REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. E001 OF 2020

DOUGLAS NYANGAYA MOKUA.....APPELLANT

-VRS-

THE REPUBLIC.....RESPONDENT

{Being an Appeal against the Conviction and Sentence of Hon. W. C. Waswa (Mr.) – RM Nyamira dated and delivered on the

29th day of September 2020 in the original Nyamira Chief Magistrate's Court Sexual Offence No. 68 of 2019}

JUDGEMENT

The appeal arises from the appellant's conviction for the offence of **defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act** and his subsequent sentence to a term of imprisonment for thirty (30) years. The appeal is premised on grounds that: -

> **"1. The Learned Trial Magistrate erred in law and in fact in finding that the Appellant was guilty of the offence charged when the prosecution had not established guilty beyond the required standard of proof.**
>
> **2. The Learned Trial Magistrate erred in law and in fact in analyzing or evaluating the Respondent's evidence separately, forming a considered opinion thereof and then laying the burden of disproving or dispelling the pre-meditated impression upon the Appellant contrary to the established principle in criminal law, which casts the burden of proof upon the Respondent.**
>
> **3. The Learned Trial Magistrate erred law and fact by finding that there was penetration when medical evidence on record concluded that there was absence of penetration.**
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> **4. The Learned Trial Magistrate applied the wrong principles by relying on the uncorroborated evidence of the complainant to find that the fact of penetration was proved.**
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> **5. The trial Court erred in law and fact in finding that the Appellant was positively identified by the complainant.**
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> **6. The Learned Trial Magistrate erred in law and fact by finding sufficiency in the evidence of the complainant on the identity of the Appellant when the prosecution failed to call a key witness who was present.**
>
> **7. The Learned Trial Magistrate failed to take in consideration to relevant mitigating factors hence meting against the Appellant a harsh and excessive sentence in the circumstances.**

The appeal was opposed and this court directed that the same be canvassed by way of written submissions.

The gist of the submissions of Counsel for the appellant was that whereas the age of the complainant was proved, penetration and his identity as the perpetrator were not proved beyond reasonable doubt. Counsel also submitted that the omission by the prosecution to call crucial witnesses compromised the case against the appellant and was fatal. As for the sentence, Counsel argued that the same was harsh and excessive in light of the circumstances of the offence and the pre-sentence report presented to the trial court. Counsel cited several cases in support of his submissions and urged this court to allow the appeal, quash the conviction, set aside the sentence and set the appellant at liberty forthwith.

On his part, Senior Prosecution Counsel Mr. Majale submitted that the **key ingredients** of the offence to wit **age**, **penetration** and **identification of the perpetrator** were all proved beyond reasonable doubt. He reiterated the complainant's testimony that on the material day he was taken to the appellant's shop by one Kevin and that the appellant put him on the bed on his belly and inserted his penis into his

anus; that after he was done the appellant gave him 50/= and pushed him out of the shop and that the appellant did the same thing to him on 20th August 2019. Counsel contended that the complainant was consistent and was not shaken even in cross examination. Counsel submitted that the trial Magistrate believed the complainant. Counsel contended that the evidence of the complainant was believable even without corroboration and that the trial court appreciated that the absence of medical evidence does not mean there was no penetration. Counsel argued that penetration was proved beyond reasonable doubt as was identification of the appellant as the perpetrator given that this was not just visual identification but recognition of the appellant as he was already well known to the complainant.

In regard to the failure to call Kevin who was purportedly present during the commission of the offence, Mr. Majale stated that the investigating officer explained that the said Kevin was at large and that warrants of arrest had been issued against him. As to the submission that the sentence was harsh and excessive, Mr. Majale submitted that whereas the trial Magistrate could have imposed a life sentence as provided in **Section 8 (2) of the Sexual Offences Act** he exercised his discretion favourably by sentencing the appellant to thirty (30) years imprisonment. Counsel pointed out that the complainant who was seven years old told the court that the appellant defiled him on two different occasions and that trial court took into consideration the age of the victim, the seriousness of the offence and the mitigation offered by the appellant and hence the sentence was appropriate in the circumstances. Mr. Majale urged this court to dismiss the appeal.

I have carefully considered the rival submissions and the cases cited by Learned Counsel for the appellant but as the first appellate court I have a duty to reconsider and evaluate the evidence before the trial court so as to arrive at my own independent conclusion. I do this keeping in mind and making provision for the fact that I did not see or hear the witnesses - ***see the case of Okeno v Republic [1972] EA 32*.**

The **key ingredients of the offence of defilement are the age of the victim, proof of penetration** and **identification of the accused person as the perpetrator of the act which caused penetration**. In this case the age of the complainant was proved through an Acknowledgement of Birth Notification (Exhibit P3) which indicates he was born on 12th February 2011 and hence seven to eight years old at the time material to this case. I find that age as an element of the offence was proved beyond reasonable doubt.

The second ingredient of the offence is **penetration,** which means **"the partial or complete insertion of the genital organs of a person into the genital organs of another person**" – ***see Section 2 of the Sexual Offences Act***. As defined in **Section 2 of the Act "genital organs"** includes **the whole or part of male or female genital organs and for purposes of this Act includes the anus**. In this case therefore the prosecution was required to prove that there was partial or complete insertion of the appellant's genital organ into the anus of the complainant. The standard of proof as in all criminal cases being beyond reasonable doubt. I have carefully evaluated the evidence adduced in support of the charge and my conclusion is that penetration was not proved beyond reasonable doubt. Whereas **Section 124 of the Evidence Act** provides that in a criminal case involving a sexual offence the accused person may be convicted on the evidence of the victim alone, the section makes it clear that the court can only do so if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth. In his judgement, the learned trial Magistrate stated that he believed the complainant and gave the reason for so doing in the following terms: -

> ***"I note that the accused did little to challenge the evidence of Pw1 in cross examination. He failed to weaken the evidence of Pw1.***
>
> ***In my humble view, having considered the evidence of Pw1 and the decisions from the superior courts, I believe he was telling the truth……"***

On my part I find it difficult to believe the complainant. This is because first, he was a witness who did not, according to the *voire dire* conducted by the trial court, understand the duty of telling the truth. It is therefore difficult to tell if what he told the court was true. Secondly, although in light of the provisions of **Section 124 of the Evidence Act** the prosecution was not bound to call a witness to corroborate the complainant's evidence, they nevertheless called a clinical officer who discredited that evidence instead of corroborating it. The clinical officer (Pw4) testified that he examined the complainant on 20th August 2019 and there was no penetration of the anus. The Court of Appeal dealt with similar evidence in the case of **John Mutua Munyoki v Republic [2017] eKLR** and it held as follows: -

> ***"As correctly submitted by the appellant, in all criminal cases, the prosecution has the task of proving its case against an accused person beyond reasonable doubt and it is a burden the prosecution must discharge in relation to each and every ingredient of the particular offence charged. As already alluded to, the most important ingredient of the offence of defilement is penetration. PW6 who examined the complainant was non committal as to whether the complainant had actually been penetrated thereby casting doubt as to whether the offence was committed. It is therefore clear that both courts below erred in holding that the evidence on record proved beyond reasonable doubt that the offence of defilement had been committed on the complainant. It is obvious that the two courts did not evaluate the evidence carefully before the verdict aforesaid."***

I am also of the humble view that given the complainant did not understand the duty of telling the truth and given the finding of the clinical officer that there was no penetration of the anus, the evidence was barely adequate to prove the guilt of the appellant and the case was therefore one suitable for calling other witnesses and the omission by the prosecution to call those witnesses entitles this court to draw an adverse inference that the evidence of those witnesses would have been prejudicial to the prosecution's case. The complainant stated that he was taken to the appellant's shop by one Kevin. The said Kevin was not arrested although ideally he should have been because if the complainant is to be believed he was clearly an accomplice but having decided not to charge him the prosecution could have treated him as a witness. The explanation that he was on the run and a warrant was out for his arrest does not serve as an excuse since the police have the means to bring such persons to book and there was more than adequate time for them to do so. The investigating officer (Pw5) did not explain what steps were taken to bring Kevin to book yet the trial took more than a year. It is also instructive that although Pw5 made reference to other witnesses to the crime none of them were called to testify. In his own words: -

> ***"The accused was arrested by members of the public after those who watched from a far raised the alarm."***

Pw5 gave no explanation for not calling any of those witnesses or all of them. While I appreciate the provisions of **Section 143 of the**

Evidence Act that the prosecution does not require to call any particular number of witnesses to prove its case, in the instant case the omission to call crucial witnesses is fatal given that the evidence in support of the prosecution's case was barely sufficient to prove its case. My finding finds support in the case of **Bukenya & others v Republic [1972] EA 349** where it was held that: -

> ***"The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."***

(See also the case of **Daniel Kipyegon Ng'eno v Republic [2018] eKLR)** where more recently it was held: -

> ***"……..the prosecution is not expected to call a superfluity of witnesses. The adverse inference will only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly it will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case."***

In his defence the appellant mounted an alibi. The law is that it is never the duty of the accused person to prove the *alibi* but the duty of the prosecution to disprove it ***(see the case of*** **Ali Mlako Mwero v Republic [2011] eKLR** where it was held that: -

> **"It is indeed the law that an accused person assumes no burden of proof in a criminal case whether his defence amounts to an *alibi* or not. As stated in Saidi v Republic [1963] EA 6:**
>
> ***"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a 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."***

In holding that ***"the accused failed to call a witness to corroborate his defence"*** and that ***"he ought to have called his friend to confirm that indeed the accused person slept at his house on 19th August 2019, the accused failed to cast doubt in the prosecution's case"*** the learned trial Magistrate misdirected himself on a matter of law and thereby shifted the burden of proof to the accused which is not permissible. The appellant stated that he was not at the shop on the days it is alleged he committed the offence. He made account of each and every one of those days and in the absence of evidence disproving his alibi he ought to have been believed. I have myself considered and weighed the *alibi* defence against the evidence called by the prosecution and I find no reason to disbelieve the appellant. I find that the prosecution did not prove the charge against the appellant beyond reasonable doubt.

In the upshot and for the afore-stated reasons this appeal is allowed, the conviction is quashed and sentence set aside and it is directed that the appellant shall be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

JUDGEMENT SIGNED, DATED AND DELIVERED ELECTRONICALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 25TH DAY OF MARCH 2021.

E. N. MAINA

JUDGE