REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. E027 OF 2021[SO]

LOW.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the whole judgement and sentence delivered by the Hon. J.P. Nandi on the 18.11.2021 in Bondo Sexual Offences Case No. E42 of 2021)

JUDGMENT

1. The appellant herein **LOW** was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence are that on the night of 8th June 2021 at about 2000hrs in Bondo sub-county within Siaya County he intentionally and unlawfully caused his penis to penetrate the vagina of SAO, a girl aged 11 years. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. The place and time and the complainant is the same as in the main charge of defilement.

2. The appellant pleaded not guilty to both the main charge and the alternative charge. The matter proceeded to hearing and the trial magistrate Hon. J.P. Nandi after considering the evidence of the prosecution witnesses against the evidence of the defence witnesses found that the prosecution had proved their case against the appellant beyond reasonable doubt and he sentenced the appellant to serve life imprisonment.

3. The appellant filed his petition of appeal dated the 25.11.2021 on the same date which appeal is premised on the following grounds, some of which are repeated:

a) That the learned Principal Magistrate in his judgement, conviction and sentence erred in law and fact in failing to fairly, properly and/or justly analyze the evidence adduced by the appellant herein before him.

b) That the learned principal magistrate in his judgement, conviction and sentence erred in law and facts in failing to fairly, properly and/or justly scrutinize and analyze the evidence adduced by both the appellant and the prosecution before him to enable him make a fair judgement for both parties.

c) That the learned Principal Magistrate in his judgement, conviction and sentence erred in law and facts in failing to scrutinize and analyze the credibility of the evidence adduced before him by the prosecution to enable him make a fair and just decision.

d) That the learned Principal Magistrate in his judgement, conviction and sentence erred in law and facts in failing to scrutinize and analyze the credibility and integrity of the prosecution witnesses in consideration of the period the alleged offence was committed before the same was taken to court for prosecution.

e) That the appellant was never granted a fair audience by the Honourable Court in the sense that he was not represented by legal counsel.

f) That further grounds may be adduced at the hearing of the appeal.

4. The appeal was canvassed by way of written submissions.

The appellant's submissions

5. The appellant submitted that he was entitled to automatic legal aid representation on account of the serious nature of the offence he was charged with and his inability to pay for legal representation. He relied on the case of **Karisa Chengo and 2 Others v R.**

6. On penetration, the appellant submitted that the results adduced failed to disclose whether the complainant was examined and tested by the doctor and further whether the appellant inserted his genitalia in the complainant's vagina as the evidence failed to show that the hymen was freshly broken.

7. The appellant submitted that evidence adduced by the prosecution was not in tandem with the trial court's determination. He further submitted that the prosecution without any reason elected not to call essential witnesses with material evidence which if it would have called, would have led the case to his favour. He relied on the case of **Sekitoleko v Republic.**

8. It was his testimony that the trial court failed to consider his alibi. The appellant further submitted that the trial court relied on the evidence of a single identifying witness.

9. The appellant further urged this court to reconsider his sentence taking into account the circumstances of his case which had the result of over punishing him.

The Respondent's Submissions

10. Opposing the appeal, the Respondent through the Senior Principal Prosecution Counsel Mr. Edward Kakoi submitted that that the appellant was the complainant's uncle and that he lured her into his house and defiled her. It was further submitted that the age of minor was proved, penetration was proved and the appellant was identified as the offender. Mr. Kakoi further submitted that in the impugned judgement, the court summarized and analyzed both the evidence for the prosecution and the defence before arriving at the decision to convict the appellant.

11. Mr. Kakoi further submitted that the credibility of the witness was never an issue even in cross-examination.

12. On the right to counsel for the accused, it was submitted that the allocation of counsel was not an absolute right and that the same is only done where it is proven that failure to allocate one an advocate would lead to a miscarriage of justice and that in this case, the appellant fully participated in the trial and fully cross-examined the witnesses.

Analysis

13. I have considered the grounds of appeal as well as the submissions by the appellant and the Respondent's Counsel. The duty of this court as a first appellate court is to reconsider and re-evaluate the evidence on record, bearing in mind that it neither saw nor heard the witnesses and therefore give an allowance in that respect in reaching its own independent conclusion. See **Okeno v R [1972] EA. 32** and **Mohamed Rama Alfani & 2 Others v Republic, Criminal Appeal No. 223 of 2002**.

14. The evidence adduced before the trial court was as follows:- PW1, SAO (full name withheld for legal reasons) the complainant testified that on the 8/6/2021 at 8.00 pm, she was outside her grandmother's house when her Uncle LOW called her while he was inside his house and asked her to take to him a chair which was outside. She complied and took the chair inside the house. He then called her to move to where he was and she did. He then told her that she would be quarrelled by her aunty if she did not keep quiet. The complainant testified that after a short while the appellant removed her inner pants and skirt before pushing her to the bed and inserting his penis in her vagina and that he had sexual intercourse with her.

15. The complainant further testified that she screamed and the appellant let her go after which she reported the incident to her aunt CA. She further testified that she left the inner pant and skirt in her uncle's house. She identified her green skirt and red pant in court. It was her testimony that her aunt called her other uncle on phone who came and the Chief too was called and he directed that the complainant be taken to hospital. She stated that the appellant was arrested from his house.

16. PW1 testified that she was taken to Nango Hospital where upon being examined, she was found to have been defiled and she was further taken to Bondo sub-county hospital where she was also examined. It was her testimony that there was a sunken solar light in the appellant's house. She stated that she sustained injuries in her private parts but she did not bleed. The complainant identified the appellant in court as her defiler.

17. In cross-examination, the complainant stated that the appellant did not call her at night but during the evening. She further stated that when she took the chair into the appellant's house, she did not leave the house.

18. **PW2 William Oreme** the Assistant Chief of West Migwena sub-location testified that on the 8/6/2021 at 9.30pm, he received a call from one GW who informed him of a minor's defilement by the appellant. It was his testimony that he rushed to the scene where he found GW and other members of the public who showed him the suspect's house where the door was locked from outside. It was his testimony that he opened the door and arrested the appellant and that the complainant was brought to the scene and revealed that she was defiled by the appellant after he removed her clothes which clothes he stated were found on the accused's bed. This witness was not cross examined.

19. **PW3** GW testified that on the 8/6/2021 he was at his place of work when his wife CA called and requested him to go home. He stated that he went home where his wife informed him that the complainant had been defiled by the appellant. It was his testimony that he went home and told his wife to take the complainant to Nango Hospital where it was confirmed that she had been defiled after which he called the chief who also went to the scene and arrested the accused and escorted him to Kopollo Police Post. This witness was not cross examined.

20. **PW4 PC Julian Otieno** testified that he took over investigations of the case from PC Caren Rutto on the 20/7/2021 at a point when the investigations had been completed and the appellant was already charged before court. It was his testimony that the complainant and the appellant were brought on the night of 8th and 9th June 2021 and escorted to the hospital for examination.

21. It was his testimony that the medical evidence revealed that the victim was defiled. He produced the complainant's hot pant and green skirt as exhibit 1 (a) and (b). He also produced a baptismal card showing that the complainant was born on 5/10/2009, as exhibit 2.

22. In cross-examination, PW4 testified that the victim was out after running away from the house leaving her pant and skirt in the appellant's house. He further testified that from the complainant's statement, the appellant threatened to cut the complainant but she screamed loudly forcing the appellant to release her.

23. **PW5 Stephen Okwiri** a clinical officer stationed at Bondo sub-county hospital testified and produced a P3 form filled for the complainant as exhibit 3. It was his testimony that on examination of the complainant, both the labia minora and majora were inflamed but there was no bleeding or discharge. He further stated that the cervix was intact and that there were no pus cells or spermatozoa seen all which led him to conclude that there was penetration. He produced the treatment notes as exhibit 4 and the laboratory report as exhibit 5.

Defence case

24. The appellant gave a sworn statement of defence denying the charges against him and stated that his chairs had been taken to the main house and he sent the complainant to bring them back to his house but she told him that the chairs were in his brother's house. He further stated that he slept at 10pm and the chief and his brother went and arrested him.

25. It was his testimony that the witnesses presented before court were coached and that he had been framed. He further stated that the doctor who testified stated that there were no injuries a sign that the complainant was not defiled. In cross examination, the appellant stated that he sent the complainant to bring the chairs at 7pm.

Determination

26. I have considered the appeal herein as well as the evidence before the trial court. The following issues are for determination:

a) Whether the appellant's right to legal aid was infringed thus denying him a fair trial;

b) Whether the evidence adduced by the prosecution was credible to sustain his conviction vis avis his alleged alibi.

c) ***Whether the sentence was manifestly harsh and should be interfered with.***

27. ***On the appellant's right to legal aid,*** the appellant's case is that he was occasioned a substantial injustice by the trial court's failure to provide him with legal aid as he was a pauper. On their part, the respondent submitted that the right to legal aid was not automatic and that it was only available where it was proven that failure to allocate one an advocate would lead to a miscarriage of justice and that in this case, the appellant fully participated in the trial and fully cross-examined the witnesses.

28. Article 50 (2) (h) of the Constitution provides for provision of legal representation by the state where substantial injustice would occur. In Republic **v Karisa Chengo & 2 Others [2017] eKLR**, cited by the appellant, the Supreme Court considered the issue of legal representation at state expense and stated *inter alia* that:

> "***the right to legal representation at state expense, under the said Article, was a fundamental ingredient of the right to a fair trial and was to be enjoyed pursuant to the constitutional edict without more. However, in accordance with the language of the Constitution, this particular right was not open ended but only became available "if substantial injustice would otherwise result".***

29. I observe that there is now an established framework under which an accused person can apply under section 40 of the Legal Aid Act No. 6 of 2016 for legal representation at state expense. Further, section 43 of the said Act imposes a duty on the court to inform an accused person of his right to apply for legal representation. The section provides as follows:

> ***43. (1) A court before which an unrepresented accused person is presented shall —***
>
> ***(a) promptly inform the accused of his or her right to legal representation;***
>
> ***(b) if substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her; and***
>
> ***(c) inform the Service to provide legal aid to the accused person.***

30. In the instant case the trial court at the very start of the trial informed the appellant of his right to legal presentation of his own choice and further informed him that he was also entitled to apply to the legal aid board for assistance. This is evidenced at page 5 of the record of appeal. The trial magistrate recorded as follows before the plea was taken on 10/6/2021:

> "***COURT: You have the right to legal representation of your own choice. You are encouraged to exercise it. You are hereby informed that you are also entitled to apply to the Legal Aid Board for assistance should you desire.***
>
> ***Accused: Understood."***

31. It was after the above information that the plea was taken after which the court granted the appellant bail pending trial and fixed a hearing date one month away. The appellant was therefore accorded an opportunity and time to seek services of an advocate of his own choice to represent him and in the event that he had no means, then, being on bond during the trial, he could have approached the Legal Aid Board and applied for legal assistance.

32. Further, in this case, the appellant seemed well versed and understanding of the charges that faced him. He was even ready to prosecute and proceeded to do so whilst cross-examining the prosecution witnesses where he deemed it necessary to do so.

33. It is evident that the accused fully understood the charges facing him and was able to address himself to the issues that arose. In the circumstances, I am satisfied that no substantial injustice resulted on the appellant by the failure to be represented by an advocate. The appellant's ground of appeal and argument therefore fails.

34. ***On Whether the evidence adduced against the appellant was enough to sustain a conviction in light of his alibi***, it is the appellant's case that the evidence adduced against him was not sufficient to sustain his conviction. Section 8 of the ***Sexual Offences Act*** provides that:

> ***"8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(2) 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."***

35. For the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether the complainant is a child; the second is whether there was penetration of the complainant's genitalia; and finally, whether the penetration was by the Appellant. See the case of **Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013,** where it was stated that:

> ***"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."***

36. The age of the complainant was proved by the production of the baptismal card by PW4 as exhibit 2 that showed that the complainant was born on the 5/10/2009 thus making her age at the time of the offence to be 11 years 8 months.

37. On the issue of the appellant's identification, PW1 testified that the appellant was her uncle thus well known to her and the appellant also conceded in his defence that he asked her to take a chair to his house. At the material time of the offence, PW1 testified that there was a sinking solar light in the appellant's house. The appellant was also arrested from his house wherein the complainant's red inner pant and skirt were recovered. Iam satisfied that the trial magistrate did not err in finding that the complainant positively identified the appellant as her assailant.

38. On whether penetration was proved beyond reasonable doubt, the appellant cast aspersions on the evidence adduced by the prosecution stating that it was not sufficient to convict him. It was his assertion that the trial court relied on the evidence of a single identifying witness to convict him. He also submitted that the evidence of the doctor who examined the complainant proved that there was no penetration.

39. Section 124 of the Evidence Act provides as follows:

> ***"Notwithstanding the provisions of section 19 of the oaths and Statutory Declaration Act, where the evidence of the victim 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 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."***

40. The evidence of the complainant was that the appellant who was her uncle lured her into his house by requesting her to take to him a chair which was outside into his house upon which he told her to move closer and that he removed her inner pant and skirt and had sexual intercourse with her on his bed, that she felt pain so she screamed upon which he left her so she ran away leaving behind her inner pant and skirt on the appellant's bed. This evidence was corroborated by PW2 who arrested the appellant and recovered the inner pant and skirt from the appellant's house which items were produced as exhibits 1(a) and (b). Further, the complainant's evidence was corroborated by that of PW5, the clinical officer who examined the complainant and found her labia minora and majora reddish and inflamed and tender. In her genitals were epithelial cells and her mandibles were painful as she reported to have been slapped as she struggled with the appellant during the ordeal. concluded that she had been defiled. In my humble view, this evidence was more than sufficient to establish that it was the appellant who defiled the complainant and that penetration was proved beyond reasonable doubt.

41. The appellant further faulted the evidence adduced by the prosecution witnesses stating that the prosecution failed to call an essential witness with material evidence. *The case of* ***Bukenya & Others vs Uganda [1972] E.A.549*** *is the locus classicus on the* issue of failure to call crucial witnesses where the Court of Appeal for Eastern Africa held that:

> *"The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case. Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution."*

42. In ***Julius Kalewa Mutunga v Republic*** **[2006] eKLR**, the Court of Appeal held that:

> ***"…As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."***

43. *In the case of* ***Bukenya & Others vs Uganda*** *(supra),* the court was clear that the prosecution is not expected to call a superfluity of witnesses. The adverse inference will therefore only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly, adverse inference will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case.

44. Under Section 143 of Evidence Act (Cap 80) Laws of Kenya, no ***particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.***

45. In the case of **Keter v Republic [2007] 1 EA 135** the court held *inter alia* that:

> ***"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."***

46. I have perused the trial court record of proceedings and judgment and Iam unable to find any such crucial witness whom the appellant on appeal claims was not called to prove any issue or particular matter so as to require the trial court or this Court to make any adverse inference that had such a witness been called, he or she could have given adverse evidence against the prosecution. I therefore find no substance in the complaint by the appellant's ground of appeal and submission that crucial witnesses were not called. The ground of appeal is hereby dismissed.

47. The appellant also claims that his defence of alibi was not considered in his favour. In the case of **Charles Anjare Mwamusi v R CRA No. 226 of 2002** the Court of Appeal stated that:

> ***"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to the charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable Kiarie V. Republic (1984) KLR 739 at page 745 paragraph 25."***

48. This court is cognizant of the fact that by setting up an alibi defence, the accused does not assume the burden of proving the alibi- see **Wang'ombe v Republic [1976-80] 1 KLR 1683** where it was stated "***the prosecution always bears the burden of disproving the alibi and proving the appellant's guilt."*** However, this defence should also be raised at the earliest opportunity as was held in the case of **Victor Mwendwa Mulinge v Republic [2014] eKLR,** where the Court of Appeal rendered itself on the issue of alibi thus:

> ***"It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see Karanjavs Republic, this court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilty is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigating and thereby prevent any suggestion that the defence was an afterthought."***

49. From the evidence adduced by the appellant in his defence, that his chairs had been taken to the main house and that he sent the complainant to bring them back to his house but she told him that the chairs were in his brother's house, and that he was asleep by 10pm and that his brother and the chief and his brother came and arrested him, I find no defence of alibi, capable of being disproved by the prosecution witnesses. It follows that the claim on appeal that the appellant was not at the scene of crime or that he was elsewhere when the offence allegedly took place is farfetched and an afterthought. I find that the trial court did not disregard any defence of alibi as none was proffered by the appellant. My finding is that the appellant's testimony created no alibi. That defence amounted to a mere denial. As stated herein an alibi must be raised at the earliest instance to enable the prosecution test it, or even during the hearing of the case during the trial for the trial court to assess that defence against the prosecution evidence as a whole, and not on appeal as is the case herein. I therefore find the ground and submission on the issue of alibi not merited. It is hereby declined.

50. The appellant further claimed that the witnesses presented before court were coached and that he had been framed. He further stated that the doctor who testified stated that there were no injuries sustained by the complainant, a sign that the complainant was not defiled. In cross examination, the appellant stated that he sent the complainant to bring the chairs at 7pm.

51. A perusal of the trial court's judgement reveals that the trial court considered both the evidence adduced by the appellant against that of the prosecution witnesses and found that the appellant's defence was unreasonable thus rejected it. I have no reason to differ with that finding by the trial magistrate as the evidence by the prosecution overwhelmingly proved all the elements of the offence of defilement as charged and beyond reasonable doubt. The allegation that the appellant was framed or that the witnesses were coached is far-fetched as there is nothing on record demonstrable of such coaching or framing up such a heinous offence against the appellant by his own family members. The trial court that the opportunity to hear and see the witnesses as they testified believed in their testimonies as being truthful and especially the testimony of the minor on what exactly happened to her. That evidence is watertight and remained so even in cross examination when she made it clear that she had not been told what to come and tell the court.

52. On the whole, I have no difficulty in finding that the prosecution adduced evidence beyond reasonable doubt to prove all the elements of defilement against the appellant herein as charged. In the circumstances, this appeal against conviction fails and is dismissed.

53. ***On Whether the sentence imposed on the appellant was manifestly harsh that it should be interfered with, t***he appellant submitted that the sentence passed on him was excessive and manifestly harsh and that the trial court failed to individualize the circumstances of the offence thus leading to his being over punished.

54. Under section 8(2) of the Sexual Offences Act, upon conviction for defilement under section 8(1) of the Sexual Offences Act, of a child aged 11 years and below, the punishment provided is life imprisonment. In his mitigation, the appellant kept quiet and the trial court found that the appellant was unremorseful.

55. Sentencing is in the discretion of the trial court. In **Bernard Kimani Gacheru v Republic (2002) eKLR**, the Court of Appeal stated that:

> ***"It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."***

56. In the circumstances of this case, there is overwhelming evidence that the appellant lured his own brother's child into his house and defiled her. The child was aged 5 years. there can be no justification for a person of the appellant to defile his own niece, He did not even feel remorseful about it. He therefore did not deserve any discretionary sentence by the trial court. meted out on the appellant considering the circumstances of his case was lawful. The appellant wielded authority over his niece, whom he ought to have protected considering he was her uncle.

57. I find no reason to interfere with that lawful sentence, bearing in mind the clarification direction given on 6/7/2021 by the Supreme Court in the **Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR (2)** to the effect that the **Francis Muruatetu & another v R [2017] e KLR** as it stands now is inapplicable to other offences that carry mandatory sentences other than under *Section 204* of the *Penal Code*, for the offence of Murder.

58. Accordingly, the sentence of life imprisonment as provided for in section 8 (2) of the Sexual Offences Act remains legal and constitutional.

59. For all the above reasons, I find and hold that the appeal herein against conviction and sentence is devoid of any merit. I uphold the conviction and sentence imposed by the trial court. I dismiss the appeal in its entirety.

60. File closed.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 23RD DAY OF MARCH, 2022

R.E. ABURILI

JUDGE