



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 25 OF 2018

MOSES NJAGI RUKEMI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against sentence from the judgment of the Hon.Omwange J Resident Magistrate, Siakago delivered on 17th July, 2015 in Criminal Case No.972 of 2018)

JUDGMENT

1. The Appellant **Moses Njagi Rukemi** was charged with the offence of defilement contrary to **Section 8 (1)** as read with **Section 8(3)** of the **Sexual Offences Act**. The particulars of the charge being that on the 27th October, 2015 at Gikiro Sub Location within Mbita Location, Mbeere South Sub-County within Embu County, the appellant intentionally and unlawfully penetrated his genitalia into that of **BMM** a child aged fifteen (15) years.

2. The alternative charge was that of Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act; that on the same date and at the same place hereinabove the appellant intentionally and unlawfully touched the private parts of **BMM** using his genital organ whilst knowing that she was a child aged fifteen (15) years;

3. After a full trial, the Appellant was found guilty and was convicted on the main charge and was sentenced to twenty (20) years imprisonment.

4. Being aggrieved by the conviction and sentence, the Appellant filed a Petition of Appeal and Supplementary Petition of Appeal and listed the grounds of appeal which are as summarized inter alia;

(i) The trial court erred in failing to inquire from the appellant the language he understood; the entire proceedings were not recorded in a language the appellant understood;

(ii) The trial was unfair as the appellant had no legal representation;

(iii) The appellant was not positively recognized or identified; the trial court relied on inconsistent evidence of **PW1** which was not corroborated by the medical evidence; the evidence used to convict the appellant was that of a single witness; the trial court failed to invoke Section 150 of Criminal Procedure Code thereby rendering the evidence of **PW1** as hearsay;

(iv) The trial court failed to consider that the incident occurred at night and there was no light used to identify the appellant;

(v) The trial court disregarded the appellants un rebutted defence of alibi and gave no reasons for rejecting it in violation of Section 169(1) of the Criminal Procedure Code.

5. At the hearing hereof the appellant was represented by learned counsel Mr.Gachuba whereas the Prosecuting Counsel for the State was Ms Chemenjo; parties were directed to dispose of the appeal by filing and exchanging written submissions; hereunder is a summary of their respective submissions;

APPELLANT'S SUBMISSIONS

6. It was the appellant's contention that he was not accorded a fair hearing at the trial; the plea taken was defective as it was done in a language the appellant did not understand; the full trial was also conducted in a language he did not understand and the charge being a serious one he was not assigned an advocate by the state to represent him at the trial all these failures amounted to a violation of his rights under Article 50(2) of the Constitution 2010; case law relied on **HO vs Republic [2020] eKLR**.

7. The appellant submitted that there was no positive identification of the assailant; the complainants evidence was not corroborated by the medical evidence as required by Section 124 of the Evidence Act and Section 36 of the Sexual Offences Act; and no reasons were given by the trial court as to why it believed the evidence of **PW1** without corroboration; referred to case of **Dominic Kibet Mwareng vs Republic (2013) eKLR**;

8. The appellant contends that he raised an '*alibi*' defence which was not considered by the trial court; whereas the prosecution did not challenge the defence; as held in the case of **Victor Mwendwa Mulinge vs Republic (2014) eKLR** where it was held that '*It was trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies with the prosecution.*'

9. In the case of **Adedeji vs The State {1971} 1 All NLR 75** it was held that;

'Failure by the police to investigate and check the reliability of alibi would raise reasonable doubt in the mind of the tribunal and lead to the quashing of a conviction imposed.'

10. The appellant prayed that the appeal be allowed; the conviction be quashed; the sentence be set aside and the appellant be set at liberty

RESPONDENT'S SUBMISSIONS

11. In response the appeal against conviction and sentence was opposed by the State; prosecuting counsel submitted that the trial court conducted the trial with utmost fairness; the record reflected that the charge and every element thereof was read out to the appellant in Kimbeere which was a language he understood and a plea of not guilty was entered; the appellant was then given an opportunity to challenge the evidence presented by the prosecution and he was given a chance to present his defence of '*alibi*';

12. Counsel submitted that the right of legal representation was not absolute;

13. **On identification:** on the claim by the appellant that he was not positively identification counsel submitted that the appellant was positively identified by **PW1** through voice recognition and her evidence was uncontroverted; the complainant testified that the appellant used to reside in their plot and she knew him by name and his unique head gear; the appellant was positively placed at the scene of crime;

14. **On penetration:** the trial court relied on the medical reports which was in line with Section 124 of the Evidence Act;

15. The law provides that no particular number of witnesses shall be required for the proof of any fact; and **PW1** had testified that the appellant had threatened witnesses and in particular Kariuki whom the prosecution was unable to procure his attendance due to this interference;

16. That it was not necessary to invoke Section 150 of the Criminal Procedure Code as the ingredients of the offence had already been demonstrated by the prosecution;

17. The appellant contended that his '*alibi*' defence was not rebutted by the prosecution; but the appellant only adopted this line at the defence hearing and merely stated that he was at home; his wife (**DW2**) who was his witness ought to have confirmed this but did not do so; and counsel submitted that this defence of alibi was weighed against the prosecution evidence by the trial court and found that it could not stand; the prosecution states that this defence was an afterthought;

18. In conclusion the respondent submitted that the prosecution proved its case beyond reasonable doubt and followed due process; and prayed that the appeal be dismissed forthwith as it lacked merit; and the conviction and sentence of the trial court be upheld.

ISSUES FOR DETERMINATION

19. The parties were directed to canvass the appeal by filing and exchanging of their respective written submissions; after taking into consideration the submissions of the counsel for the appellant and prosecuting counsel this court finds the following issues for determination;

(i) Whether the appellant was accorded a fair trial;

(ii) Whether the prosecution proved its case to the desired threshold;

(iii) Whether the trial court disregarded the appellants defence of alibi without giving sound reasons.

ANALYSIS

20. This court being the first appellate court it is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion bearing in mind that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified. Refer to the case of **Okeno vs Republic (1972) EA**.

Whether the appellant was accorded a fair trial:

21. The appellant's contention was that the Plea taken was defective due to the fact that it was not read out to him in a language he understood;

22. This court has had occasion to peruse the court record and notes that the plea for the main and alternative charge were recorded by the trial court as follows;

Interpretation – Kimbeere

Accused – present

Represented by – Self

The substance of the charge(s) and every element thereof has been stated by the court to the accused person in the language that he understands who being asked whether he admits or denies the truth of the charge(s)

Replies – It is not true

Court – Plea of Not Guilty Entered

Alternative

Accused – It is not true

Court – Plea of Not Guilty Entered

23. Though the record reflects that the trial court used a template for taking the plea the specific language the appellant understood was clearly stated as Kimbeere; the trial court then proceeded to enter a plea of not guilty on the main charge and also on the alternative;

24. Had the plea been one of ‘**Guilty**’ followed by a conviction then this court would have belabored itself in interrogating the process of taking the plea by use of a template, at length, and any attendant consequences thereto; but in this instance the plea entered was one of ‘**Not Guilty**’ and this was followed by a full trial; this court finds no fault with the manner and language in which the plea was taken and is satisfied that no miscarriage of justice or prejudice was occasioned to the appellant;

25. The appellant went on to submit that the trial court conducted the proceedings in a language he did not understand and there for the trial was unfair; again a cursory perusal of trial proceedings reflects that the prosecution witness **PW2** had indicated to the trial court that he did not understand Kiswahili or English; whereupon the trial court stepped down the witness and directed that a Kamba interpreter be availed; the witness later gave evidence in her mother tongue;

26. The record shows that the appellant followed and appreciated the evidence tendered against him and that he was able to cross-examine the prosecution witnesses; and when called upon to defend himself was able to ably defend himself;

27. This court is satisfied that the appellant knew the exact offence that he was alleged to have committed and finds nothing on the court record that demonstrates that he had raised any objection to the language the proceedings were conducted in;

28. The appellant was always aware of the nature of the charge against him, he actively participated in the proceedings and also ably defended himself when called upon to do so; this court is satisfied that the language used did not occasion any miscarriage of justice or prejudice to him;

29. The third limb to this ground of appeal was that the charge being a serious one, the appellant contends that he ought to have been assigned an advocate by the state to represent him at the trial; that this failure amounted to a violation of his rights under Article 50(2) of the Constitution 2010;

30. The right to state funded legal representation in criminal matters is normally dependant upon the gravity of the offence and on the nature of the penalty; the offences envisaged are all situations where an accused person is charged with an offence which attracts the death penalty then such persons have an automatic right to legal representation at the states’ expense;

31. The categories of those persons who may receive state funded legal representation was expanded by the Court of Appeal to include instances where substantial injustice would otherwise result due to the seriousness of the offence; reference is made to the case of **David Njoroge Macharia vs Republic [2011] eKLR**;

32. Nevertheless, it is this courts considered view that even though the charge the appellant faced was indeed serious due to the penalty to be imposed and that it may have fallen within the expanded category it was incumbent upon the appellant to have applied or requested for the legal aid at the trial and not to leave it to the trial court to interrogate his circumstances; The record is devoid of any such application, request or complaint or objection being made by the appellant at the trial;

33. For the forgoing reasons this court is satisfied that the appellant was accorded a fair trial and finds this ground of appeal lacking in merit and it is disallowed;

Whether the prosecution proved its case to the desired threshold:

34. The appellant contends that the prosecution failed to prove the offence of defilement to the desired threshold; the respondent in response stated that the prosecution had proved the three key ingredients of the offence to the desired threshold; the three key ingredients that the appellant must prove are identification, age and penetration.

35. **On identification;** In this instance it was not identification but a case of recognition of the appellant as being the assailant; recognition is usually more satisfactory and reliable than identification of a stranger because it is dependant on personal knowledge of the assailant;

36. **PW1** in her testimony indicated that she knew the appellant by name as she used to reside in the same plot with the appellant and the record reads as follows;

‘...I was heading to Mama I’s house when I heard somebody call my name M. It was dark but the person was covering his head with ‘a kilemba’.

...I knew the voice of the person who called my name that night. We used to reside in their plot and I knew him as Njagi.’

37. Even though evidence on voice identification is admissible the trial court must receive it with care and caution and ensure that the witness was familiar with the appellants voice and recognized it in the conditions obtaining at the time; and in receiving such evidence it was free from possibility of error before it can make it the basis of conviction; case law relied on **Karani vs Republic [1985] KLR 290**;

38. The court record reflects that the trial court was guided by the fact that the appellant and the complainant used to live on the same plot and hence the appellant was a person who was familiar and not a stranger to the complainant; this was not disputed by the appellant during the trial; **PW1** also stated that the appellant knew her by name and called it out on the fateful date; this fact was also not disputed by the appellant and therefore her evidence on familiarity was uncontroverted; from the testimony of **PW1** the trial court made a finding that **‘It was clear from the evidence subject knew the accused well having lived in the house for a while as neighbors and was able to identify him by voice’.**

39. The trial court made a finding that the appellant was positively identified by way of voice recognition after examining their familiarity and relationship; it is this considered view that the trial court had the opportunity to observe the demeanor of **PW1** and found her evidence consistent and credible; therefore, having re-examined the evidence on record on the voice recognition this court finds no reason to interfere with the trial courts finding and is satisfied that the voice recognition by **PW1** was positive and free from error.

40. **On Age;** this court notes that the Charge Sheet indicates that the age of the child was fifteen (15) years at the time the incident took place; **PW2** the mother of the complainant stated that the minor was aged fifteen (15) years at the time of the incident; Doctor Godfrey Njuki Njagi (**PW5**) corroborated this evidence when he confirmed that the age of the minor at the time he examined her was fifteen (15) years; the Investigating Officer (**PW3**) produced documentary evidence in the form of a Birth Certificate (**‘PEXh.5’**) which indicated that the complainant was born on 23/02/2000;

41. From this evidence the trial court made a finding that **PW1** was aged fifteen (15) years at the time of the alleged offence and made a finding that this element had been proved;

42. This court finds no reason to interfere with the trial courts finding on the age of the complainant.

43. **On Penetration;** penetration is defined under the provisions of Section 2 of the Sexual Offences Act and it reads as follows;

“Penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person.

44. **PW1** clearly described how on the fateful night she was followed by the appellant who called her by name causing her to stop; he then accosted and overpowered her and dragged her into a bush; he proceeded to remove her skirt and biker and inserted his member into her genitalia; the appellant was interrupted when two persons appeared causing him to flee; she reported the matter to her mother (**PW2**) and was taken to hospital and the matter was reported to the police;

45. The P3Form and treatment notes were presented as exhibits (**‘PEXh.3’ and ‘PEXh.4’**) by the doctor (**PW5**) whose testimony was that upon examination of the minor he found the complainant’s hymen was perforated and there were bruises on the labia minora and majoria; after the examination the doctor’s opinion was that the injuries demonstrated recent defilement;

46. This court is satisfied that the evidence of **PW1** on penetration was corroborated by the medical evidence tendered by **PW5** and that it sufficiently proved this element of penetration; and coupled with the identification evidence this court finds no reason to interfere with the trial court’s finding that the appellant was the person who had defiled the minor.

47. This court finds that the three elements of defilement; that is age, penetration and identification were proved by the prosecution to the desired threshold;

48. This ground of appeal is found lacking in merit and it is hereby disallowed.

Whether the trial court disregarded the appellants ‘alibi’ defence;

49. In his sworn statement of defence the appellant raised an **‘alibi defence’** and stated that on that material day he was at home with his wife

DW2 whom he called to be his witness; his contention was that his alibi defence was un rebutted as the prosecution did not challenge it yet the trial court chose to disregard it without giving reasons in violation of ;

50. The record reflects that the trial court made the following observation on the alibi defence in its judgment and stated that ***'From the evidence tendered by DW2 she does not indicate that she was with the accused on the date and time of the alleged offence.'***

51. Upon weighing the appellant's ***'alibi defence'*** against the prosecution's evidence the trial court found ***'....His defence of alibi has not created any doubt in my mind.....'***

52. It is this courts considered view that the appellant in this case raised his ***'alibi defence'*** belatedly; the ideal position would have been to have raised it either during cross-examination or to have brought it up at the earliest possible moment in order to give the prosecution an opportunity to inquire into the ***'alibi'*** and a chance to interrogate and establish if it checked out.

53. Nevertheless, it is trite law that there is no statutory provision that requires an accused person to disclose his defence prior to being called to his defence;

54. The court record reflects that the appellant called his wife (**DW2**) as a witness to corroborate his evidence as to his whereabouts on that material date; but as observed by the trial court the wife did not ***'testify that they were at home with the accused on the alleged date of the offence.'***

55. For those reasons this court is satisfied that the alibi defence did not dislodge the prosecution's case and finds that the trial court was justified in disregarding the appellants ***'alibi defence'*** and gave reasons for disregarding it; this ground of appeal is found lacking in merit and it is hereby disallowed.

FINDINGS & DETERMINATION

56. In the light of the forgoing this court makes the following findings and determination;

- (i) This court finds that the appellant was accorded a fair trial.
- (ii) This court finds that the prosecution proved its case to the desired threshold; the appellant was positively identified; the conviction is therefore found to be safe.
- (iii) The trial court is found to have considered the appellants defence of alibi and gave sound reasons for disregarding it.
- (iv) The appeal is found to be lacking in merit and is hereby dismissed.
- (v) The conviction is hereby upheld and sentence is confirmed.

Orders accordingly.

Dated, Signed and Delivered Electronically at Nyeri this 19th day April, 2021.

HON.A.MSHILA

JUDGE