REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT NAIROBI

HIGH COURT CRIMINAL APPEAL NO. 27 0F 2019

JOSEPH NJOROGE WAMBUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

(Being an appeal from the decision of; Hon. J. Kamau, Senior Resident Magistrate (SRM),

delivered on 22nd October, 2018 vide Chief Magistrate Criminal Case

Number S. O. No 68 of 2014 at Kibera).

1. On 2nd July 2014, the appellant was arraigned before the Chief Magistrate's Court at Kibera, charged vide; Criminal Case No. S.O. 68 of 2014, in three (3) counts, with the offences of; defilement contrary to section 8(1) as read together with section 8(4) of the Sexual Offences Act, No. 3 of 2006 (herein "the Act"), in count 1, and an alternative count of; committing an indecent act with a child contrary to section 11(1) of the Act, and assault, contrary to; section 251 of the Penal Code, (Cap 63) Laws of Kenya.

2. The appellant pleaded not guilty to all counts, whereupon the case proceeded to full hearing. The prosecution called a total of five (5) witnesses, while the appellant gave an unsworn statement in his defence without calling any witness. The prosecution case in a nutshell is that, in the month of; January 2013, the complainant, "J.M" came from her rural home in Maseno, to stay with her aunt in Nairobi. However, following bad blood between them or her aunt, she allegedly threw her out of her house.

3. That, she became destitute and in the course of searching for shelter, she met the appellant who took her into his grandmother's house with a promise to find her a job as a house help. However, that never came to pass, as the appellant turned her into a wife for an accumulated period of three (3) months and day in day out, subjected her to serious physical assault, using all sorts of objects; from a knife to broken bottles to wooden sticks.

4. The complainant testified that, she sustained serious injuries and her finger got deformed. However, she sought help from a teacher in a nearby school, who got someone from a rescue centre and she was taken to Statelite Children's Home. Later, she was taken to Nairobi Women's Hospital where the tests revealed inter alia that, she was two (2) months pregnant.

5. That, at the time she testified, she had given birth to a baby girl who was five (5) months old. She was also examined by the Police Surgeon who filled and produced P.3 form, in evidence. Subsequently, the appellant was arrested after the complainant pointed him out as the perpetrator and charged accordingly.

6. At the close of the prosecution case, the trial court ruled that, the prosecution had established a prima facie case and placed the appellant on his defence on all charges. In an unsworn statement, he told the court that, he was arrested while on duty at Kawangware, Riruta, where he works a conductor of a PSV and taken to the Police Station and charged. He denied knowledge of the charges and/or the complainant.

7. At the close of the entire case, the trial court found the appellant guilty on the alternative and 2nd count and convicted him accordingly. He was acquitted on the main count of defilement. The trial court then sentenced him to serve; twenty (20) years imprisonment on the alternative count and five (5) years imprisonment on the 2nd count. The sentence was ordered to run consecutively.

8. The appellant is however aggrieved by the conviction and sentence and has lodged the appeal seeking that the conviction be quashed and the sentence be set aside. The appeal is supported by the grounds that, the trial court erred in law and facts by relying on; unproven allegations, contradictory evidence, and shifting the burden of proof to the defence and/or unfairly dismissing the evidence adduced by the

defence. In a nutshell, he argues that, he was not accorded a fair trial.

9. However, the Respondent opposed the appeal on the grounds of appeal dated; 18th May, 2021, wherein, it is stated that; the appellant's right to a fair trial under; article 50 of the Constitution of Kenya, 2010 was not violated. That, the prosecution case was proved beyond reasonable doubt and was based on corroborated evidence. Finally, that the defence evidence was duly considered.

10. The appeal was disposed of, by filing of submissions by the respective parties which I have considered. Indeed, the role of the first appellate court, was well articulated in the case of; ***Okeno vs. Republic [1972] EA 32*** **as follows: -**

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). 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 finding and conclusion; it must make its own findings and draw its own 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, see Peters vs. Sunday Post [1958] E.A 424."***

11. I have considered the evidence adduced herein in the light of the charges preferred against the appellant and I find that, the appellant was acquitted on the main charge of defilement on the ground that, the age of the complainant was not proved. In this regard, the learned trial magistrate thus stated: -

> *"First, in this matter and pursuant to section 124 of the Evidence Act, upon analysing the record, I found that, the voire dire examination was not carried out by the court and as such I cannot confirm the truthfulness of the complainant statement about her age. The fact that her evidence was not corroborated by any other document example a birth certificate, clinic card, age assessment report from a doctor or a p,3 form makes her evidence grim"*

12. The learned trial magistrate further stated as follows: -

> *"Secondly, as cited in Musyoki Mwakavi (supra), common sense suffices in regard to determining the age of the complainant. However, unfortunately, the trial court did not also make any reference as to how old the accused seemed (though I believe accused should have read "complainant"). In the instant scenario, it is difficult to determine the age of the child, who is of tender age through common sense and observation, if the court does that, it risks making baseless observations whose inevitable end product would be grave injustice:*

13. The trial court equally stated that, although the complainant repeatedly stated she was 15 years old, the charge sheet indicates that, she was 16 years old. That being a "notable discrepancy, it may be fatal in meting out the justice in finding and sentencing". The trial court then arrived at the conclusion that, the prosecution failed to prove beyond reasonable doubt that, the complainant was 16 years old.

14. In the final analysis of the case, the trial court thus stated: -

> *"I therefore consider the charges against the accused and evidence presented by the prosecution vis a vis the evidence of the accused. I find that, the prosecution proved beyond reasonable doubt that the accused indeed defiled, committed an indecent act against PW 2 and also assaulted her. However, because of the ingredient of age, this court will only convict the accused of the offence of indecency and that of assault"*

15. The court will not delve into the finding of the trial court on the main count as the accused was acquitted thereon. However, as regards the alternative count, I find that, the provisions of section 11(1) of the Act states as follows: -

> *"(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years".*

16. The aforesaid provisions require that, the prosecution must prove inter alia, the complainant was a child at the time the offence was committed. The Sexual Offences Act under which the appellant was charged states that, the term, "child" has the meaning assigned thereto under the Children Act, No.8 of 2001. In that regard, the Children Act, No. 8 of 2001, defines the term child as; "any human being under the age of eighteen years"

17. In the instant matter, a cursory look at the particulars of the charge sheet on the alternative count, indicates that, the complainant was "aged 16 years". Thus the prosecution had the responsibility to prove the same. Indeed, the provisions of section 107 of the Evidence Act (cap 80) Laws of Kenya, states that,

> *(1) "Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist*
>
> *(2) When a person is bound to prove existence of any fact it is said that the burden of proof lies on that person"*

18. In addition, the provisions of section 109 of the Evidence Act states that: -

"The burden of proof as to any particular fact, lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact, shall lie on any particular person"

19. Thus, it is trite law that, the burden of proof in a criminal case is beyond reasonable doubt. However, it suffices to note that, courts have struggled with a definition for this burden of proof for a long time and as Chief Justice Shaw stated nearly a century ago,

"(w)hat is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge" (Commonwealth v. Webster, 2010).

20. In general, therefore, the prosecution's evidence must overcome the accused's presumption of innocence, which the Constitution guarantees as due process of law. (In re Winship, 2010), this fulfills the policy of criminal prosecutions, which is to punish the guilty, not the innocent. If even a slight chance exists that, the accused is innocent, the case most likely lacks convincing and credible

evidence, and the trier of fact should acquit the accused.

21. The trial court herein acquitted the appellant on the main count on the ground that, the age of the complainant was not proved. It is therefore, not possible then that, the same age was proved in relation to the alternative count. It suffices to note that, proof of age is material under section 11(1) of the Act, in that, it distinguishes the offence of indecent act with a child under that section and the offence of; indecent act with an adult under section 11 (A) of the Act.

22. Further, it determines the sentence to be under section 11(1) and 11(A) of the Act. In the given circumstances, the conviction on alternative count of committing an indecent act with child was not proved beyond reasonable doubt and therefore cannot be sustained.

23. However, before I move to the next charge, I note that, this case was extremely badly handled by all the players therein. In fact, the evidence in relation to the charges in the main and alternative count, was lost on the first day of investigation. The investigations were so slapdash and/or glum that, there was no hope for a conviction.

24. First and foremost, the key witness, who included; the complainant's aunt, the grandmother, or any other blood relative, the teacher who allegedly rescued her, the Administrator of the Rescue Centre, where she was taken after rescue, and the Police Surgeon who examined her and filed the P3 form were not called.

25. In the same vein, the most crucial evidence that of; DNA which would have nailed the appellant, on the basis that, he is the father of the child the complainant bore, was completely ignored. In fact, neither the prosecution and/or the court inquired and/or even ordered for the same, despite the complainant literally presenting the child physically in court, but even more so, the Police doctor did not testify, for reasons completely unclear on the court record.

26. It suffices to note that, the proceedings of the lower court on; 8th March, 2018, indicates that, the prosecution requested for another date to call Dr Maundu. The accused is recorded as having stated that, he had "no objection". The court then stated "noting the record, the prosecution case is marked closed".

27. From the aforesaid record, two things arise, the prosecution was not accorded an opportunity to decide on what cause of action to take, when the court declined the application for adjournment. Probably, the prosecution would have considered withdrawal of the case under section 87 (a) of the Criminal Procedure Code and preserved the case for trial in future. Secondly, the accused having raised no objection to the application to the adjournment, the trial court (with outmost due respect) should not have closed the prosecution case. As a result, the victim's constitutional right to justice was compromised. This, in my considered opinion a most classic case of travesty of justice.

28. However, to revert back to the last charge of assault, I note that, the learned trial magistrate found that, the complainant had narrated the "horrific tale of her injuries" and that her evidence was corroborated by the evidence of PW1. That, PW3 evidence supported by PCR Form detailed out the injuries the complainant sustained. The trial court then dismissed the defence evidence as being a mere denial and "comical" in that, after the appellant cross examined the complainant turned around and alleged that, he only met her for the first time in court. The appellant was then found guilty and convicted of the offence of assault.

29. I have considered the evidence herein and I find that, PW 1 Deborah Nyaboke, a social worker, who deals with gender based violence issues, testified as follows:

"I saw the girl was beaten, had some sores on the head, face thighs, legs and other parts. Some sores looked old others were fresh. Some injuries were rotten and were discharging maggots green in colour"

30. The complainant on her part testified inter alia as follows: -

"I refused to take drugs offered to me the girl reported that I had brought men to the house. The accused came and asked whether if there was a person I brought in the house, I denied. When I told him that I had not brought any person in the house, he started forcing me to admit to have done it. He started beating me.

He beat the whole body, and was piercing me with a bottle and knife. He beat (sic) me with the bottle and broke it and he started piercing me with the broken pieces of bottle and also using a knife.

He pierced me on the legs, back, face, finger.

On the back he was piercing me with a bottle. There are injuries that can be seen.

There are healing scars-about-seen—(page torn)

On the forehead he pierced me with sticks.

A scar on the forehead. He bit on the left jaw. There a scar mark seen.

On the lower side of the right eye, he hit me with a piece of wood

There is a scar seen

On the right thigh he stabbed me with a knife

A big black scar round seen.

On the left leg there are several scars on the knee and leg.

(About 8 scars black in colour seen)

He pierced me with tose bottles and they would break in the skin.

On the right leg, he also pierced with bottles.

There are two very visible scars.

On the left index finger, he stabbed me with a stick.

The finger is swollen and a bit deformed there is a healed scar.

He was assaulting me in the house

He was beating me in the house when I was naked. He tore the clothes and beat me up when I was naked.

Then he took me outside when I was naked. The time was 2.00pm.

Neighbours were unable to help me because he was also beating them"

31. The other evidence adduced in relation to the injuries sustained by the complaint was led by PW3, Dr. Daniel Nguki. He testified that:

"*On the body visibly there were healing wounds on various parts of the body. Healing wounds on the thighs, both legs and at the back.*

32. The Dr. went on to state that: -

"*We formed the opinion that from (sic) the lab results and physical examination, there was physical assault, which in or opinion was battery(sic), this was a battered (sic) patient. And there was evidence of sexual assault too. We put her on medical treatment dressing(sic) the wounds and then gave(sic) her antibiotics"*

33. It is appalling that, the appellant was charged with the offence of; assault contrary to section 251 of the Penal Code, in the light of the aforesaid evidence. The provisions of that offence states that: -

"*Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanor and is liable to imprisonment for five years".*

34. On the other part, the provisions of; section 234 of the Penal Code creates the offence of grievous harm and states that:

"*Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life*.

35. The question that arises is what is the difference between the offence of assault and grievous harm. The provisions of section 4 of the Penal Codes states that: -

> *"grievous harm" means any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense;" (emphasis added),*
>
> *"harm" means any bodily hurt, disease or disorder whether permanent or temporary;"*
>
> *"maim" means the destruction or permanent disabling of any external or internal organ, member or sense;"*

36. It therefore follows that, the nature of injuries sustained will distinguish the two offences. In addition, the offences are distinguished by the classification thereof as a felony or misdemeanor hence the sentence for each.

37. In that regard, the provisions of section 4 of the Penal code states that: -

> *"felony" means an offence which is declared by law to be a felony or, if not declared to be a misdemeanor, is punishable, without proof of previous conviction, with death, or with imprisonment for three years or more;*
>
> *"misdemeanor" means any offence which is not a felony"*

38. In my considered opinion, the injuries the complainant sustained were very serious especially when one takes into account that, the weapons used to inflict them varied from; broken bottles, knife, sticks and human bites and the prolonged period that the injuries were inflicted. The narration given by the complainant of how the injuries were inflicted was corroborated by PW 2 and Pw3, and it is chilling. It can only have been inflicted by a sycophant or mentally challenged person, if not a "beast".

39. I therefore, find that, the injuries inflicted on the complainant amounts to grievous harm. The provisions of; section 234 of the Penal Code states that: -

"Grievous harm Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life."

40. I therefore, hold in conclusion that, the offence of defilement was not proved and quash the conviction thereon. As regards, the 2nd count I substitute the charge of assault with that of grievous harm.

41. The provisions that create the offence of grievous harm aforesaid state that, the sentence for the offence is life imprisonment. I note that, the appellant was sentenced to serve twenty (20) years imprisonment on count (1) which I have quashed. In the interest of justice, having convicted him on the charge of grievous harm, and setting aside the sentence of five years on count 2, I sentence the appellant to serve twenty (20) years imprisonment. The sentence shall run from the date of arraignment in court on; 2nd July, 2014.

42. Those then are the orders of the court. Right of appeal 14 days explained.

DATED, DELIVERED VIRTUALLY AND SIGNED AT NAIROBI ON THIS 18TH DAY OF OCTOBER 2021.

GRACE L. NZIOKA

JUDGE

IN THE PRESENCE OF;

APPELLANT PRESENT IN PERSON

MS AKUNJA FOR THE RESPONDENT

EDWIN OMBUNA – COURT ASSISTANT