REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 15 OF 2019

JULIUS MALUKA ITUMANGE..............APPELLANT

VS.

REPUBLIC..RESPONDENT

(An appeal from the original conviction and sentence of the

Chief Magistrate's Court at Gatundu, Hon. C.M. Makori, SRM

dated 6th February, 2019 Sexual Offences Case NO. 19 of 2017)

JUDGMENT

1. ***BENJAMIN MALUKU ITUMANGE*** was convicted for the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the Sexual Offences Act. On conviction, he was sentenced to serve life imprisonment. He has appealed before this Court against his conviction and sentence.

2. The expectation by the appellant of this Court as a first appellate court in consideration of his appeal is as was stated in the case ***KIILU & ANOTHER VS. REPUBLIC IKLR 174***, thus:-

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.***
>
> ***It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."***

3. The prosecution's evidence adduced before the trial court was that the appellant was a watchmen at a polytechnic. The children in that locality often went to that polytechnic to play. On the day in question, **GW** who was then **6 years old** was playing with other children. The appellant whom the children colloquially referred as "watchie" (meaning watchman) asked GW and HW to go with him. GW and HW followed the appellant to a hall, within the polytechnic.

4. GW said appellant did "bad manners" to her. She described appellant's actions of removing his trousers and lifting her dress then placing her on the ground and defiling her.

5. HW said that when they arrived at the polytechnic hall appellant instructed her to write numbers 1 to 50 on the ground and as she did so, she saw the appellant remove the pants of GW and he did "bad manners" to her.

6. Other children who either were peeping into the hall or came immediately after the defilement described the appellant's defilement of GW and also said they saw appellant and GW dressing up.

7. The mother of GW also testified and said that on her return home from duty, she was informed by the children that GW was defiled. The mother took GW to Mundoro dispensary where she was referred to **Gatundu Level 4 hospital**. At the hospital GW was treated and PW3 form was filled by the doctor who treated GW.

8. The P3 Form and medical notes were produced by *Doctor Wycliff Omol* who was not the doctor who treated GW. The doctor had been transferred and was not present to testify. The PW3 Form indicated that GW had vaginal discharge which had presence of blood. The doctor stated that the discharge was indicative of forceful penetration, which was not normal for a 6 year old child. The doctor also stated that GW's hymen was freshly broken.

9. The appellant gave sworn evidence in his defence. Appellant confirmed that he worked as a watchman at the Kiganjo polytechnic. On the material date, he reported at work at 6.00 pm and that he was not at the polytechnic at 4.00 pm. as claimed by the prosecution's witnesses. He stated in response to cross examination that on reporting on duty, on the day in question, at 600 pm he did not find any children there. He confirmed there was no enmity between him and the children but stated that the women in that area including GW's mother used to cut grass in the polytechnic compound and because he stopped them he believed that could have motivated the charges brought against him. He also alleged that GW's mother wanted to have a love affair with him but he declined.

10. Appellant called MKI, his brother, who stated that the appellant on the day in question was at home in Mundoro before leave at 5.00 pm to report to his place of work, Kiganjo Polytechnic.

ANALYSIS AND DETERMINATION

11. By his appeal against conviction and sentence appellant has raised several grounds of appeal which call on this Court to determine the following issues:-

a) Did the trial court consider appellant's alibi defence?

b) Did the trial court err in permitting one who did not make the medical records submit them in evidence?

c) Were appellant's rights violated in not informing him his right to legal representation?

d) Was the prosecution's evidence contradictory or hearsay to vitiate appellant's conviction?

e) Was there mistaken identity of the appellant?

f) Did the trial court err to find GW was a truthful witness?

12. I shall proceed to consider the above issues in clusters.

13. Did the prosecution's case meet the criminal standard of proof? In consideration of this issue, I will examine appellant's contention that the prosecution's case was riddled with inconsistencies and that GW was not a truthful witness. In the case ***STEPHEN NGULI MULILI VS. REPUBLIC (2014) eKLR*** the court considered the criminal standard of proof and stated:-

> **"*The standard of proof required is*** *"proof beyond reasonable doubt." I* ***n reference to this Lord Denning in*** *MILLER V MINISTRY OF PENSION [1947] 2 ALL ER 372* ***stated: -***
>
> ***"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."***

14. Appellant submitted that the evidence of GW and the other four children, who testified on behalf of prosecution gave contradictory evidence. Appellant submitted that GW's evidence was not truthful because she said that when the appellant defiled her she was on her own and the other children were outside playing. Appellant stated that this evidence was contradicted by the other four children who testified some of whom said they were outside peeping while one said she was in the same room where the defilement occurred. Appellant placed reliance on the case ***ELIZABETH WAITHIEGENI GATIUM VS. REPUBLIC (2015) eKLR***:-

> ***"To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty."***

15. The issue for this Court's determination is, was there contradiction in prosecution's case and if any, did it occasion failure of justice. To determine what the position is one needs to carefully consider the prosecution's evidence.

16. GW said that the appellant found her playing with HW (whom she referred to as S) and VWW. This is what WG said:-

> ***"We were with S and W (VWW) playing when he (the appellant) called us to go write."*** (Underlining mine)

17. WG used the word, "us", meaning that she was making reference to the appellant taking her together with another or others, to write.

18. After describing how the appellant defiled her, GW said:-

> ***"My friends were not there at the time. It was inside a room in the school. I told my friends what had happened…"***

19. HW was 8 years old at the date of her testimony before court. She said that on the day in question, she was called by GW who asked that they should go to play. They were playing and riding bicycle when the appellant called her and GW There was a boy (who I shall refer to as G) who is also brother to GW. HW said appellant told G to go back, in other words he refused G to go with them, as GW and HW went with him. HW said:-

> ***"The accused (appellant) only called me and GW We followed him to the hall at the poly. The floor is made of soil so the accused (appellant) told me to write on the ground 1-50…***
>
> ***When the accused (appellant) was defiling GW I was still writing 1-50, the accused and GW were behind me but I looked back and its when I saw the accused doing bad manners to GW."***

20. Appellant submitted that GW's account of who was present when she was defiled contradicted that of HW to such an extent to warrant the finding that the appellant was not guilty.

21. In my view, having gone through the testimony of GW and HW I find no contradiction. This is because GW said appellant took "us". She was clear that appellant did not take her alone. when she later said my friends were not there when she was defiled, that statement ought to be understood from the perspective of a child's understanding. It is clear from the proceedings that GW when she said her friends were not there, she seems to have been responding to a question, perhaps a question from the prosecution or the court. In saying her friends were not there, it may very well mean that those who she refers to as her friends were not there. The evidence showed GW and HW were cousins. Perhaps GW did not regard HW as her friend but a relative. GW's evidence has to be considered from a child's point of view.

22. Further, GW's statement that her friends were not present is supported by the testimony of VWW a 13 year old girl. VWW said she saw the appellant called GW and HW, as they were playing. She saw GW and HW go with the appellant to the hall. She then stated:-

> ***"We followed them to near where the hall was and started peeping and saw the accused (appellant) had removed the pants of G.W. and he had lifted her dress and was doing bad manners to her…***
>
> ***It was only GW and HW and the accused (appellant) in the hall…***
>
> ***As we were leaving we asked GW what the accused (appellant) did to her and she told us bad manners."***

23. Brother of GW, whom I referred to as G was 12 years old. He was in the company of the children that were playing. He saw the appellant call GW and HWG said:-

> ***"… me and VWW went to check what they were doing at the hall, we found HW writing on the ground which has soil, GW had no pants and her dress was lifted up and the watchman (appellant) was doing bad manners to her…***
>
> ***It was just 3 of them in the hall."***

24. G said that he and VWW went to call E, a girl of 16 years. E was sister to HW. E rushed to the hall and she described what she saw as follows:-

> **"I rushed and found GW was pulling on her pants and the accused was crossing (sic) his zip. HW was writing on the ground with a stick."**

25. From that short review of the evidence of the eye witnesses, it become very clear there is more compatibility than discrepancies in the prosecution's evidence.

26. Contradictions that do not occasion failure of justice and are not of such nature as to create doubt will not lead to acquittal. That is the jurisprudence discussed in the case ***S.C.N. V. REPUBLIC (2018) eKLR*** as follows:-

> ***"12. Further in JACKSON MWANZIA MUSEMBI V REPUBLIC [2017] eKLR the court relied on the case of Uganda Court of Appeal in TWEHANGANE ALFRED V UGANDA - Criminal Appeal No 139 of 2001, [2003] UGCA, 6, where the court noted that it is not every contradiction that warrants rejection of evidence. There the court stated:-***
>
> ***'With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.'"***

27. The Court of Appeal also expressed itself in the same vein in the case of ***KAZUNGU KATANA NGOA VS. REPUBLIC (2017) eKLR*** thus:-

"15 This Court had occasion to address this issue recently in ***PHILLIP NZAKA WATU VS. R*** *(2016) eKLR*, ***where it expressed:-***

> ***'However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed it has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and couching.'"***

28. The trial court found the evidence of GW which was corroborated by 4 witnesses, convincing and reliable. I uphold that finding.

29. Appellant, in the second cluster of issues submitted that the trial court erred to have permitted a doctor who did not examine GW and who did not prepare the medical report to submit that report in evidence. Appellant submitted that prosecution failed to lay a basis for the doctor Omol to produce the medical report on behalf of his former colleague doctor. Appellant cited **Section 33 and 48** of the Evidence Act in support of his submission.

30. When Doctor Omol testified, he confirmed that he had worked at Gatundu Level 5 hospital from the year 2014. He said he was familiar with the hand writing of **Doctor Yusuf**, the maker of the medical report. Doctor Omol further said that Dr. Yusuf had been transferred to Mandera. Thereafter, Doctor Omol read through the medical report which he said concluded that GW had been defiled.

31. The Court of Appeal in the case of ***ROBERT ONCHIRI OGETO VS. REPBULIC (2004) eKLR*** discussed **Section 77** of the Evidence Act held that a post-mortem produced by a doctor who was not its maker was in accordance with the law. Section 77 of the Evidence Act provides:-

> ***"1. In criminal proceedings any document purporting to be a report under the handwriting of a Government Analyst, Medical Practitioner or of any Ballistics expert, Document Examiner or Geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.***
>
> ***2. The court may presume the signature of any such document is genuine and that the person signing it or the office and qualifications which he processed to hold at the time when he signed it.***
>
> ***3. When any report is so used the court may, if it thinks fit, summon the analyst, Ballistics expert, Document Examiner, Medical Practitioner, or Geologist, as the case maybe, and examine him as to the subject*** *matter there of*".

32. The Court of Appeal in the case of ***ROBERT ONCHIRI OGETO VS. REPUBLIC*** (supra) held:-

> ***"The postmortem on the body of the deceased was done by*** *Dr. Ondigo Steven*. ***The postmortem report was produced as exhibit at the trial by*** *corporal Ambani* **under** *Section 77* ***of the Evidence Act. One of the grounds of appeal is that the trial court erred in receiving the postmortem report which was inadmissible.*** *Mr. Gichaba*, ***learned counsel for appellant, submitted before us that the postmortem report does not have probative value as it is hearsay evidence since*** *Dr. Ondigo* **Steven was not called as a witness.** *Section 77 (1)* ***of the Evidence Act allows such document under the hand of a medical practitioner to be used in evidence. By section 77 (2) of the Evidence Act, the Court is allowed to presume that the signature to any such document is genuine and the person signing it held the office and qualification which he professes to hold at the time he signed it. The appellant was represented by counsel at the trial who did not object to the production of the postmortem report under section 77(1) of the Evidence Act and the Court did not see it fit to summon Dr. Ondigo Steven for examination. Nor did the appellant's counsel ask for the calling of the doctor for cross-examination. In our view the postmortem report was properly admitted as evidence in accordance with the law."***

33. The above was also the holding by the High Court in the case of ***REPUBLIC VS. RONAH KHALIF AHMED (2015) eKLR*** as follows:-

> ***"In my view*** *section 77* ***of the*** *Evidence Act* ***does not deal with the issue as to who can produce such a document. The section allows the court to presume the*** **genuineness** ***of the document. The section also states that the court may call the maker of that statement to be examined on the same. This means that such a document need not be produced by the maker. It also means that the court may or may not require the maker of the document to come to court. It thus means that the document is admissible whether or not the maker comes to court."***

34. It follows that no injustice was suffered by the appellant when doctor Omol produced the medical report on behlf of his colleague doctor.

35. Appellant raised the defence of *alibi* and called a witness to support that defence.

36. The *alibi* defence was that he was not at the polytechnic at 4.00 pm on the day in question because he was in the company of his brother from 1.00 pm that day until he reported to work at 6.00 pm.

37. His brother, *MKI* testified and stated that the appellant was with him on that day until 5.00 pm when he left to report for work.

38. The trial court was of the view that the appellant's defence was not plausible. The court termed it a mere denial. The trial court found no basis for the children who testified and the mother of GW to have a grudge or to have fabricated evidence against the appellant. The trial court found the prosecution's evidence to be overwhelming.

39. The High Court in considering alibi defence in the case ***ELIZABETH WAITHIEGENI GATIMU vs. REPUBLIC*** (supra) had this to say:-

> **"*VICTOR MWENDWA MULINGE VS REPUBLIC*, 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 KARANJA VS 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'.***
>
> ***An* alibi *must be raised at the earliest opportunity in answer to the charge and once a defence of alibi is promptly and properly put up, the burden shifts to the prosecution to investigate it and rebut such evidence in order to prove the case against the accused beyond reasonable doubt."***

40. It was only two witnesses who stated of the time the defilement took place. VWW said "it was around 3.00 pm" E said "it was on a Sunday at around 4.00 pm."

41. At no point in appellant cross examining the prosecutions' witnesses did he suggest that he was not at the polytechnic at the time the children started the defilement occurred. It was only when appellant gave his sworn defence and as he was cross examined that he said:-

> ***"At 1.00 pm on that day, I was at Mundoro with my brother. I stayed with him all day until I reported to work at 6.00 pm."***

42. Appellant's brother as stated before said that the appellant left his home at 5.00 pm to go to report on duty.

43. In consideration of the totality of the whole evidence, I too find that the alibi defence was not plausible, it was an afterthought. That defence came out when the appellant was tasked in cross –examination being asked evidence of when he reported on duty. I too reject that defence. Further, the witnesses who gave the time of defilement as 3.00 pm and 4.00 pm were clearly estimating the time.

44. Appellant also for the first time while being cross examined blamed the charges he faced to a grudge the local women had against him because he prevented them from harvesting grass at the polytechnic and he also said that mother of GW had a grudge against him because he declined to have a love affair with her.

45. That defence is discredited because although GW's mother testified appellant did not question her in that regard. More importantly, she stated that she did not before the incident know the appellant and appellant failed to question her in that regard.

46. It is worth stating that the appellant was well known to the children. One child stated that he attended the Catholic Church which they also attended. There was therefore no possibility of mistaken identity.

47. I am satisfied that prosecution well met the criminal standard of proof and the trial court's conviction is therefore upheld.

48. The argument that appellant's rights to fair hearing under Article 50 of the Constitution were violated has no basis. Appellant argued that the trial court failed to inform him that he had a right to apply for legal aid to enable him get legal representation.

49. Before the Court of Appeal in the case of ***THOMAS ALUGHA NDEGWA VS. REPUBLIC (2016) eKLR,*** that court was faced with an application by an appellant seeking to be provided with legal aid. The Court of Appeal in that case considered amongst others, the case of ***KARISA CHENGO & 2 OTHERS CR. CASE NOS. 44, 45 and 76 of 2014*** as follows:-

> ***"It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This Court in the*** *DAVID NJOROGE MACHARIA* ***case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise."***

50. The Court of Appeal in the case of ***THOMAS ALUGHA NDEGWA VS. REPUBLIC*** (supra) considered the application for legal aid made by an appellant who had been convicted of the offence of defilement and was sentenced to life imprisonment and the court stated:-

> ***"21. In the instant application, it is clear the framework for full implementation of*** *Article 50 (h)* ***is now in place as required by the Constitution.*** *Section 40* ***of the*** *Act* ***requires that a person who wishes to receive legal aid may apply to the Service in writing so long as such an application is made before the final determination of the matter by a court, tribunal or any other forum to which the application relates. In light of the constitutional and statutory provisions aforementioned, the provision of legal aid is a constitutional, legal and human right. The appellant is serving a life sentence and in the circumstances of this case, substantial***

injustice may result unless represented. We therefore find that the applicant, according to** section 41 **of the** Legal Aid Act **is eligible to make the application for legal aid to the Service in person or **through any other person *authorized by him in writing. The Service may at its discretion grant legal aid to the applicant subject to such terms and conditions, as the Service considers appropriate."***

51. It is however important to note that Section 43(6) of the Legal Aid Act provides:-

> **"Despite the provisions of this Section, lack of legal representation shall not be a bar to the continuation of proceeding against a person."**

52. It therefore follows that the absence of legal representation for the appellant during his trial is not a basis of overturning his conviction. The Court of Appeal in the case of ***THOMAS ALUGHA NDEGWA*** (supra) was aware that the appellant before it had gone through trial at the magistrate's court and through the first appellate court, the high court without legal representation. The Court of Appeal did not make adverse comment of him not being represented before those courts.

53. It follows that appellant appeal against conviction fails.

54. Appellant was sentenced to mandatory life imprisonment as provided under **Section 8(1)** of the Sexual Offences Act. The Court of Appeal in the case of ***DISMAS WAFULA KILWAKE VS. REPUBLIC (2018) eKLR*** and in ***JARED KOITA INJIRI VS. REPUBLIC (2019) eKLR*** stated that in interpreting Section 8 of the Sexual Offences Act, as was held by the Supreme Court in ***FRANCIS MURUATETU*** case, the court's discretion on sentencing on conviction on sexual offences.

55. Similarly, the Court of Appeal in the case of ***CHRISTOPHER OCHIENG VS. REPUBLIC (2018) eKLR*** stated:-

> ***"In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8(1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis… Needless to say, pursuant to the Supreme Court's decision in*** *FRANCIS KARIOKO MURUATETU & ANOTHER V REPUBLIC* ***(supra) we should set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years imprisonment from the date of sentence by the trial court."***

56. On the basis of above decision of the Court of Appeal, I set aside appellant's life sentence. I order that he serve 20 years imprisonment.

DISPOSITION

57. Bearing in mind the above discussion, I grant the following orders:-

(a) The appeal against conviction is dismissed.

(b) The trial court sentence of life imprisonment is hereby set aside and the appellant is sentenced to serve 20 years imprisonment which shall commence from 6th February, 2019.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 24TH DAY OF JUNE 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Ndege

Appellant: present

For Appellant: N/A

For the Respondent : Mr. Kasyoka

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE