REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 86 OF 2019

GEOFFREY BISERA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 2248 of 2013 at the Chief Magistrates Court Bungoma by Hon. J. Kingori – CM on 14th June 2019)

JUDGMENT

1. **Geoffrey Bisera**, the Appellant, was charged as follows:

Count 1: Defilement of a child contrary to section 8 (1) as read with **section 8 (2**) of the Sexual Offences Act No.3 of 2006. Particulars being that on the 13th day of October 2013 at [Particulars Withheld] Police lines within Bungoma County, intentionally and unlawfully caused his penis to penetrate the vagina of **SW.** a child aged 5 years.

2. In the alternative, he faced a charge of Committing an Indecent Act with a child contrary to **Section 11 (1)** of the Sexual Offences Act No.3 of 2006. Particulars being that on the 13th day of October 2013 at [Particulars Withheld] Police lines within Bungoma County intentionally and unlawfully caused his penis to come in contact with the vagina of **SW.** a child aged five years**..**

3. **Count 2:** Defilement of a child contrary to **Section 8(1)** as read with **Section 8(2)** of the Sexual Offences Act. Particulars being that on the 13th day of October 2013 at [Particulars Withheld] Police Line within Bungoma County, intentionally and unlawfully caused his penis to penetrate the vagina of **CCT** a child aged 5 years.

4. In the alternative, he was charged with Committing an Indecent Act with a child contrary to **Section 11(1)** of the Sexual Offences Act No. 3 of 2006. Particulars being that on the 13th day of October 2013 at [Particulars Withheld] Police lines within Bungoma County intentionally and unlawfully caused his penis to come in contact with the vagina of **CCT**.

5. The prosecution's case was that both the complainants were playing with other children when the appellant told them to go to his house so that he could give them pineapples. They did, but, he gave them 'githeri'. After eating he molested then released them when they screamed. On being informed, their parents took them to hospital for examination and treatment. They reported the matter to the police who investigated the case and caused the appellant to be charged.

6. Upon being placed on his defence the appellant stated that on the material day he left Bungoma in the morning, travelled to Mumias by matatu, ran all the way back, and arrived at 8.30 am, then went to Chicken Place Hotel for breakfast. He passed by the butchery to place an order for boiled meat for lunch, where after he visited one Ondieki who was unwell. That he shared a house with two (2) other police officers. He went to eat lunch at 12.30 pm and stayed there while reading a newspaper until 3.00 pm, thereafter he returned to his house and ultimately went to the airstrip for physical training. In the evening he reported on duty at 8.00 pm and worked until morning. He trained, reported for duty and worked until the morning of 15th October, 2013. At 4.30 pm he was called by the Officer Commanding the Station (OCS) and informed of the allegations that he had molested children. The father of 1st complainant, **SW** arrived and threatened to shoot him with a pistol. Therefore he (Appellant) demanded to be charged otherwise he would be shot. He explained that he had disagreed with the 1st complainant's father who was a CID Corporal driver following an incident where he arrived at midnight in the course of the month of May 2013 and started removing items from the motor-vehicle which turned out to be alcohol. When he demanded to know what he had carried, he claimed that he was investigating the items and they disappeared. The appellant reported the matter to the OCS. The OCS summoned him and he told him off but he returned the alcohol to the accident vehicle. That the corporal threatened to teach him a lesson and he was even shot in a robbery incident in Nairobi. Concerning this case the OCS advised him to report to Corporal Yusuf which he did and was placed in cells and charged the following day.

7. He faulted the police for not conducting an investigation parade as he lived with two (2) colleagues, and there was a water point some two

meters away from his house where women wash clothes and hang them on a drying line that was outside his door and that he was not taken to hospital for examination.

8. The appellant called a witness who shared a house with him, PW2 No. [Particulars Withheld] Inspector Otieno Ogenda who testified that on the 13th October 2013 he was on night patrol duties, therefore he was sleeping inside the house. He woke up at 3.00 pm preparing for his night duty therefore he did not witness anything. The following morning he heard PW1's father complaining that she had been defiled at the house. He got interested and enquired from Madam Cherop who told him that she had checked the child, taken her for examination but nothing was found. When he met SW's father, he said that the matter was weighty and demanded for Ksh.800,000/- When he contacted the appellant, he did not have money. The following day SW's father called him and now asked for Ksh.300,000/- He pleaded with him but the appellant did not have any money. That he was never interviewed and the police quarters are one (1) roomed, separated by curtains.

9. The trial court considered evidence adduced and found that there was no evidence to support the allegation of defilement of the complainants, but, was of a considered view that indecent acts had been perpetrated against them. The learned Trial Magistrate believed the children because having observed their demeanor they were firm and consistent and even demonstrated how the perpetrator's 'dudu' was put into their private parts. That although a high vaginal swab done on PW1 showed spermatozoa, her hymen having been intact, he did not entertain a doubt in his mind as to the act of indecency having occurred. He was not persuaded that the appellant was framed following a grudge between him and the corporal.

10. Aggrieved, the appellant appeals on grounds that:

(i) That the trial Magistrate erred in law and fact when in his judgment failed to handle the evidence of the Appellant in the manner as directed by the law.

(ii) That the learned trial Magistrate erred in law and fact as he failed to take into account pieces of contradictory evidence taken from the prosecution witness. Their evidence rouses reasonable doubt on the prosecution case.

(iii) That the trial Magistrate erred in law and fact when he convicted the appellant while the prosecution's case had not been proved to the requisite standards.

(iv) That the learned trial Magistrate erred in law and fact when he handed down a sentence on the appellant, which the sentence was wrongful and unlawful in the circumstances of the matter.

(v) That the learned trial Magistrate erred in law and fact when he relied on the evidence of the witnesses who were recalled but never turned up.

11. The appeal was canvassed through written submissions.

It was urged by learned counsel for the appellant, **Mr. Onkangi** that the burden of proof that lay on the prosecution was to be proved beyond a shadow of doubt. As explained in the case of **Miller -vs- Minister of Pension (1947) 2 ALL 372-373** where it was held that:

> ***"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 by a sentence of course, it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short will suffice."***

12. That evidence adduced by the prosecution was scanty which the court should not have relied on to convict the appellant. That PW1 could not tell the court when the incident took place, and when she went to hospital. That she alleged that when they entered the house of the appellant they sat on chairs while PW2 said that they sat on the bed. He questioned why PW2 was taken to school, and after her mother checked her the previous day and found nothing.

13. That the mode of identification was not reliable as no identification parade was conducted; a crucial witness whose evidence could have placed the complainants at the house of the appellant per the prosecution's allegations was not called to testify. In that regard he relied on the case of **Bukenya and Others -vs- Uganda (1972) EA 549** where the court stated that:

> "***The prosecution must make a 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.***"

14. That the age of the complainant was not ascertained as no birth certificates were not produced.

15. Further, the trial court was faulted for having acted *suo moto* and ordered re-calling of witnesses to testify, who did not turn up then proceeded to rely upon their evidence.

16. Arguing that there was no evidence to warrant a conviction on alternative counts, he relied on the case of **Abdi Ismail Moulid -vs- Republic (2019) eKLR** where **Mrima J** held that:

> ***"As to whether there was any contact between any body part of the appellant with the genital organ, breast or buttocks of the***

complainant which act however did not cause any penetration, I must say that I have re-read the proceedings severally and did not see anywhere where the complaint alleged that the appellant touched her genital organ, breast or buttocks. The complainant talked of the appellant having had sex with her twice, an allegation which the trial court rejected for lack of proof and no appeal was lodged against the finding. The complainant was not lead to describe how the sexual act unfolded and which part of her body was touched by which part of the body of the appellant. With such state of evidence, I do not see how the offence of committing an indecent act with a child was proved. A trial court should not assume that once it finds no evidence of commission of the principal charge of defilement then the lesser charge of committing an indecent act with a child must have been committed. Every offence has the same threshold of being proved beyond any reasonable doubt"

17. And that the defence case was not shaken.

18. The appeal is opposed by the Respondent/state. It is submitted that the trial court considered evidence on record accordingly without favour. That the court analyzed and dismissed the defence of the appellant together with that of his witness as an after-thought. That evidence adduced by the complainant minors who were firm and consistent and told the truth was not contradictory. He denied the allegations that the court opened the prosecution's case on its own motion. That PW4 and PW5 were to be re-called because part of their evidence was torn up, but they had already given their evidence and they were investigation officers whose evidence was not completely lost.

19. This being a first appellate court, I am duty bound to analyse and evaluate afresh all the evidence adduced before the trial court and draw my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. In the case of ***Okeno vs. Republic [1972] EA 32***, the Court of Appeal set out the duties of a first appellate court 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."

20. This court's duty being to re-consider evidence adduced in totality so as to satisfy itself whether the trial court reached a correct conclusion, I must interrogate whether the main and alternative counts were proved. Being a criminal case, the prosecution was required to prove the case against the accused (Appellant) beyond reasonable doubt. In the case of **Republic -vs- Derrick Waswa Kuloba (2005) eKLR** it was stated that:

"The burden of the prosecution is to establish its case beyond reasonable doubt."

21. In the case of **Republic -vs- David Ruo Nyambura and 4 others (2000) eKLR** it was stated that:

"An accused person does not assume any burden to prove his innocence in a criminal case. He is obligated only, if he so wishes to give an explanation or raise a defence to the charge which is probably or possibly true."

22. Section 8 (1) of the Sexual Offences Act provides:

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

23. To prove the offence of defilement the prosecution was required to prove:

a The age of the victim

b. The act of penetration

c. Positive identification of the assailant

24. The defence argues that the age of both complainants was not proved. The age had to be proved beyond reasonable doubt as was stated in the case of **Hillary Nyongesa -vs- Republic (2010) eKLR** where the court stated that:

"Age is such a critical aspect in Sexual Offences that it has to be conclusively proved. Anything else is not good at all. It will not suffice. And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim"

25. In the case of **Francis Omuroni -vs- Uganda, Criminal Appeal No.2 of 2000,** the Court of Appeal stated that:

"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence, apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense…"

26. In the case of **Mwalango Chichoro Mwanjembe -vs- Republic (2016) eKLR** the Court of Appeal stated that:

"The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof"

27. The charge sheets in respect of both complainants indicated that both of them were five (5) years old. PW1 SW told the court that she did not know her age but her mother told her that she was seven (7) years old. **PW2 CC** told the date she was born but she was six (6) years old. **PW3 EMN** the mother of PW1 told the court that PW1 was born on 15th November 2006. **PW7 NO.83740 Corporal Joylene Cherop** the mother of **CC** stated that her daughter was aged five (5) years. Both complainants were subjected to medical assessment and their age estimated to be children of tender years

28. On the question of penetration, it is defined by section 2 of the Sexual Offences Act as:

The Partial or complete insertion of the genital organs of a person into the genital organs of another person;

29. **S.W.** told the court that the incident occurred at midday of the 13th day of October 2013. That as she played with **J, K.** and **C.C.** the appellant called and offered to give them pineapples. They went and ate 'githeri' instead and the appellant who promised to show them something unleashed his 'dudu' interpreted to be his genital organ and inserted it into PW2 C.C.'s genetalia who had been made to lie on the bed. She screamed and he told her to go out, leaving him with PW1 S.W. He also inserted his 'dudu' into her genitalia and she saw some whitish substance in her vagina and she screamed. He told her to dress up and leave, she went outside and told J. what had happened then asked her to tell her mother. Both the complainants stated that the appellant inserted a finger prior to inserting the 'dudu' into their private parts. According to PW2 when PW1 was being molested she was not present.

30. PW3 S.W.'s mother did not get to hear of the allegation until the following day, the 14th October 2013 at midday. She was given the information by PW7 the mother of PW2 C.C. got the information from J. and she enquired from PW2 who confirmed that they had been molested. According to her testimony she got the information on 13th October 2013 at 5.00pm but when she examined the child she did not "see anything strange." She took the child to hospital on the material date at night but nothing significant was noted.

31. PW3 having received the information on the 14th October 2013waited for the child to return from school that is when she interrogated her and later took her to hospital. She also examined the complainant but did not see anything unusual.

32. The complainants were examined at the outset by **PW8 Ogochi Oigo Wilson,** a clinical officer who was based at Bungoma County Referral Hospital. A high vaginal swab done at the laboratory in respect of PW1 showed evidence of bacterial infection, spermatozoa were seen and pus cells too. He formed an opinion that it was a case of attempted defilement. With regard to PW2 C.C. no spermatozoa were seen but there was presence of pus cells that indicated a bacterial infection in progress which was sexually transmitted hence a conclusion of attempted penetration on cross examination he said that even for PW1 there was no penetration.

33. **PW6 Dr. Raymond Ndamba** examined the complainants for purposes of filling P3 forms. In respect to PW1 he found her hymen intact but noted that the high vaginal swab done which showed presence of spermatozoa and pus cells. With regard to PW2 evidence adduced in her regard was interfered with as it was torn up. But, on cross examination he stated that there was no obvious fleeting of penetration.

34. Evidence adduced by the medical practitioners leave a doubt as to whether there was partial penetration. Therefore, the learned Magistrate correctly reached the finding that the cases of defilement remained unsupported.

35. Looking at the alternative charges, **Section 2** of the Sexual Offences Act defines "indecent act" as:

"Indecent act" means an unlawful intentional act which causes—

(a) ***Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;***

(b) ***Exposure or display of any pornographic material to any person against his or her will;***

36. The minors gave accounts of how the appellant's 'dudu' was placed and how it touched their genitalia and they felt pain and screamed. It is however argued that the prosecution's case was full of contradictions. It is contended that the minor's evidence was not clear and consistent as PW1 said they sat on a bed while PW2 said they sat on a chair. In the case of **Dickson Elia Nsamba Shapwata & Another -vs- the Republic Cr. App. No. 92 of 2007** the Court of Appeal stated that:

"In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

37. The contradictions alluded to were not grave so as to affect the essential ingredients of the offences. The minors were consistent as to the appellant's actions as to when he called them, offered them 'githeri' and lay on each one of them in turns. PW1 divulged what happened to J. who told PW7 and the children repeated what happened, to their parents. It is urged that failure to call J was detrimental to the prosecution's case. It is not in dispute that J. was a minor.

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

"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."

39. Evidence adduced by PW1 and PW2 which was believed by the trial court that observed their demeanor and gave its reasons could not be dismissed to have been barely adequate.

40. The appellant put up a defence of alibi, in the case of **R -vs- Sukha Singh s/o Wazir Singh & others (1939) 6 EACA 145** the Court of Appeal held that:

"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped".

41. The appellant ought to have put forward the allegation of having not been at the scene of the incident at the earliest opportunity to enable the prosecution investigate it. In the case of **Charles Anjare Mwamusi -vs- 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."

42. The trial court rightly found that the appellant was in his house for the part of the day after finishing training therefore he had the opportunity of committing the offence. His witness came up with a testimony to fill in any lacuna that may have been established but this was an individual he did not refer to during his testimony. This was a person who may have been availed as an afterthought. The witness did not seem to be aware of an alleged grudge between the appellant and his colleague.

43. It is evident that proceedings capturing evidence of the investigating officers were tornup. The court had directed that they were to be re-called. The appellant therefore argues that his rights were infringed in regard to a fair trial which is a non limited right. The appellant failed to demonstrate how he was prejudiced. The court made the order *suo moto* and having failed to turn up proceeded to rely on evidence adduced.

44. In the case of ***Jeremiah Gathuku vs Republic, Cr. App. No. 73 of 2008***, it was held that:

"The effect of failure to call police officers in criminal trial, including investigating officer, is not fatal to the prosecution under the circumstances each particular case so demonstrate."

45. The trial court that heard evidence of the witnesses relied on evidence of complainants, noted their demeanor and relied on section 124 of the Evidence Act that provides thus:

Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is 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 material 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.

46. The minors' testimony was consistent therefore the Investigation Officer's evidence simply confirmed what they were told. Part of the evidence is on record and cross examination they were subjected to was intact, therefore there was no prejudice suffered.

47. The sentence meted out was the minimum prescribed sentence for the offences.

48. The upshot of the above is that the appeal lacks merit.

Accordingly, it is dismissed in it's entirety.

49. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY,

THIS 20TH DAY OF DECEMBER, 2021.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

COURT ASSISTANT – LINUS MALABA

ODPP – MS. MUKANGU

APPELLANT MR. WANJALA HOLDING BRIEF FOR MR. ONKANGI FOR APPELLANT