REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 61 OF 2019

(From the Ruling of D.O Onyango CM Kimilili Criminal Case (SO) No. 9 of 2018)

REPUBLIC/PROSECUTION.....APPELLANT

VERSUS

DENNIS NDARA.....RESPONDENT

JUDGEMENT

1. This is an Appeal against the acquittal in respect of Senior Principal Magistrate's Court at Kimilili Ukwala Resident CR No. 9 of 2018, **Republic Vs Dennis Ndara** wherein the respondent was found to have no case to answer and was acquitted of the charge under section 210 of the Criminal Procedure Code.

2. The Respondent herein had been charged with a main charge of defilement contrary to section 8 (1) as read with 8 (3) of the Sexual Offences Act No. 3 of 2006, and an alternative charge: of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.

3. The particulars of the main count are that the respondent on 28th July, 2018 around 1800 hours at [particulars withheld] in Mount Elgon Sub County within Bungoma County, intentionally caused his penis to penetrate the vagina of PC, a child aged 14 years. The particulars of the alternative count are that on the 28th day of July 2018 at [name withheld] in Mt Elgon Sub-County within Bungoma County, intentionally touched the buttocks/breast/anus/vagina of PC, a child aged 14 years.

4. Aggrieved by the ruling of the trial court, the Appellant herein filed a Petition of Appeal dated 28th May, 2019 in which the following grounds were raised:

> i. THAT the trial magistrate erred in law and in fact in disregarding the prosecution's application and averments on merit laying a basis for his recusal from the case on account of being partisan, subjective and conflicted in interest.
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> ii. THAT the trial magistrate erred in law and in fact in emotionally closing and terminating the case devoid of the due process solely on account of being moved to recuse himself from the case by the prosecution
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> iii. THAT the trial magistrate other than misdirecting himself as aforesaid proceeded to arbitrarily fix a ruling date of the case and dismissed the case under section 210 of the Criminal Procedure Code (cap 765) without a full hearing.
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> iv. THAT the trial magistrate erred in law and in fact in putting weight on the court's wrangles and/or differences with the prosecution to terminate the case instead of considering and implementing the welfare principle in favour of the minor and victim in the case through rendering a full trial in conducive and accommodative environment.
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> v. THAT the trial magistrate erred in law and in fact in being biased and prejudiced in favour of the defence counsel instead of implementing tenets of fair hearing and natural justice as would be expected in a court of law.

5. In determining this Appeal, the court must fully understand its duty as the first Appellate court as stated in the case of **Pandya vs. R (1957) EA 336 and Ruwala vs. R (1957) EA 570** which is to subject the evidence as a whole to a fresh and exhaustive examination and to arrive at its own decision on the evidence, it must weigh evidence and draw its own conclusions and its own findings while making allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses.

6. On what transpired before the trial court, the respondent denied the charges and the appellant only called one witness in support of its case against the Respondent herein.

7. PW1, P.C, testified that she was born on 8th March, 2004 and her birth certificate was produced and marked for identification as MFI-1. She testified that on 28th July, 2018 while on her way home from a maize mill, a man came from behind her and blocked her mouth and then pushed her into a maize plantation. She testified that it was becoming dark and that her load of maize flour fell down. She stated that he removed her inner clothes and inserted his penis into her vagina and that the man was wearing a black jacket and trouser. She stated that she had on a white pant and red/black biker. After he finished with her vagina, he inserted his penis in her anus and on finishing the act, he dressed up and left her at the scene after threatening to strangle her if she screamed. She testified that the Respondent released his sperms onto the ground and that after the ordeal she put on her clothes and went home. She testified that when she got home, she found her grandparents who enquired on why her shoes were missing but she kept quiet and went to sleep. She testified that on her grand parents noticing the mud on her clothes, they inquired as to what had happened and that she informed them that she had fallen down. On 29 th July, 2018 she informed her grandmother that her vagina was painful and she was escorted to the chief enroute the hospital. She testified that she was asked to go back to the hospital the next day and was given drugs to take for 28 days and that she developed a problem controlling her passage of urine and long calls due to the pain in her anus. She testified that she was escorted by FIDA to hospital and was given a catheter to use to empty her bowels. She further testified that on 11th August, 2018 while going to her grandfather's house, she saw a man coming from the opposite direction and who called her three times but she refused to respond and she alerted Christine that the man was the one who had done bad things to her. She stated that the man started chasing her but she managed to run into the house of one Steve while screaming and that the man whom she pointed out in court held Christine. She reported the incident to her grandfather and they went to the police who arrested the man and she was able to identify him.

8. The prosecutor indicated to the court that he was not comfortable handling the case and wanted the same transferred and be handled by a lady magistrate. The defence opposed the application on the grounds that the prosecution was engaging in forum shopping. The trial court noted the sentiments of the prosecution and proceeded to direct that the prosecutor should request his other two colleagues to take it up if he was not comfortable handling the case and that no valid reason had been adduced to warrant him transferring the matter.

9. After the court ruling on the recusal application, the prosecution requested to have the same reviewed in the High Court and prayed for stay of proceedings. The court declined the request but granted a stay of seven days to enable the prosecution move to the High Court and in the event of no further stay of proceedings by High Court, the matter would proceed before the trial court to logical conclusion as it was in the best interest of the complainant that the matter was handled without any delay. The learned trial magistrate directed that the proceedings be typed and supplied to the prosecution to enable them take any appropriate steps before the High Court.

10. This appeal was canvassed by way of written submissions. The Appellant submitted that the failure by the trial magistrate to recuse himself was a breach of the rules of fair hearing, lack of partiality and prejudice against the Appellant. The appellant contends that the conduct of the trial court in condoning the defence scathing allegations against the complainant and open name calling demonstrated that the trial magistrate was swayed by the defence. It was further contended that the failure of the trial court to apply the welfare principle in favour of the minor and complainant was an error by the trial court and which warrants this court to quash the impugned ruling.

11. The Respondent submitted that the sudden urge by the prosecution to have the trial magistrate recuse himself and be replaced by a female magistrate was not well grounded as they did not give logical reasons. It was submitted that the prosecution kept on seeking adjournments until it was given a last adjournment but when it came up for further hearing, it declined to proceed forcing the trial court to find that they had no evidence and proceeded to reserve the matter for ruling. It was submitted that the trial court had no option but to acquit the respondent based on the evidence availed by the appellant. It was also submitted that the trial magistrate acted judiciously when it he declined to recuse himself as no good reasons were availed by the appellant. It was finally submitted that allowing the appeal will send the wrong signal that one party in the trial can manipulate the court and proceedings in their favour by refusing to cooperate with the court in order to obtain the outcome they desire. Learned counsel sought for the dismissal of the appeal.

12. A perusal of the lower court record reveals that after the learned trial magistrate declined to recuse himself, the prosecution kept on seeking several adjournments in a casual manner with no valid explanations. It is noted that the complainant was stood down as she was stopped midway in her testimony by the learned prosecutor and that she was never recalled to continue with her testimony and be cross-examined. The court after several adjournments granted the prosecution a last adjournment. It also transpired that on several occasions the witnesses were within the court precincts but were not called to testify. After the prosecution declined to proceed with the matter, the trial court proceeded to find that the prosecution had no further evidence to offer in respect to the case and deemed their case closed and proceeded to reserve the matter for ruling where after it ruled that the prosecution had failed to establish a prima facie case to warrant placing the respondent on his defence and went ahead to acquit him.

13. The appellant vide its grounds of appeal has attacked the decision of the learned trial magistrate on the basis that he refused to recuse himself upon being requested to do so and further showed open bias towards the victim and further arbitrarily closing the appellant's case and finally failing to apply the welfare principle in favour of the victim. The appellant now seeks that the said ruling be quashed.

14. I have given due consideration to the submissions by the learned counsels as well as the record of the trial court. It is not in dispute that the appellant's case comprised of only one witness who is the complainant and who was not even cross-examined by the defence. It is also not in dispute that the appellant's request for the recusal by the trial magistrate was declined. It is also not in dispute that upon the refusal by the trial magistrate to recuse himself the appellant neither lodged an appeal or review before the High court and further did not seek for stay of proceedings from the High court but went ahead with the matter before the trial court until it was ordered closed and the impugned ruling made. That being the position, I find the issues for determination are firstly; whether the appellant had proved its case beyond the threshold of proof; and secondly, whether the refusal by the trial magistrate to recuse himself was proper.

15. As regards the first issue, it is noted that in determining this appeal, this court being a first appellate court is alive to the principles laid down in the case of **Okeno vs. Republic (1972) EA 32** where the Court of Appeal for Eastern Africa stated that:

"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 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 (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the junction 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; 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 V Sunday Post 1978) E.A. 424."

16. This being a case for defilement the appellant was under a duty to prove the ingredients of the offence. In the case of **George Opondo Olunga v Republic [2016] eKLR**, it was stated that the ingredients of an offence of defilement are; identification or recognition of the offender, penetration and the age of the victim. The appellant herein called only the complainant whose testimony was not tested on cross examination. The said witness was scheduled to be recalled after the trial court declined the appellant's request for recusal but after several scheduled dates the appellant failed to recall the said witness as well as the remaining witnesses and thus the trial court made a determination on the issue of whether a prima facie case had been made by the appellant based on the evidence so far adduced. In the absence of other evidence being presented by the appellant, it is not rocket science to find that the only evidence so far tendered could not marshal the appellant's case to lead to a finding of a case to answer against the respondent. A prima facie case has been defined in the case of **Bhat V. Republic [1957] EA 532** as follows:

''It may not be easy to define what is meant by a prima facie case but at least it must mean one which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.''

Looking at the evidence of Pw1, it is obvious that the same alone could not sustain a conviction against the respondent were he to elect to remain silent in defence. The said witness was not subjected to cross-examination by the defence. Again, there was no evidence adduced by a doctor which was to establish the other ingredients of the offence namely penetration/indecent assault or the age of the victim. In the absence of other corroborating evidence, the sole evidence of Pw1 could not sustain a conviction against the respondent in any event. Hence, the finding by the learned trial magistrate that no prima facie case had been made by the appellant, in the circumstances, was not in error as claimed by the appellant and thus i see no reason to disturb it.

17. As regards the second issue, it is noted that the appellant's case is hinged on the refusal by the trial magistrate to recuse himself upon being requested to do so as well as the trial court's action in ordering the appellant's case as closed and proceeding to reserve the matter for ruling. The appellant has taken great exception at the conduct of the trial magistrate in his handling of the case leading to the request for recusal and up to the conclusion of the matter. The record shows that upon Pw1 tendering her evidence, it was the appellant's prosecutor who indicated to the court that he was not comfortable handling the matter and requested that the matter be taken to another court presided by a female magistrate whereupon the trail court declined the request and upon the prosecutor seeking for stay of proceedings, the said trial court gave him some time to move the High court for an order to that effect. However, the record shows that the appellant did not approach the High court for any redress but proceeded to appear before the trial court severally and made several adjournments culminating in the trial court granting him a last adjournment and thereafter ordering the appellant's case as closed. It is appropriate to give a chronology of events as they appear on the lower court record namely; that on 12/11/2018 the complainant tendered her evidence up to a certain point when the prosecutor indicated that he did not wish to handle the case before the trial court and that the trial court did consider the sentiments of both counsels and ruled that no reasons had been made for transfer of the case to another court whereupon the prosecutor stood down the witness and sought to seek redress in the High court and was given some time to do so; that on 26/11/2018 the prosecution sought for an adjournment on the grounds that the complainant was unwell which request was granted and the matter deferred to 19/2/2019 when court did not sit; that on 26/3/2019 the prosecution sought for adjournment on the grounds that one of the witnesses was unwell which request was granted but the court gave a last adjournment; that on 23/4/2019 the prosecution sought for adjournment on the ground that the police file was not available and farther that the witnesses were not in court and that the trial court granted another chance and deferred the matter to another date; that on 6/5/2019 the prosecution sought for adjournment on the grounds that it did not have the police file whereupon the trial court ordered the prosecution to proceed with the matter and that on the prosecutor's insistence on not proceeding, the trial court ordered the prosecution's case as closed and reserved the matter for ruling.

Looking at the said record of the lower court, it is clear that the appellant's counsel did not approach the High court for an order of revision or stay of proceedings despite being given the opportunity to do so but instead kept on appearing before the trial court on all the dates for hearing and went ahead to seek several adjournments. If he was able to be part of the court's Coram throughout the trial from start to finish, he cannot now turn around and use the refusal by the trial magistrate to recuse himself as a ground of appeal against the acquittal of the respondent. In any event, the trial magistrate as a judicial officer had discretion to exercise on such a matter and was entitled to rule that way if no tangible evidence of bias had been placed before him. The trial magistrate did point out to the prosecutor that if he wasn't comfortable handling the matter himself then he could let any of his colleagues to do so. The choice of the prosecutor that the matter be handled by a lady magistrate was in my view not proper since it would then mean that all matters involving females should be handled by female judicial officers. Such a state of affairs would not be proper in the society as all judicial officers whether male or female have taken a judicial oath of office to impartially do justice in accordance with the constitution, the laws and customs of the Republic without fear, favour, bias, affection, ill will, prejudice, religious or other influence. The appellant in seeking for the recusal of the trial magistrate was thus required to present cogent evidence of a likelihood of bias so as to sit with the maxim ''**justice must not only be done but seen to be done.''** In the case of **Galaxy Paint Company Ltd V. Falcon Guards Ltd [1999] eklr** the Court of Appeal held as follows:

''Although it is important that justice must be seen to be done it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.''

It would appear that the appellant failed to present credible reasons backed by evidence for the recusal of the learned trial magistrate and

hence the sentiments by the trial magistrate that the appellant was engaging in forum shopping. If the appellant failed to avail to the trial magistrate the requisite evidence for his recusal, then the learned trial magistrate was entitled to decline the said request. In any case, the appellant merely indicated to the court that he was not comfortable to handle the matter himself and suggested that it be heard by a female magistrate but failed to present the evidence that would warrant recusal of the trial court. The court proceedings from 12/11/2018 to 6/5/2019 does not show anything untoward by the learned trial magistrate. The appellant herein vide its submissions has alluded to a letter dated 8/11/2018 by the respondent's counsel addressed to the office of the DPP Kimilili in which it had cast aspersions on the complainant and which letter had been copied to the trial court. The appellant contends that the said letter might have influenced the trial magistrate to be biased against the appellant. However, it is instructive that the appellant's counsel during the request for recusal of the trial magistrate did not bring the same to the trial magistrate's attention as there is no evidence that such a letter reached him. The record also does not indicate that the contents of the said letter were deliberated upon by the parties and the court. It was appropriate for the appellant to have presented the said letter to the trial court for consideration as there is no evidence that it had reached him. The said letter was as follows:

The Office of the Director **Date;8/11/2018**

Public Prosecution

P.o Box

KIMILILI

Dear Sirs/Madam,

RE; CRIMINAL CASE No.9 OF 2018

REPUBLIC=VS=NDARA DENIS

We refer to the above mentioned matter which comes up for hearing on the 12th day of November 2018.

We have learnt of the theatrics that the complainant has been coached to perform on that day to mislead and attract sympathy. The theatrics of feigning a cry, purportedly upon seeing the accused.

Notify her that this has come to our attention and that the intended acts will not assist.

By copy hereof for the wider interest of justice, we copy this correspondence to court.

Yours faithfully,

OCHARO KEBIRA

cc

Senior Principal Magistrate-Kimilili

The issue of the aforesaid letter was never discussed at all throughout the proceedings until now that the appellant is raising it on appeal. It was prudent for the appellant to have laid it before the trial magistrate for consideration during the request for recusal. The appellant has not given reasons why it did not do so at the time. Iam unable to find fault with the trial court's refusal to transfer the case to another magistrate since the appellant di not furnish sufficient reasons to warrant the same. I find that the trial magistrate exercised his discretion judiciously and that there is no whiff of caprice that I can smell. The trial court was right in rejecting the appellant's request as it would amount to forum shopping. It is clear that the appellant committed a litany of blunders; first by failing to present credible evidence of bias against the trial magistrate so as to warrant his recusal; second, by failing to move to the High court for an order of revision/review and stay of the lower court proceedings despite being given an opportunity to do so; thirdly, by continuing to participate in the proceedings and failing to avail witnesses culminating in the impugned ruling. The appellant in its grounds of appeal and submissions seems to suggest that the case was terminated under section 210 of the Criminal Procedure Code because the trial court had declined to recuse himself. The record however, reveals that even after the recusal was declined, the trial court fixed the matter for further hearing on several dates but the appellant failed to present any witnesses or even recall Pw1 to continue with her testimony. The appellant has failed to explain why it did not avail the witnesses now that it had opted not to approach the High court for revision or stay of proceedings. The appellant's grouse that the trial court ordered its case closed is not convincing because the appellant knew that it had been granted two last adjournments and that in the event of lack of witnesses the matter would be dealt with one way or the other. It is ingenious for the appellant to approach this court that it lost the case in the lower court because the trial magistrate refused to disqualify himself yet it knew that upon refusal to recuse himself, and upon being ordered to proceed, it was under obligation to avail its witnesses. It failed to do so despite being given sufficient time. In the circumstances, the trial court had no option but to proceed as it did by terminating the case under section 210 of the Criminal Procedure Code as the evidence did not establish a prima facie case against the respondent.

The appellant has also contended that the trial court did not consider the welfare principle regarding the victim of the crime who was a minor. Indeed, every court is called upon to consider the welfare of children and vulnerable persons but it must be noted that the trial court had no option but to acquit the respondent in view of the failure by appellant to avail witnesses. It became quite clear that the appellant's prosecutor was reluctant to prosecute the case as it transpired from the record that on some occasions the witnesses were within the court precincts but were not availed to testify. The appellant's prosecutor ought also to have worked in the best interest of the victim by ensuring that the witnesses were called to testify and further to speed up the trial process but he did not do so as he embarked on seeking adjournment after

adjournment. It is clear that the appellant's case was bungled by the trial court's prosecutor who refused to cooperate with the court and should not now shift blame upon the trial magistrate. Both the subordinate and the appellate courts are guided by the principle namely to decide cases based on the evidence availed without fear or favour. Hence, I find the trial court decided the case based on the evidence availed and that its hands were tied and to decide the matter based on the evidence available. As far as this court is concerned, the appellant has failed to prove the grounds of appeal and further failed to prove that it had established a prima facie case against the respondent.

18. In the result, it is my finding that the appellant's appeal is devoid of merit. The same is dismissed. The ruling of the trial court dated 14/5/2019 is hereby upheld.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 16TH DAY OF DECEMBER, 2021.

D. KEMEI

JUDGE

In the presence of:

Miss Mukangu Appellant

Miss Wakoli for Asimbi for Respondent

Wilkister Court Assistant