REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 121 OF 2018

ABDALLAH KUTO SULEIMAN.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal from the conviction and sentence of the Senior Principal Magistrates Court at Mavoko delivered on 21.9.2018 by the Senior Principal Magistrate C.C. Oluoch in Mavoko SPMCC Criminal Case SO.5 of 2017)

JUDGEMENT

1. This is an appeal from the judgment and sentence of **Hon. C.C. Oluoch SPM, in Criminal Case SOA No. 5 of 2017** delivered on 21.9.2018. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act No. 3 of 2006. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. He pleaded not guilty to both charges.

2. The appeal was lodged on 21st November 2018 pursuant to leave that was granted by this court. The appellant's case is three-fold. Firstly that the conviction was based on inadequate and unsatisfactory evidence. Secondly that the court rejected the defence of alibi that was raised by the appellant. Thirdly that the conviction of the appellant was based on a trial that was conducted in a biased manner. Learned counsel for the appellant prayed that the conviction and sentence of the trial magistrate be set aside in its entirety and the appellant be acquitted and set free.

3. Counsel for the appellant submitted that penetration was not proven. It was the strong argument of counsel that it was not established that the appellant was identified as the perpetrator and that it was not established that he was at the scene of crime. Counsel placed reliance on the case of **Victor Mulinge Mwendwa v R (Criminal Appeal 357 of 2012) Nairobi (2014) eKLR.** Learned Counsel urged the court to acquit the appellant.

4. The state opposed the appeal vide submissions dated 29.10.2019 filed on 30.10.2019. Learned counsel addressed two issues namely whether the prosecution proved their case beyond reasonable doubt and the consideration of the appellant's defence. On the issue of proof of the prosecution case, learned counsel submitted that all the elements of the offence were proven. That age was proven vide the birth certificate; penetration was proven vide the evidence of Pw5 and that the appellant was identified by the evidence of Pw1. On the issue of the appellant's defence, counsel submitted that the appellant's defence failed to answer to the charges that the appellant was facing nor did it exonerate him from the charges he was facing and that the trial court rightly rejected his evidence that he was away. To that end, counsel submitted that the court dismiss the appeal and uphold conviction and sentence of the trial court.

5. This is the first appeal and this court has to evaluate the evidence afresh and make its own conclusion. **PW1** was **PWW,** a voir dire revealed her age as 10 years and that the court was satisfied that she had sufficient intelligence to understand the nature of an oath was thus sworn to testify. It was her testimony that on 30.7.2017 she was sent to the shop and she detoured to her cousin's house whereupon whilst playing outside she heard someone signal her. She testified that a man took her to a forest at [particulars withheld] and told her to remove her clothes and he lay her down and that the man also removed his trousers and penetrated her with his organ and when he was done he gave her Kshs 20/- to board a motor cycle. She testified that she met her aunt and later her mother who took her to the police station and then to Nairobi Women Hospital where she was admitted and discharged on Wednesday. It was her testimony that she saw the man at S's home and that S told her that he was her brother in law. When recalled for cross examination she testified that she did not know the appellant before the incident but had seen him several times before.

6. **PW2** was **RNN** who testified that on 30.7.2017 she was in church and had given Pw1 money to buy a sweet and that she left church at 3 pm. It was her testimony that she arrived home and did not find Pw1. However later a P brought her and that is when Pw1 informed her a certain "uncle" had slept with her. She testified that she examined Pw1 who had blood stained pants and she reported to the police station where she was sent to Kitengela Women Hospital. She testified that Pw1 had been found at [particulars withheld] while crying and that Pw1 identified the suspect who was said to be an uncle of a child she was playing with. She presented in court the P3 form, PRC form, the sick sheet, discharge summary and birth certificate. When recalled for cross examination she testified that the appellant was identified and was arrested.

7. **PW3** was **PNNN** who testified that on 30.7.2017 at 5 pm she met a motorcycle rider who was riding the complainant who was crying. She testified that she and Pw2 noticed that Pw1 was bleeding and the matter was reported to the police station where they were sent to Nairobi Women's Hospital at Kitengela and that Pw1 was later discharged. It was her testimony that the complainant identified the appellant and pointed him out and he was arrested. When recalled for cross examination, she testified that she received Pw1 from the motor cyclist and called Pw2. She testified that Pw1 informed her that she had come from [particulars withheld] and identified the appellant.

8. **Pw 4** was **WWW** who testified that on 30.7.2017 Pw1 came home at 6 pm and that Pw2 realized that she had been raped hence a report was made to the police and Pw1 was taken to Hospital where she was admitted for four days. It was his testimony that after three weeks that was on 10.8.17 Pw1 pointed out the appellant who was arrested.

9. **Pw5** was **Everlyne Njambi Kahiru**, clinical officer Nairobi Women's hospital Kitengela. She testified that she examined Pw1 on 30.7.2017 and she noted that Pw1 was limping and her clothes were soaked in blood. She noted that her hymen was not intact and concluded that Pw1 had been raped and she filled the PRC form. She testified that Pw1 was taken to the theatre for stitching and was admitted for three days. She testified that she filled the P3 form on 10.8.2017 and the findings were similar to those on the P3 form. She produced the discharge summary that was filled by Dr. Chesoni whose handwriting she was familiar with. The same was tendered under Section 33 of the Evidence Act with no objection by the appellant. When recalled for cross examination, she testified that Pw1 identified him and that the doctor confirmed that Pw1 had been raped.

10. **Pw6 was Cpl Florence Ngomoni**, the investigating officer who testified that on 30.7.2017 a defilement case was reported and she recorded statements and a P3 form issued that was filled at Nairobi Women Hospital. She told the court that the appellant was spotted on 10.8.2017 and arrested. On cross-examination, she testified that the appellant was identified as the perpetrator.

11. The court was satisfied that a prima facie case had been established against the appellant who was placed on his own defence. Section 211 Criminal Procedure Code was explained to the appellant and he opted to give sworn evidence. He denied commission of the offence and that on 28.7.2017 he had travelled to Mombasa and travelled back on 5.8.2017. He testified that on 10.8.2017 he was arrested. On cross examination, he testified that on 30.7.2017 he was in Mombasa.

12. **Dw2 was Mukhdar Hussein Omar** who testified that on 28.7.2017 the appellant informed him that his mother was ailing he offered the appellant a lift to Mombasa. He told the court that on 5.8.2017 he brought him back to Nairobi. On cross examination, he testified that the appellant informed him that he had been arrested.

13. The court found that the age of Pw1 was proven vide the birth certificate; that penetration was proved vide medical evidence and after warning herself of the danger of relying on uncorroborated evidence of a single witness was satisfied that the complainant was telling the truth in terms of Section 124 of the Evidence Act. She placed reliance on the case of **Geoffrey Kioji v R, Nayeli Criminal Appeal 270 of 2010** and found that Pw1 identified the appellant who was said to have gotten a sudden emergency and a free ride to Mombasa, which account she discounted meaning that ultimately she was satisfied with the identification of the appellant. She found that the prosecution proved its case against the appellant and he was convicted of defilement and sentenced to life imprisonment.

14. Having looked at the Appellant's and State's Written Submissions, the grounds of appeal and the evidence on the court record the following are the issues for determination:-

a. **Whether or not the Prosecution had proved its case beyond reasonable doubt.**

b. **Whether the appellant's alibi exonerates him from commission of the offence**

15. On the issue of proof of the prosecution case, the Appellant submitted that the prosecution did not prove its case. The prosecution opposed the appeal and submitted that the prosecution proved its case. A perusal of the List of Exhibits in the Trial Court showed a birth certificate as evidence of age, a P3 form as evidence of penetration as well as a PRC form. There is no eye witness account of the incident.

16. The appellant has disputed that he was at the scene on the material day and yet Pw1 was said to have identified him. The appellant denied commission of the offence. The trial court relied on the P3 and PRC forms to prove that there was penetration and the account of Pw1 as identification and was satisfied with her account after warning itself in line with Section 124 of the Evidence Act. The court rejected the alibi that was set up by the appellant.

17. It is trite law that in cases of defilement, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

a) That the victim was below 18 years of age.

b) That a sexual act was performed on the victim.

c) That it is the accused who performed the sexual act on the victim.

18. This standard of proof of "beyond reasonable doubt" is grounded on a fundamental societal value determination that it is far worse to convict an innocent man than to let a guilty man go free. A reasonable doubt exists when the court cannot say with moral certainty that a person is guilty or that a particular fact exists. It must be more than an imaginary doubt, and it is often defined judicially as "such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause or hesitate before or taking the represented facts as true and relying and acting thereon" (see **Rex v. Summers, (1952) 36 Cr App R 14; Rex v. Kritz, (1949) 33 Cr App R 169, [1950] 1 KB 82 and R. v. Hepworth, R. v. Feamley, [1955] 2 All E.R. 918**).

19. Beyond reasonable doubt is proof that leaves the court firmly convinced the accused is guilty. Reasonable doubt is a real and substantial uncertainty about guilt which arises from the available evidence or lack of evidence, with respect to some element of the offence charged. It is the belief that one or more of the essential facts did not occur as alleged by the prosecution and consequently there is a real possibility that the accused person is not guilty of the crime. This determination is arrived at when after considering all the evidence, the court cannot state with clear conviction that the charge against the accused is true since an accused may not be found guilty based upon a mere suspicion of guilt.

20. The prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift to the accused person and the accused is only convicted on the strength of the prosecution case and not because of weaknesses in his defence, (See ***Ssekitoleko v Uganda [1967] EA 531***). By his plea of not guilty, the accused put in issue each and every essential ingredient of the offence of defilement which he is charged and the prosecution has the onus to prove each of the ingredients beyond reasonable doubt. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent, (see **Miller v. Minister of Pensions [1947] 2 ALL ER 372**).

21. The evidence as narrated by Pw2 to Pw5 is largely hearsay and violates the provisions of s 63 of the *Evidence Act* which requires that oral evidence must, in all cases whatever, be direct; that is to say, if it refers to a fact which could be seen, it must be the evidence of a witness who says he or she saw it. In ***Junga v R* [1952] AC 480** (PC) it was held that the trial magistrate had before him hearsay evidence of a very damaging kind. Without the hearsay evidence the court below could not have found the necessary intent to commit a felony and that being the case the Court of Appeal allowed the appeal against conviction I find that the evidence relied on by the trial court is not evidence capable of sustaining a conviction and such evidence can only corroborate other credible evidence. There is no other direct and cogent evidence pointing irresistibly to the appellant as the defiler. From the record, it is only the evidence of Pw1 that tells of the event that the appellant penetrated her and there is the evidence of Pw5 that is indicative of penetration. However there is doubt as to the identity of the perpetrator.

22. Section 143 of the Evidence Act provides that: "**Subject to the provisions of any other law in force, no particular number of witnesses shall in any case be required for the proof of any fact.**"(emphasis added). A conviction can be solely based on the testimony of the victim as a single witness, provided the court finds her to be truthful and reliable. From the evidence on record, the court is not sure who exactly the perpetrator is and is not able to rely on her evidence alone hence the need for corroborative evidence. A person had bleeding pants; who was operated on and was admitted for 2 days; who was seen crying could not be mistaken in identification. The trial court did satisfy itself of the danger of a conviction based on evidence of a single witness and the need for corroboration as well as did satisfy itself that the single witness was telling the truth. The Proviso to Section 124 of the Evidence Act is that "***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***."

23. In reanalyzing the evidence on identification, in order to determine the correctness of visual identification, I have taken into account the following factors:

(i) The length of time the appellant was under observation;

(ii) The distance between Pw1 and the appellant;

(iii) The lighting conditions at the time; and

(iv) The familiarity of the Pw1 with the appellant.

24. With regard to the length of time, Pw1 told the court that she was taken to Green Park from the church and this is adequate time to observe a person. The distance between the two is relatively small as she walked with him, saw him remove his trousers and saw him lay on her and also saw him give the motorcycle rider Kshs 20/-. The evidence is to the effect that it was day time hence she was able to see him well. She was not familiar with him but told the court that she used to see him. I have examined closely the identification evidence of the complainant and found it to be free from the possibility of mistake or error since before, during and after the ordeal she was in close proximity to him, the events she narrated enabled her to correctly identify the appellant. The complainant stated clearly that the appellant was an uncle to one of her friends with whom she regularly plays and that upon her discharge from hospital led her parents to his house from where the appellant was arrested.

25. The appellant has raised the defence of alibi. The law on alibi is now well settled. It is that a prisoner who puts forward an alibi as an answer to a charge does not assume any burden of proving it. The burden remains on the prosecution to disprove it. If evidence adduced in support of an alibi raises a reasonable doubt as to the guilt of an accused person it is sufficient to secure an acquittal. (see ***Leonard Aniseth v. Republic*** (1963) EA 206).

26. To counter this defence, the prosecution was required to adduce direct or circumstantial evidence proving that the appellant was the perpetrator of the unlawful actions. This was proved by the testimony of the prosecution evidence as analyzed above and in light of that evidence, I reject the appellant's alibi. I am satisfied that there was ample evidence which put him at the scene of crime.

27. There is circumstantial evidence that the court seemed to have relied upon to discount the appellant's alibi. In a case depending exclusively upon circumstantial evidence, the court must find before deciding upon conviction that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt. It is necessary before drawing the inference of the accused's responsibility for the offence from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference (see **Simon Musoke v. R [1958] EA 715; Teper v. R [1952] AC 480 and Onyango v. Uganda**

[1967] EA 328 at page 331).

28. The circumstantial evidence that is available is that the appellant was not in Mombasa and if he was then he must have dashed there to hide as he waited for the coast to clear. He was promptly pointed out by the complainant and was arrested. The appellant's alibi did not manage to shake the evidence of the prosecution. It also transpired that there had been no differences between the appellant and the complainant's parents so as to suggest a frame up.

29. In the instant case, I find that there is direct and cogent evidence pointing irresistibly to or showing that it is the appellant that caused the victim the absent hymen. The evidence available has proven the ingredient of penetration occasioned by the appellant, his participation and that the complainant was the victim and a child beyond reasonable doubt.

30. In addressing the question as to whether or not the prosecution proved its case to the required standard, being proof beyond reasonable doubt, if find that the evidence on record is satisfactory to convince this court that the offence was committed by the appellant. The alibi that he set up did not exonerate him from the offence. The conviction arrived by the trial court is sound and safe. I am not inclined to interfere with it.

31. As regards the aspect of sentence it is noted that the appellant was sentenced to life imprisonment as stipulated by the law and that the trial court did not have a leeway to interfere with the said minimum sentence. It is trite law that an appellate court has jurisdiction to interfere with sentences imposed by a subordinate court if it is established that the trial court did not take into account a relevant factor or that the sentence is harsh and excessive. Following the decision of the Supreme Court in the case of **Francis Karioko Muruatetu and others vs R (2017)eKLR** several persons serving long sentences have petitioned the courts for review of their sentences. In the case of **Jared Koita Injiri Vs R (2019) eKLR** the Court of Appeal at Kisumu considered an appeal against life sentence under section 8(2) of the Sexual Offences Act as follows:

> **"In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8(2) 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……We would set aside the sentence of life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court".**

Guided by the above authority I find that the appellant's circumstances are not different and he ought to benefit from that decision. The appellant herein had waylaid the complainant near [particulars withheld] estate and defiled her. The victim was established to be aged 10 years old and she must have been traumatized by the ordeal. The appellant therefore must atone for his sins. I find a sentence of thirty (30) years would be appropriate for the offence.

32. In the result the appeal partly succeeds. The conviction is hereby affirmed. The sentence of life imprisonment is set aside and substituted with a sentence of thirty (30) years from the date of arrest namely 10.8.2017.

It is so ordered.

Dated and delivered at Machakos this 27th day of January, 2020.

D. K. Kemei

Judge