REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 129 OF 2018

SIMON ISIAYO.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(from the original conviction and sentence in Kakamega Sexual Offence Case No. 65 of 2018 by E. Malesi, SRM, dated 30/8/2018)

JUDGMENT

1. The appellant was convicted of the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006 and sentenced to life imprisonment. He was aggrieved by the sentence and the conviction and filed this appeal. The grounds of appeal are that:-

(a) The learned trial magistrate failed to exercise his judicial authority judiciously and impartially and was therefore biased against the appellant.

(b) The learned trial magistrate erred in law in failing to fore warn the appellant at the probable sentence to be meted against him.

(c) The learned trial magistrate erred in law in neglecting and dismissing the appellant's defence and specifically that of alibi.

(d) The learned trial magistrate failed to avail to the appellant the services of a lawyer.

(e) The prosecution evidence was wanting and contradictory and failed to meet the threshold in sexual offence cases.

(f) The learned trial magistrate failed to appreciate the lack of scientific evidence to back the prosecution's case and more specifically lack of DNA testing in the prosecution's case.

2. The grounds of appeal were expounded by the written submissions of the advocates for the appellant, **Elungata & Co. Advocates**. The state did not respond to the submissions by the advocates for the appellant. They instead relied on the record of the lower court.

3. The particulars of the charge against the appellant were that on the 23rd day of June, 2018 at around 1800 hrs in Murhanda Location in Kakamega East Sub-County within Kakamega County, intentionally caused his penis to penetrate the anus of HM (herein referred to as the complainant/victim) a child aged 1 ½ years.

Case for Prosecution –

4. The case for the prosecution was that the victim herein was a daughter of one LM PW1. PW1 was newly married to the appellant. They had stayed together for about 7 weeks. PW1 had moved to the appellant's home with the victim when she got married to him. The victim was aged 1 ½ years.

5. That on the material day at 6 p.m. PW1 went to the posho mill and left the appellant at their home with the victim. PW1 returned home at 7 p.m. She found the child sleeping. She proceeded to prepare the evening meal. Later on she woke up the child. She found it with fresh wounds on the buttocks and exposed anus. The child had had her clothes changed. She suspected that the child had been defiled. She inquired from the appellant as to what had happened to the child. He said that he did not know. He told her to ask his mother. She went and asked his mother. His mother asked the appellant but he continued denying. The appellant's mother bathed the child. On the following day PW1 took the child to Kakamega County Referral Hospital. She was examined by a Dr. Miriam who found her with bruises on the forehead

and left cheek, tender and swollen anal region with blood oozing from the region. The region was also painful. The doctor completed a Post Rape Care form. A laboratory examination was done but there was no spermatozoa seen. On the same day PW1 reported the incident at Muhanda AP Post. APC Ndege PW4 went with PW1 to her home and arrested the appellant. He was taken to Shinyalu Police Station. He was received by PC Winfred Ikamati PW5. PW5 investigated the case. On 25/6/2018 PW5 took the child and the mother to Shinyalu Health Centre. The child was examined by a clinical officer PW2 who found her with bruises on the face, tenderness and multiple bruises on the buttocks and tears on the anal region. PW2 completed the P3 form. The appellant was charged with the offence. Later the investigating officer took the child to Kakamega County Referral Hospital. The child was examined and found to be 1 ½ years old. During the hearing the clinical officer PW2 produced the treatment notes from Shinyalu Health Centre and the P3 form as exhibit, P.Ex 4 and 5 respectively. Dr. Kibisu PW3 of Kakamega County Referral Hospital produced the Post Rape Care form, the Laboratory Request form and Client Referral form as exhibits, P.Ex. 1-3 respectively. The investigating officer PW5 produced the photographs of the child as exhibits, P. Ex 6 (a) – (c). She also produced the child's clothes as exhibits, P.Exh. 7 and 8. She produced the age assessment report as exhibit, P.Ex 9.

Defence Case –

6. When placed to his defence the appellant stated in a sworn statement that on the material day he returned home at 8 p.m. The complainant's mother told him that the child had scratch marks on her buttocks. He saw the injuries. He denied that he was at home when the offence was committed. In cross-examination he denied that his wife had left him in the house with the child. He said that his wife told him that she had left the child with his mother when she went to the posho mill. He said that his wife could have fabricated the case against him as she had said that they were related and they could not continue being married to each other. **Submissions –**

7. The advocate for the appellant Mr. Elungata submitted that the plea in the case was taken in Kiswahili language. That on the hearing day the appellant stated that he did not understand Kiswahili and that he only understood Isukha language. That the proceedings then continued in Isukha language which was being interpreted by a court interpreter. Counsel submitted that upon the court realizing that the appellant did not understand Kiswahili the plea should have been re-taken in Isukha language. That the plea was not taken in the said language. That there was miscarriage of justice as the plea was not taken in a language understood by the appellant.

8. Counsel submitted that the trial magistrate did not explain to the applicant of his right to legal representation given the gravity of the sentence in case of a conviction. That failure to do so showed bias on the part of the trial magistrate. That the trial magistrate did not grant the appellant bond. That this showed impartiality on the part of the trial magistrate. That the case was heard in a haste and in record period of two months.

9. It was submitted that the prosecution relied on evidence of circumstantial evidence. That there was no evidence as to how many other people were staying in the compound of the appellant and within the vicinity. That there was no evidence to support the evidence of PW1 that she had left the child with the appellant. That the mother to the appellant was not called to corroborate the evidence of PW1. That there was no evidence that the appellant was the only person who had the opportunity to commit the offence.

10. Counsel submitted that there was no DNA testing done to confirm whether the appellant was the perpetrator of the offence. That it was not clear when the offence was committed.

11. It was submitted that the investigations were poorly conducted. That the investigating officer did not visit the scene. That it was not safe to convict on the evidence adduced before the lower court. Counsel urged the court to acquit the appellant of the offence.

Analysis and Determination –

12. This being a first appeal, the duty of the court is to analyse and re-evaluate afresh the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify – See **Okeno –Vs- Republic (1972) EA 32**.

13. Counsel for the appellant contended that the plea was not taken in a language understood by the appellant. However the court record depicts otherwise. The record shows that when on the 27/7/2018 the appellant said that he did not understand Kiswahili language a court interpreter for Isukha language was made available. The record shows that the plea was re-taken in Isukha language to which the appellant pleaded not guilty. The urguement that the plea was not taken in a language understood by the appellant does not stand.

14. The appellant contended that the trial magistrate was biased against him because he did not grant him bond. Article 49 of the Constitution of Kenya 2010 grants an accused person the right to be released on bond or bail unless there are compelling reasons not to do so. The plea in the case was first taken before Hon. H. Wandere who directed that a pre-bail report be availed. When the matter came for mention before the trial magistrate Hon. Malesi on 10/7/2018 the probation officer told the court that they were yet to conduct a home enquiry. The issue on bond did not come up again during the hearing of the case.

15. The test on bias by a judicial officer was stated by the Court of Appeal in **Philip K. Tunoi & Another –Vs- Judicial Service Commission & Another (2016) eKLR** where the court cited the English case of **Porter –Vs- Magill (2002) 1ALL ER 465** where the House of Lords held that:-

> **"The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".**

The court also cited with approval the decision in **Tumaini –Vs- Republic 1972 EALR 441** where it was held that in considering the possibility of bias, it is not the mind of the judge which is considered but the impression given to reasonable people.

16. It is not in record in this case that the trial magistrate refused to grant the appellant bail. It is only that the court was waiting for a pre-

bail report from the probation department. The appellant himself did not at any time remind the court that there was a pre-bail report that was being awaited. It is not in every case that a judicial officer can remember the orders made previously in a case. It is the duty of an accused person to remind the court of such orders. Where an accused person does not do so there is no basis of inferring bias on the part of the trial court. It would seem that the appellant was not keen on being released on bail. He cannot now allege impartiality on the part of the trial magistrate when he did not raise the issue during the trial. The only thing that would have showed bias on the part of the trial magistrate is if the application was made and the court refused to grant him bond when there were no compelling reasons to deny him bail. The question of bail may have escaped the mind of the trial magistrate because it was not thereafter brought to his attention. I do not think that an independent observer would read bias on the part of the magistrate simply because an order for bail was not made in the case. That the case was heard in record time of two months does not show bias on the part of the trial magistrate. In fact the trial magistrate should be commended for finalizing the case in such a time. That is what Kenyans have been asking for.

17. Counsel for appellant submitted that the prosecution evidence was contradictory. Counsel claimed that there was no clear evidence as to the date when the offence was committed. That there was contradiction between the evidence of the doctor PW3 and the victim's mother PW1 as to the date when the offence was committed.

18. The victim's mother stated that the offence was committed on the evening of 23/6/2018 and that she took the child to hospital on 24/6/2018. Dr. Kibisu PW5 confirmed the same. There was thereby no contradiction between the evidence of the two witnesses.

19. Section 36 (1) of the Sexual Offences Act empowers a court trying an accused person of a sexual offence to make orders compelling the accused to undergo a test, including a DNA test, to ascertain whether or not he has committed a sexual offence. In this case Dr. Kibisu said that a laboratory examination was done but no spermatozoa were seen. There was then no basis of conducting a DNA test. Such a test is not mandatory even under the provisions of section 36 (1) of the Act – See **Hadson Ali Mwachongo –Vs- Republic (2016) eKLR**. Failure to conduct a DNA test was not fatal to the prosecution case as a case of defilement can be proved by other ways other than by way of medical evidence. It can be poved by way of oral and circumstantial evidence – See **AML –Vs- Republic (2012) eKLR** and **Kassim Ali –Vs- Republic**, **Mombasa Criminal Appeal No. 84 of 2005.**

20. There was no doubt from the evidence adduced before the court that the victim was defiled. The victim was examined both at kakamega County Referral Hospital and at Shinyalu Health Centre. The findings were the same that there were bruises in the anal region. The bruises in the anal region proved penetration into the anus. Penetration was therefore proved.

21. It was submitted that the circumstantial evidence adduced against the appellant did not point to the guilt of the appellant. It has been held that in a case built on circumstantial evidence the inculpatory facts must be such that they are incompatible with the innocence of the accused and incapable of explanation upon any reasonable hypothesis than that of his guilt – See **Republic –Vs- Kipkering Arap Koskei & Another (1949) EACA 135**. In **Abanga Alias Onyango –Vs- Republic, Criminal Appeal No. 32 of 1990**, the Court of Appeal said that such evidence has to meet three tenets that:-

> **"1. The circumstances from which an interference of guilt is sought to be drawn, must be cogently and firmly established;**
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> **2. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;**
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> **3. The circumstances taken circumstantively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."**

22. The trial court accepted the evidence that the victim was left under the care of the appellant and that when PW1 returned back she found the victim having been defiled and the clothes the victim had been wearing changed. The court found no truth in the appellant's defence that he was not present when the offence was committed. The court found as far-fetched the defence by the appellant that the evidence was fabricated by PW1 because she wanted to walk out of their marriage.

23. On my own analysis of the evidence I have no reason to fault the finding by the trial court that the victim was left under the care of the appellant only for her mother to come back and find the victim defiled. The appellant initially stated in cross-examination that he had never before differed with his wife only to thereafter state she wanted to walk out of the marriage because they were related. There cannot have been any truth in the appellant's defence. The victim was defiled and the clothes she had been wearing changed. There was no allegation that there was anybody else who had gone to the appellant's house when the victim's mother was away. The child had wounds on the buttocks. Such a child must have cried a lot when the injuries were inflicted. There was no explanation by the appellant as to where he was when the injuries were inflicted. The circumstances unerringly pointed at the appellant as the only person who had the opportunity to commit the offence. There were no exonerating circumstances that the appellant is not the one who committed the offence. The evidence that the appellant is the one who committed the offence was overwhelming. The trial court rightly dismissed his defence.

24. Counsel for the appellant submitted that the appellant was not accorded a fair trial because the trial court did not avail him the services of a lawyer. Article 50 (2) of the Constitution of Kenya 2010 stipulates that:-

> **"Every accused person has the right to a fair trial which includes the right –**
>
> **(h) to have an advocate assigned to the accused person by the state and at state expense. If substantial injustice would otherwise result, and to be informed of this right promptly."**

25. Article 25 of the Constitution stipulates that the right to fair trial cannot be limited.

26. In **Republic –Vs- Karisa Chengo & 2 Others (2017) eKLR** the Supreme Court considered at length the issue of legal representation

and held that:-

> **"It is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expense specifically. Inevitably there will be instances in which legal representation at the expense of the State will not be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the Legal Aid Act, various other factors which include:-**
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> **i. the seriousness of the offence;**
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> **ii. the severity of the sentence;**
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> **iii. the ability of the accused person to pay for his own legal representation;**
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> **iv. whether the accused is a minor;**
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> **v. the literacy of the accused;**
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> **vi. the complexity of the charge against the accused."**

In the said case the court associated itself with the sentiments of the Court of Appeal decision in **Thomas Alugha –Vs- Republic, Criminal Appeal No. 2 of 2014 (2016) eKLR** where the court stated that an accused person who faced a sentence of life imprisonment deserved to be accorded legal representation.

27. In **Joseph Kiema Philip –Vs- Republic (2019) eKLR** where the appellant was sentenced to 20 years imprisonment for the offence of defilement but was during the trial not accorded legal representation and neither was he informed of that right the High Court held that there was substantial injustice for lack of legal representation. The court further held that the trial proceedings were conducted in a manner prejudicial to the appellant and caused him grave injustice.

28. In **Vincent Muchera Isalano –Vs- Republic (2019) eKLR** where the appellant was also charged with defilement and was not informed of his right to legal representation and had difficulties in representing himself, the High court held that the appellant was not accorded a fair trial in that the offence was serious, the sentence severe and the charge complex in nature.

29. The appellant herein was not informed of his right to legal representation. He faced a serious charge that carried a sentence of life imprisonment. Such a charge called for legal representation. Failure to inform the appellant of that right and conducting the trial without legal representation caused injustice to him. The appeal should succeed on this ground.

30. The upshot is that the appeal is upheld. The conviction is quashed and sentence set aside.

31. The question is whether I should order a retrial. A retrial ought only to be ordered if it will not cause injustice to an accused person. In **Muiruri –Vs- Republic (2003) KLR 552**, the Court of Appeal held that whether a retrial should be ordered or not must depend on the circumstances of the case. It was observed that a retrial will only be ordered when it is in the interests of justice and if it is unlikely to cause injustice to the appellant. Among the factors the court ought to consider include the nature of illegalities or defects in the original trial, length of time that has elapsed since the arrest and arraignment of the appellant, whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not.

32. In this case the mistake was by the trial court. The offence the appellant was charged with was serious. The prosecutions seems to have a strong case against the appellant. I am of the considered view that the appellant should be retried of the offence. I accordingly direct that the appellant be tried afresh before another magistrate of competent jurisdiction other than the one who tried him herein. The appellant therefore to be produced before the Chief Magistrate's Court Kakamega to be re-tried afresh of the offence.

Delivered, dated and signed in open court at Kakamega this 12th day of March, 2020.

J. NJAGI

JUDGE

In the presence of:

No appearance for Appellant

Miss Omondi for State/Respondent

Appellant - present

Court Assistant - Polycap

14 days right of appeal.