 which was not corroborated.**
>
> **3. THAT the Learned Trial Magistrate erred in law and fact in failing to see that there was bad blood between him and the Complainant's mother, PW 2.**
>
> **4. THAT the Learned Trial Magistrate erred in law and fact in failing to consider that the medical examination was not proved.**
>
> **5. THAT the Learned Trial Magistrate erred in law and fact by not appreciating the age of the injuries which were not confirmed.**
>
> **6. THAT the Learned Trial Magistrate erred in law and fact in believing the evidence of the Complainant, PW 1 without conducting a proper *voire dire* enquiry.**

5. On 28th June 2016, the State filed its Written Submissions of even date and a Notice of Enhancement of the Sentence from thirty (30) years to life imprisonment. On 29th June 2016, the court granted leave to the Appellant to file Written Submissions in response to the said Notice of Enhancement and the State's Written Submissions.

6. However, on 11th July 2016, the Appellant filed Further Written Submissions in response to the State's Written Submissions but did not respond to the Notice of Enhancement of the Sentence.

7. When the matter came up for the hearing of the appeal on 11th July 2016, both the Appellant and the counsel for the State asked the court to deliver its Judgment based on their respective Written Submissions which they did not highlight.

LEGAL ANALYSIS

8. 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".**

9. This court identified the following issues for its determination:-

> **a. Whether or not the Learned Trial Magistrate had conducted a proper *voire dire* examination.**
>
> **b. Whether or not the Prosecution proved its case against the Appellant herein against reasonable doubt.**

10. It therefore addressed the said issues under the separate heads shown hereinbelow.

I. VOIRE DIRE ENQUIRY

11. The Appellant submitted that the evidence of the J W M (hereinafter referred to as "PW 1") could not be taken to have been the truth for the reason that being a minor, she could not understand the meaning of an oath.

12. The State discounted this submission and stated that a *voire dire* enquiry was properly done in line with the provisions of Section 19(1) of the Oaths & Statutory Declarations Act Cap 15 (Laws of Kenya). It referred this court to the cases of **Alex Mungai Waweru vs Republic [2014] eKLR** and **Kibangeny vs Republic (1959) EA 92**where *voire dire* enquiries were done as the children therein were of tender years.

13. It pointed out that in this particular case, the Learned Trial Magistrate found that PW 1 was possessed of sufficient intelligence to testify but not on oath as she did not understand the meaning of an oath, a position this court found to have been correct. As seen in the case of **Johnson Muiruri vs Republic [2013] eKLR**, the said Learned Trial Magistrate acted correctly when he directed that PW 1 give unsworn evidence.

14. This position was well articulated in the aforesaid case of **Johnson Muiruri vs Republic** (Supra) where the Court of Appeal stated as follows:-

> **"We once again with 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)…"**

15. In view of the fact that the Learned Trial Magistrate conducted a proper *voire dire* enquiry by asking PW 1 her name, age, the school she went to, the Church that she attended and whether she knew what telling the truth from which he formed the opinion that she was of sufficient intelligence and understood her duty to tell the truth, he duly complied with the provisions of Section 19(1) of the Oaths and Statutory Declarations Act. His finding that PW 1 could proceed to give unsworn evidence was on all fours with the holding in the case of **Johnson Muiruri vs Republic** (Supra).

16. For the foregoing reasons, this court found no merit in Ground No 6 of the Appellant's Amended Grounds of Appeal and the same is hereby dismissed.

II. PROOF OF PROSECUTION'S CASE

A. EVIDENCE OF THE PROSECUTION WITNESSES

17. Grounds Nos 1, 2 and 3 of the Appellant's Amended Grounds of Appeal were dealt with under this head as they were related.

18. The Appellant contended that the offence he had been charged with was so serious that if he had been guilty, he risked his house being burnt down. He was categorical that PW 3 ought to have carried out further investigations once he suspected him of any wrong doing as his house was along a road that had many passers-by. He averred that there was no record of a meeting having been held as had been stated by PW 1, PW 2 and PW 3.

19. He further said that no teachers or PW 1's father were called to confirm that the said meeting did in fact take place. It was his contention that this evidence would have corroborated that of D M (hereinafter

referred as to “PW 3”) who testified that he gave PW 1 and other children money to buy sweets. He added that both PW 2 and her husband ought to have taken better care of their daughter by ensuring that she got home on time and checkingher especially after she had gone outside their home.

20. He attributed his woes to the PW 1’s mother, namely P G M (hereinafter referred to as “PW 2”). He said that PW 2 used to sell illicit alcohol. It was his contention that villagers and the Chief of their area went to her house and destroyed alcohol and that she suspected that it was him who had tipped them because he was the last person in her “sellings” **(sic)**.

21. On its part, the State pointed out that it was PW 3 interrogated PW 1 and other children coming from a shop to buy sweets when it emerged that PW 1 had been defiled by the Appellant hereinand consequently his evidence as to whether or not PW 1 was defiled was sufficient was not heresay evidence and required no corroboration by any other witness.

22. It was undisputed that no one witnessed the alleged defilement of PW 1 by the Appellant herein. It was therefore PW 1’s word against that of the Appellant herein. The proviso to Section 124 of the Evidence Act Cap 80 (Laws of Kenya) 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 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.

23. The said Proviso 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.**

24. According to PW 1, on 21st September 2014, she was coming from Church at about 9.00 am when the Appellant herein greeted her, held her hand and took her to his house. He removed her clothes and sodomised her whereafter he took a sheet, cleaned her and warned her not to tell anyone about the incident because if she said anything, he would kill her.Although she screamed because of the pain she underwent, he covered her mouth.

25. The following day on 22nd September 2014, at around 3.00pm, she was in the company of three (3) of her friends when they met the Appellant and he gave them money to buy sweets. Mr C, who was a teacher in their school met them buying sweets and because the Appellant gave them money, he got to know that something was amiss.

26. On 26th September 2014, M L called her and told her to call her dad. They went to school with her father but he told her to go to class. She then went to the Chief and reported the defilement and was referred to Mwatate Police Station where she was issued with a P3 Form which was duly filled at the hospital.

27. Having considered the evidence that was placed before him, the Learned Trial Magistrate was satisfied that the Appellant’s defence was displaced by that of PW 1 who he found to have told the truth. He noted that the Appellant was known to PW 1 and that the P3 Form had confirmed that there was a tear at the anal region measuring 0.5 cm.

28. Appreciably, as PW 1 adduced unsworn evidence, the Appellant herein could not be found liable for

the alleged offence based on her evidence alone unless it was corroborated by other material evidence, a position that was held by the Court of Appeal in **Johnson Muiruri vs Republic** (Supra).

29. Accordingly, a careful analysis of PW 1's evidence against the backdrop of the evidence that was adduced by the other Prosecution witnesses led this court to find and hold that the same was not sufficient to sustain a conviction against the Appellant. In other words, it fell short of evidence of a single witnessas required by the proviso of Section 124 of the Evidence Actdue to several reasons.

30. It was not clear from PW 1's evidence at what point she told teachers what had happened. She merelysaid that she told her teachers what had happened "later on". PW 3 who testified that he saw the Appellant buying PW 1 and other children sweets did not also say when PW 1 and the other children were interrogated. He merely stated that he found children buying sweets and he went to school and called a meeting.On her part, PW 2 testified that her husband was called to the school on 29th September 2014.She also stated that the date of the incident was on 22nd September 2014 and not 21st September 2014 as PW 1 had told the Trial Court.

31. The details of when this meeting was called was important as PW 1 said that on 26th September 2016 M L called her and told her to ask her father to go to school.While it would be onerous to have expected PW 1 to have known the exact date of when she was interrogated during the meeting was called due to her age and the passage of time as at the time she was testifying in court, the discrepancy of the dates made this court uneasy because M L and PW 1's father were not called to testify.

32. The court could not be certain whether the discrepancy in the dates was merely a confusion in the dates or whether the dates were concocted. The Prosecution had a duty to clarify the witnesses' evidence during re-examination but it did not do so. It is not the duty of this appellate court to excuse the sketchy evidence regarding the date of this important meeting on the ground that PW 1 was a minor as there were other witnesses who could have corroborated her evidence.

33. Indeed, while Section 143 of the Evidence Act Cap 80 (Laws Kenya), it is provided that *in the absence of any provision of law to the contrary, no particular number of witnesses shall be required for the proof of any fact,* corroboration of PW 1's evidence in this regard was critical.

34. Going further, PW 1 stated that the teacher who saw her buying sweets was Mr C. He was not called as a witness in this case. The teacher who was called to testify was D M, PW 3 herein. He told the Trial Court that he saw PW 1 among five (5) children at a nearby shop where they had bought sweets and that he went to school and called a meeting.

35. During his Examination-in-chief, PW 3 said that PW 1 did not tell him anything to do with defilement. In his Cross-examination, he said that he was only warning PW 1 not to associate with people like the Appellant herein. It was therefore not correct as the State had submitted that he evidence did not required corroboration. To the contrary, it was heresay and had to be corroborated.

36. If indeed, Mr C and Mr D M were one and the same person, nothing would have been easier than for the Prosecution to have sought clarification from PW 3 to establish if Mr C and D M were one and the same person considering that Mr C was mentioned by PW 1 way before he testified.

37. Appreciably, a person giving money to children to purchase sweets is not in itself a pointer of that person's guilt. Such action must be accompanied by an unlawful action. PW 3's evidence was therefore hearsay contrary to what the State had submitted and was not in itself proof that the Appellant had defiled PW 1.

38. In the absence of any evidence to the contrary, this court found and held that Mr C and PW 3 referred to two (2) different people. Failure to have called the persons who interrogated PW 1 and the other children and established that PW 1 had been defiled dealt a fatal blow to the Prosecution's case.

39. Further, PW 2 could not be said to have corroborated PW 1's evidence as far as the alleged defilement

was concerned. She had stated that teachers did their investigations and found that the Appellant had been sodomising PW 1. She did not say who these teachers were. That part of her evidence was heresay hence inadmissible.

40. In this regard, after carefully analysing the evidence of PW 1, PW 2 and PW 3 in respect of the alleged defilement, this court was not satisfied that the Prosecution had presented a water tight case to sustain the conviction of the Appellant in the Trial Court.

41. On the other hand, the Appellant's defence pointed to a history of some sort of previous association with PW 2 who had informed the Trial Court that they were village mates. The issue of a grudge arose very early in the trial when PW 2 denied during her Cross-examination by the Appellant that she had any grudge against him.

42. It was not therefore correct as the State had submitted that the issue of bad blood between the Appellant and PW 2 was an afterthought which would only have come out during Cross-Examination because it was actually raised during the said Cross-Examination. Similarly, the Learned Trial Magistrate misdirected himself in his Judgment when he averred that the defence that the charges were due to bad blood was an afterthought as the Appellant had not raised the issue during Cross- Examination.

43. In the premises foregoing, the court came to the conclusion that it was unsafe to sustain the Appellant's conviction based on the evidence of PW 1, PW 2 and PW 3 and his Grounds Nos 1, 2 and 3 of his Amended Grounds of Appeal had merit. The same are hereby upheld.

A. MEDICAL EXAMINATION

44. Grounds Nos 4 and 5 were addressed under this head as the same related to the issue of PW 1's medical examination.

45. PW 1 was said to have been sodomised on 21st September 2014. Although she said she felt a lot of pain when the Appellant allegedly sodomised her, she went to school the following day when she met the Appellant who gave her money to buy sweets. PW 2 said that she did not notice any "funny" movement by PW 1. None of the school teachers noted any queer walking style by PW 1 the whole day she was in school. In fact, PW 1 behaved in a normal manner as she accompanied her friends from school.

46. While PW 1 may have pointed to where the penetration was and PW 4 produced a P3 Form which confirmed that a blunt object was used to cause the injury in PW 1's anal region as was submitted by the State, the delay in taking her medical examination immediately the alleged defilement was discovered piqued the curiosity of this court considering that the injuries must have caused her a lot of pain, a fact that was rightly pointed out by the Appellant herein.

47. Although meetings were said to have been held at PW 1's school very close to the date of the alleged defilement was discovered and PW 4 found the Appellant buying sweets for PW 1 and other children on 22nd September 2014, it was curious that neither the teachers nor her parents found it necessary to take to her hospital for treatment immediately.

48. In fact, PW 1 appeared to have been in school throughout as PW 2 told the Trial Court that her husband was called to the school on 29th September 2016. Medical treatment notes show that she was only taken to hospital on 30th September 2014,which was over a week after the date of the alleged defilement.

49. While the Clinical Officer, Restitutah Mghoi (hereinafter referred to as "PW 4") observed a cut of about 0.5 cm at the anal region, the delay in confirming this injury through medical examination was inordinate. In addition, no reason was advanced to explain the cause of the delay in seeking treatment.

50. Bearing in mind the said delay, cause of the injury or the person who could have caused it could not

be attributed to the Appellant herein. While this court noted that fear of being killed may have been a good reason for PW 1 not to have reported the incident to anyone, it found it difficult to fathom how a nine (9) year old child could have been sodomised and continued carrying herself as a child who had not received such traumatic injuries over a period of nine (9) days without any other person, a teacher or parents having noticed that there was something amiss.

51. It is for the foregoing reasons that this court found the offence of the alleged defilement was not proven to the required standard. Indeed, there was no proof of penetration of her anal region as there was no evidence that was furnished by the Prosecution to demonstrate that the said cut could only have been caused by penetration by a human being and if so, or the same was caused by the Appellant herein.

52. In this regard, this court came to the firm conclusion that there was merit in Grounds Nos 4 and 5 of the Appellant's Amended Grounds of Appeal and the same are hereby allowed.

III. CONCLUSION

53. 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.

54. In this regard, the Prosecution is obligated to present cases on Sexual Offences Act after thorough investigations and present water tight evidence. Indeed, perpetrators of defilement ought not to be allowed to get away with serious crimes if they are guilty merely because the Prosecution has not conducted its case diligently.

55. Unfortunately, the investigations in the Trial Court were shoddy and the Prosecution presented a poor case for trial. The failure by PW 1 to attend hospital immediately the alleged defilement occurred and the gaps in her evidence as well as the evidence of PW 2 and PW 3 raised great doubts in the mind of this court as to what actually happened on the date of the alleged offence.

56. It did appear to this court that the evidence that was adduced in the Trial Court did not measure to the standard required, which in criminal cases, is proof beyond reasonable doubt. To this court, the case against the Appellant herein appeared to have been determined on a balance of probability.

57. It is the duty of an appellate court 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. The Appellant may have guilty of what he was charged with but the moment doubts were created in the mind of this court, it could not affirm the Appellant's conviction and sentence as it would be clearly unsafe to do so.

58. Indeed, as the case against the Appellant was not proved beyond reasonable doubt, this court was not persuaded by the State that the Appellant ought to be sentenced to life imprisonment. However, hadit found itself in agreement with the Learned Trial Magistrate's judgment and the submissions by the State herein, it would not have hesitated in enhancingthe Appellant's sentence from thirty (30) years that he was handed down by the Trial Magistrate as that sentence was clearly illegal and had no basis in law.

59. As was rightly submitted by the State Section 8 (2) of the Sexual Offence Act Cap 62A(Laws of Kenya) strictly provides that:-

> "**A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."**

DISPOSITION

60. As doubtwas created in the mind of this court, it hereby quashesthe conviction and set aside the sentence that was meted upon the Appellant by the Trial Court as it would be clearly unsafe to affirm the

same.

61. The upshot of this court's judgment, therefore, was that the Appellant's Appeal that was lodged on 8th January 2016 was merited and the same is hereby upheld. 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 **6th** day of **September 2016**

J. KAMAU

JUDGE

In the presence of:-

Paul Mwakio Mwashumbe…….. Appellant

Miss Anyumba……..……..for State

Ruth Kituva…….……Court Clerk