REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 160 OF 2014

T T W…….....…….. APPELLANT

VERSUS

REPUBLIC……. RESPONDENT

(From original conviction and sentence in Criminal Case Number 245of 2013 in the Senior Resident Magistrate's Court at Wundanyi delivered by Hon M. Chesang(Ag SRM) on 5th November 2013)

JUDGMENT

INTRODUCTION

1. The Appellant herein, T T W, was convicted for the offences of defilement of a girl and incest contrary to Section 8(1) as read with Section 8(2)and 20(1) respectively of the Sexual Offences Act No 3 of 2006.He was sentenced to suffer life imprisonment for each Count with both sentences running concurrently. He had also charged with an alternative charge for committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.The particulars of the charges were as follows:-

COUNT I

"On the 15th day of July 2013 at [particulars withheld]in Bura Location within Taita Taveta County, intentionally and unlawfully caused his penis to penetrate the vagina of S M a child aged 4 ½ years."

ALTERNATIVE CHARGE

"On the 15th day of July 2013 at [particulars withheld] in Bura Location within Taita Taveta County, being a male person, intentionally touched the vagina of S M a child aged 4 ½ years with his penis."

COUNT II

"On the 15th day of July 2013 at [particulars withheld] in Bura Location within Taita Taveta County, being a male person, caused his penis to penetrate the vagina of S M a child aged 4 ½ years who (sic) **to his knowledge."**

ALTERNATIVE CHARGE

"On the 15th day of July 2013 at [particulars withheld] in Bura Location within Taita Taveta County, being a male person, intentionally touched the vagina of S M a child aged 4 ½ years with his penis."

2. Being dissatisfied with the said judgment, on 3rd December 2013, the Appellant filed a Notice of Motion to file an appeal out of time. The said application was allowed on 7th October 2014. The Memorandum of Grounds Appeal were as follows:-

1. THAT the learned trial magistrate erred in law and fact by failing to appreciate that prosecution witness (sic) **did not prove their case beyond reasonable doubt in that no independent witness was called. Yet** (sic) **the trial magistrate used the evidence from one family to convict him.**

2. THAT pw2 said to have informed his sister immediately about the offence but the prosecution side did not call her for verification(sic)**.**

3. THAT the magistrate erred in law and fact by failing to note that the doctor who filled the p3 (sic) **form said to have not seen to the child to prove that she was defiled** (sic)**.**

4. THAT the court erred in law and fact by failing to note that the offence was committed on 15th July 2013 and yet the report was made to the police station on 17th July 2013 which renders this an afterthought.

3. On 9th May 2016, the Appellant was granted leave to liaise with his advocate with a view to filing his Written Submissions. However, when the matter was mentioned on 21st June 2016, he filed his Written Submissions along with Amended Grounds of Appeal in person on the same date. His Reply to the State's Written Submissions dated 29th June 2016 and filed on 30th June 2016 was filed on 11th July 2016.

4. The Amended Grounds of Appeal were as follows:-

1. THAT the Hon Senior Resident Magistrate erred in law and fact by failing to appreciate the Appellant's personal and social circumstances in her sentencing.

2. THAT the Learned Trial Magistrate erred in law and fact by believing the medical evidence relating to a broken (torn) hymen and hence penetration (sic).

3. THAT the Senior Resident Magistrate erred in law and fact by relying on the evidence of PW 1 which was merely exaggeration (sic**) and uncorroborated** (sic)**.**

4. THAT the honourable magistrate erred in law and fact by failing to establish whether the language spoken by the child witness (sic)**.**

5. THAT the Resident Magistrate erred in law and fact by failing to appreciate whether the appellant had been medically examined at the hospital.

5. When the matter came up in court on 11th July 2016, the Appellant and the counsel for the State asked that judgement be delivered based on their respective Written Submissions which were not highlighted. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

6. As this is a first appeal, this court analysed and re-evaluated 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".**

7. After a careful perusal of the parties' respective Written Submissions, it appeared to this court that the issues that had been placed before it for determination were as follows:-

i. Whether or not the Prosecution had proved its case beyond reasonable doubt?

ii. Whether or not the sentence that was meted upon the Appellant was lawful, fair and in accordance with the law?

8. The court therefore addressed the issues that had been raised by the Appellant under the separate heads shown hereinbelow.

I PROOF OF THE PROSECUTION CASE

9. Although the Appellant had raised the issue of the language that was used by S M (hereinafter referred to as "the Child") in court as a ground of appeal, he abandoned the same as he did not submit on the same. It appeared to this court that. The court did not therefore deal with Ground No (4) of the Amended Grounds of Appeal. The court, however, dealt with Grounds of Appeal Nos (1),(2), (3) and (5)together as they were related.

10. It was the Appellant's submission that the case that faced him was a result of a family dispute between him and his wife, A K (hereinafter referred to as "PW 1"), whom he accused of having had a love affair with another person.He contended that PW 1's evidence was fabricated and uncorroborated as she did not scream to seek assistance from neighbours when she allegedly caught him in the act of defiling the Child herein.

11. He also averred that the P3 Form that was filled four (4) days after the alleged incident showed that the Child had not been defiled. He argued that the fact that the Child had talked about "buttocks" was not sufficient reason for PW 1 to have concluded that he had defiled the said Child.

12. He questioned where PW 1 was when he was said to have been escaping. It was his averment that he never did anything and that he was in the ordinary course of his duties on the material date and time. It was therefore his submission that the matter ought to be referred for Re-Trial as life imprisonment was a serious matter.

13. On its part, the State denied that the evidence by PW 1 was uncorroborated and exaggerated. It set out in detail the evidence she adduced during her Examination-in- Chief to the effect that she entered the room and found both the Appellant half naked while the Child naked. It added that her evidence was unshaken during her Cross-examination. It was its contention that the Appellant ought to have been brought the fact of PW 1's unfaithfulness or any marital issues between him and PW1 during the trial and not at this appellate stage.

14. It was also its submission that the Clinical Officer Restituta Mghoi (hereinafter referred to as PW 2) testified that her examination showed that the Child's hymen was broken after penetrationand that the childshowed her where she was feeling pain.

15. It referred the court to the case of **Julius Kiunga M'birithia vs Republic [2013] eKLR**in which Gikonyo J spelt out what proved penetration of the four (4) year old child therein.

16. According to PW 1, on 15th July 2013 she left her house at about 7.00 am to pick milk. She left the Child and the Appellant herein in the house. When she came back, she found the Appellant half- dressed sitting on the Child's bed while the Child was naked from the waist down. When she asked the Appellant

what he was doing, he told her that he was removing the child's panty. The Child told her that the Appellant had hurt her on the buttocks but she pointed to her vagina.

17. She took the child outside the house and upon examining her, she found that the Child had a thick watery substance like mucus, her vagina was very wide and she had been penetrated. She then took the Childto Bura Police Station after which she was sent her to Bura Dispensary where the child was treated.

18. She said that she also went to Sisal Estate Police who sent her to Mwatate Sub-District Clinic where she was given a P3 Form. She suspected that this was not the first time that the Appellant had defiled the Child as she had complained of pain previously when she was bathing her. She was emphatic that she knew the child had been defiled just by looking at her.

19. During her Cross-examination, she stated that she did not see the child bleeding which she attributed to the fact that the hymen had already been broken following previous acts of defilement by the Appellant. She also stated that the Appellant gave all his belongings to his mother including his cow, locked the door and went to Mwatate where he was arrested.

20. PW 2 testified that she examined the Child on 17th February 2013, which was about two (2) days she was defiled. She said that she did not see any blood or discharge and that there were no blood stains on the Child's clothes. She did not also see any HIV or spermatozoa. However, from her tools of observation which she said was with the naked eye and touching using hands, she found that the vagina was painful, hymen was torn and there were pus cells in the urine, an indicator of infection.The child was treated with ARVs and antibiotics.

21. Number 2005008998 AP Anorld Mbaruku Mdali (hereinafter referred to as PW 3") testified that on 16th July 2013 at about 8.20 pm, he received a call from members of public who informed him that a man who had escaped from his jurisdiction after he was alleged to have defiled a child had been seen at a place called Peleleza. He was accompanied by AP Ng'etich to Nangale Bar where they arrested the Appellant herein.

22. On his part Number 63884 Sergeant Joshua Muilu Kimeu (hereinafter referred to as "PW 5") stated that he was at the Mwatate Patrol Base on 16th July 2013 when at about 10.00 am, PW 1 came with the Child to report the latter's alleged defilement by the Appellant herein. He recorded the incident in the Occurrence Book and advised PW 1 to take the child to hospital. He was informed by his colleague that the Appellant had been arrested and taken to the AP Post Mwatate. When he went to the said Post, he found the P3 Form that had been given to PW 1 had been filled and deposited there.

23. The Appellant's defence was that he went to Mwatate on 14th July 2013 to conduct his business and on the following day, his mother called him and told him that PW 1 had reported to the police that he had defiled the child. He denied having committed the alleged offence.

24. R W M S (hereinafter referred to as "DW 2") told the Trial Court that he was married to the Appellant's sister. During his Cross-examination, he testified that the Appellant took himself to the police and was not arrested. Unfortunately, his evidence added no value to the trial as he only stated that he enquired and found that the Appellant had been reported at the AP Post, Bura and subsequently taken to Mwatate Police Station.

25. The Child herein was aged four and a half (4½) years. She said that she did not go to school but that she attended Church with her mother. She identified the Appellant who was in the dock as her father. She testified that the Appellant touched her buttocks and hurt her. After conducting a *voire dire* enquiry, the Learned Trial Magistrate declared the child a vulnerable witness on account of her ageand allowed PW 1 to testify on her behalf as an intermediary.

26. This was very much in line with Section 31 of the Sexual Offences Act Cap 62A (Laws of Kenya) that provides that a court may declare a witness, other than an accused person, a vulnerable witness where

the witness is the actual victim of the alleged offence, a child or a person under mental capacity.

27. Under Section 31(2)(a)-(k) of the Sexual Offences Act, acourt may declare a witness a vulnerable witness on account of age, intellectual, psychological or physical impairment, cultural differences, religion, language, possibility of intimidation, race, relationship of the witness to any party in the proceedings, nature of the subject matter of the evidence any other fact that the court may consider to be relevant in the circumstances of the case.

28. It is, however, important to note that PW 1's evidence required corroboration in accordance with the provisions of

29. Section 31(10) of the Sexual Offences Act that specifically provides as follows:-

> **"A court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary."**

30. On perusing PW 1's evidenceon what exactly transpired on the material date and time, the court found the same to have been difficult to comprehend. Although she was clear of the exact time that she left her house to pick the milk, she did not allude to the time that she returned. This would have gone a long way in establishing if the Appellant had sufficient time or opportunity to have committed the offencesshe had accused him of committing.

31. Further, her evidence of the Appellant having been half-dressed did little to demonstrate whether that was a peculiar thing for him to have done especially because he was said to have been in his house at the material time and date. Indeed, she had said that he had kept his clothes where they normally kept. It was also not clear from her evidence whether he was naked above or below his waist.

32. Her observations of the state of the child's vagina ought to have been corroborated by medical treatment notes from Bura Dispensary or Mwatate Sub-District Hospital where she said she took the Child for treatment. However, these were not tendered in evidence before the Trial Court and no reason was proffered to explain why they were not produced. This was fatal to the Prosecution's case.

33. However, assuming PW 1's evidence was cogent and consistent as was contended by the State, a careful analysis of the evidence of PW 2, PW 3 and PW 4 showed that the same was disjointed.

34. PW 2 testified that she completed the P3 Form on 17th February 2013 and that the child was defiled on 15th February 2013. This court could have been persuaded to find that the dates she orally gave the court to have been a slip of the tongue if the said P3 Form had the date 17th July 2013 only.

35. However, on page 2 of the P3 Form, the date indicated therein was 17th February 2013 confirming what she had herself told the Trial Court as having been the date when she filled the said P3 Form. On page 4 of the said P3 Form, another date of 17th July 2013 had been indicated therein. There was, however, no stamp by the hospital on this page.

36. The question that came into the mind of this court was, what was the exact date of the alleged offence given the discrepancy of the date of the alleged incident by both PW 1 and PW 2 noting that PW 2 had in her examination-in- chief testified that the child was said to have been assaulted by a person known to her on 15th July 2013.

37. The date of the alleged assault in the said P3 Form was therefore in complete variance with the particulars by the police in the said Form and the Charge Sheet which were specific that the alleged offence occurred on 15th July 2013. PW 2 presented the P3 Form she completed herself and was for all purposes and intent expected to been able to read her own handwriting.

38. It was the responsibility of the Prosecution to have had the date of the alleged defilement clarified to

avoid the difficulty this court found on this issue. If the incident occurred on 15th February 2013, it was incumbent upon the Prosecution to have amended their Charge Sheet. As PW 1's evidence had to be corroborated other material evidence, failure by the Prosecution to have its witnesses clarify the date of the alleged offence was fatal to its case.

39. PW 3's evidence was also critical for purposes of corroborating that of PW 4. However, his evidence was very sketchy and left more questions than answers. It was unclear from his evidence when exactly the Appellant escaped from his jurisdiction. Although he said that they went to Nangale Bar, he did not specify who "they" were. He also failed to explain how he knew that the Appellant was at Nangale Bar at Mwatate as "they" seemed to have gone straight to the said Bar.

40. He did not also tell the Trial Court the date he went to arrest the Appellant or how he identified him at the time of the arrest. Was he accompanied by a person who knew the Appellant so as to point him out to him or did he him previously so as to arrest him without any identification by any other person?

41. Turning to PW 4, he stated that PW 1 went to Mwatate Patrol Base to report the incident on 16th July 2013 at about 10.00am. It is expected that the incident ought to have been recorded in the Occurrence Book on the same date. However, the P3 Form showed that the incident was recorded on 17th July 2013. The OB Number was given as [particulars withheld].

42. Assuming the date given by PW 1 of the alleged incident was the correct date, there was no explanation that was advanced either by PW 1 or PW 4 to explain why the report of the incident was recorded on 17th July 2013, two (2) days after the offence was alleged to have occurred bearing in mind the seriousness of the offence the Appellant had been accused of and the action PW 1 is said to have taken immediately she observed that the Child had been defiled.

43. This court was also not certain whether Mwatate Patrol Base was the same as Sisal Estate Police who PW 1 had said had sent her to Mwatate Sub-County Hospital with a P3 Form. Indeed, this uncertainty was reinforced by the fact that from PW 1's evidence, it appeared that the alleged defilement, the taking of the child to Bura Dispensary, the reporting to Sisal Estate Police, being issued with a P3 Form and the same being filled were all done on the same date.

44. It was the opinion of this court that the investigations in the case facing the Appellant herein were poorly conducted and raised doubts in its mind of this court due to the manner in which the evidence was presented before the Trial Court.

45. The Prosecution did not help matters. Dates,which are a critical component in any case so as to establish a sequence of events, were taken too causally. Further, as was seen hereinabove, PW 1's evidence, who was an intermediary was also uncorroborated and PW 3 and PW 4 gave very sketchy testimony.

46. The many questions that were raised in the mind of this court made it difficult for it to make a conclusive finding that indeed the Appellant committed the offence he had been charged with. He may have committed the offence but the evidence that was adduced was not water-tight and had too many unexplained gaps. In a nutshell, the Prosecution did not prove its case beyond reasonable doubt.

47. In view of the risk of curtailing the Appellant's liberty for life on the strength of the evidence that was placed before the Trial Court, this court found and held that his conviction and sentence was unsafe and ought not to be affirmed.

II. **FAIRNESS OF THE APPELLANT'S SENTENCING**

48. Having court found that the Appellant's conviction and sentence to have been unsafe, it would not have been necessary for this court to have addressed the issue of his sentencing. However, as the Appellant was sentenced to two (2) life imprisonment sentences, this court felt compelled to render its

opinion on the same.

49. The State pointed out that although the Appellant did not raise the issue, the Learned Trial Magistrate ought not to have sentenced him to life imprisonment for Count II and the alternative charge ought to have been withdrawn as there was duplicity. This was the correct position of the law.

50. Indeed, once the Appellant was convicted on one (1) count of a sexual offence, having been charged with defilement, incest of child or indecent assault on a child, it was this court's considered opinion that it was an over-kill for the Learned Trial Magistrate to have sentenced him to two (2) life sentences.

51. The reason for this is that any of the offences could have proved by one (1) set of facts adduced before the Trial Court. Any two (2) of the charges the Appellant had been charged with could have been alternative charges as it is difficult to separate these offences of they occurred in one (1) single transaction.

52. The sentence that was meted upon the Appellant was therefore unlawful and illegal.

DISPOSITION

53. For the reasons that the Prosecution did not prove its case to the required standard, this court was persuaded to quash the conviction and set aside the sentence that was meted upon the Appellant by the Trial Court as it would be clearly unsafe to confirm the same.

54. The upshot if this court's Judgment was that the Appellant's Petition of Appeal that was lodged on 3rd December 2013 was merited and the same is hereby allowed. The court therefore hereby orders that the Appellant be set free forthwith unless he be held or detained for any other lawful reason.

55. It is so ordered.

DATED and **DELIVERED** at **VOI** this **6th** day of **September 2016**

J. KAMAU

JUDGE

In the presence of:-

Thomas Tigina Wanjala……..Appellant

Miss Anyumba……..for State

Ruth Kituva…….. Court Clerk