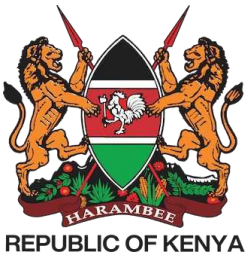

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL N0. 13 OF 2019

REPUBLIC.....APPELLANT

-VERSUS-

S S M.....RESPONDENT

(Being an appeal from the Judgement of the Learned Senior Resident magistrate (Hon Y Shikanda) in Machakos Chief Magistrate's Court Criminal Case S.O No. 10 of 2017 delivered on 22nd January, 2019)

REPUBLIC.....PROSECUTOR

VERSUS

S S M.....ACCUSED

JUDGEMENT

1. The Respondent, **S S M**, was charged before the Machakos Chief Magistrate's Court Criminal Case S.O No. 10 of 2017 with the offence of Sexual Assault Contrary to Section 5(1)(a)(i) as read with section 5(2) of the ***Sexual Offences Act, No. 3 of 2006***. The particulars were that the Respondent on the 21st day of June, 2017 in Wamunyu Location Mwala Sub-County within Machakos County, intentionally and unlawfully used his fingers to penetrate the vagina of **NM**, a child aged 10 years.

2. According to the complainant, PW3, who gave an unsworn testimony, on 21st June, 2017, she had been sent home from school because of money. At the market she saw the Respondent who gave her Kshs 10/= to go and buy for him chapati. Upon taking the said chapati to the Respondent's house, the Respondent entered the house and closed the door then asked her to remove all her clothes. The Respondent then removed her clothes and inserted his fingers in her vagina. He then tied a piece of cloth over her eyes, carried her and placed her on the bed and inserted his penis into her vagina after which the Respondent warned her not to tell anybody and she went home and returned to school.

3. At home she found her grandmother, PW1 and reported the incident to her and to her teacher when her teacher went to her home. She was then taken to the police where she narrated what happened to her after which she was taken to the Hospital where she was treated.

4. In cross-examination the complainant stated that she had been at the Respondent's place of work and was on her way home. She stated that the market is on a different route from the one from her school to her home. During the examination, she stated the doctor checked her vagina using his hands.

5. According to PW1, **MM**, on that day at about 3.30pm she was at home when the complainant, her granddaughter aged 10 years with whom she was staying, returned home from school. According to PW1, the complainant was not walking properly and her clothes had water and were bloodstained.

6. On asking the complainant what had happened, the complainant became evasive. Since she had organised for a prayer session in her house and there were people around, she took the complainant inside the house where the complainant informed her that she had been sent out of school to collect tuition money and she met her grandfather, the Respondent who gave her Kshs 10/= to buy for him chapati and take to his house. When he got to the house, the Respondent closed the door and asked her to remove the clothes and when she declined the Respondent did so, then inserted his fingers into her vagina, placed her on the bed, inserted his penis into her vagina and ejaculated therein. After that the Respondent told her to dress up and return to school but warned her not to disclose the incident to anybody.

7. PW1 took the complainant to Hospital but did not get a doctor. Upon returning home, she called the Respondent and warned him to desist from defiling children. The following day the Respondent, the chairman of the *Nyumba Kumi*, went to her home and spoke to her mother telling her about what PW1 had alleged saying that PW1 had been bribed to frame him but PW1 insisted that since she was the one who had called the respondent, the Respondent ought to speak to her. The Respondent then sent a message to a certain police officer, the Chief and the Elders telling them a child had been defiled and he was being suspected of the act.

8. After the news reached the complainant's teacher, two teachers were sent to her home and they took the complainant to the police station after which PW1 was called and she reported what she had been told by the complainant. She was then advised to take the complainant to Machakos General Hospital where they found no doctor due to the doctors strike and proceeded to Bishop Kioko Hospital where they were advised to return the following day and were referred to Nairobi Hospital. The following day PW1 took the complainant to their home dispensary where she was examined and later took her to Nairobi Women Hospital. She identified the medical report and Post Rape Care Form. According to her, the Respondent who is her cousin was arrested after about one week. She however stated that she had no grudge with the Respondent.

9. In cross-examination she confirmed that when she called the Respondent, the Respondent informed her that he was attending prayers.

10. On 23rd June, 2017, PW4, **CM**, the complainant's class teacher discovered that the complainant was missing. Upon inquiring from the complainant's sister, she was informed that the compliant had been defiled by a relative. On 21st June, 2017. Accompanied by PW7, **CM**, a fellow teacher, they proceeded to the complainant's home where they found the complainant's grandmother, **PW1**, and her great grandmother, one **A**. The complainant then narrated to them that after the Respondent sent her to buy chapati, upon her return to the house, the Respondent closed the door, ordered her to remove her clothes and upon her declining to do so, the Respondent removed her clothes, blindfolded her, took her to his bed and inserted his fingers into her private parts before asking her to dress up and go home. According to PW4, the grandmother washed the complainant's clothes but not her bloodstained panty which they took and proceeded to Wamunyu Patrol Base where they reported the incident to PW8. Both teachers recorded their statement and they were issued with P3 form.

11. On 21st June, 2017 at about 6pm, **PW5, OMM**, was from work when he met the Respondent, his uncle on the road. The Respondent informed him that he had been called by PW1, PW5's Aunt, who told the Respondent to keep of the children. The Respondent then gave PW6 Kshs 20/- to buy airtime and seek clarification. Upon calling his wife, PW5 was told to speak to PW1. When he arrived home at 9.00pm, he was informed by his wife, M, and PW1 what had happened. The following day the complainant narrated to her how she was on her way to school when the Respondent after sending her to buy for him chapati locked her in his house, tied her with a piece of cloth, blindfolded her, removed her clothes and inserted his fingers in her private parts before releasing her to go to school telling her to pass by on her way from school which she declined to do but reported the matter home. Upon the advice from police they took the complaint for treatment but did not get treated due to strike. Eventually they took the complainant to Nairobi Women's Hospital.

12. PW2, **PMN**, the complainant's mother was working in Mombasa when she was called by PW1 on 22nd June, 2017 and informed that her daughter, the complainant had been defiled by the Respondent. According to her, the complainant was by the time of her testimony aged 12 years having been born, according to the exhibited birth certificate, on 26th October, 2005. The following day she travelled home and proceeded to the police station where she found that the matter had already been reported. The complainant narrated to her how the Respondent, after sending her to buy for him chapati, locked in his house, removed her clothes after she declined to do so herself, inserted his fingers into her vagina, blindfolded her and inserted his penis into her vagina before releasing her with a warning not to reveal what had happened.

13. In cross examination, PW2 disclosed that the complainant was weak due to mental instability.

14. PW6, **Dr. Peter Wanyama**, was called to testify on behalf of his colleague, **Dr Godrfrey Wagura**, who was unavailable having travelled to India. According to the P3 form and PRC form the complainant's panty was dirty and bloodstained and the complainant was sick looking and mentally challenged. There was a tear in her hymen possibly caused by a sharp object but not consistent with penile penetration. There were no STIs. In his opinion penetration could not have been caused by a penis though it could have been caused by a finger.

15. PW8, **PC Robert Mwangi**, the investigations officer was in the office on 23rd June, 2017 when the complainant was taken to her by two teachers and the school chairman. After taking the statements he issued them with P3 form and advised them to take the complainant to Hospital. She was eventually treated at Nairobi Women's Hospital, Kitengela where the P3 form was filled in. Later he arrested the Respondent and charged him. He produced the panty as an exhibit.

16. In cross-examination PW8 admitted that he knew the Respondent with whom they used to worship in the same church and who was the chairman of *Nyumba Kumi* Cluster. He admitted that after receiving the information the respondent sent him a message stating that there were allegations that he had defiled the complainant. According to PW8 he summoned the respondent several times during the investigations and eventually put the Respondent in the cells on 2nd July, 2017.

17. Upon being placed on his defence, the Respondent testified that on 21st June, 2017 he was attending a funeral meeting of one **Augustine Muasya Musoo**, his brother in law, at **Musau Mulinge's** home, more than 5 kms away from [particulars withheld] from 9.00 in the morning till 5.00pm when he received a call from PW1 warning him not to get close to her children. Upon his return to [particulars withheld] he went to PW5, his nephew and gave him Kshs 20/- asking him to call his wife and find out what had happened concerning the call he received from PW1. PW5's wife said she did not want to get involved and asked PW5 to talk to PW1. The following day, the Respondent went to PW1's home and asked PW1 and her mother what had happened but they both insisted that the Respondent knew what he had done the previous day having defiled the complainant. The Respondent then sent an SMS to his fellow *Nyumba Kumi* officials with copies to the Chief and police for investigations to be done. By that time the police had not informed him of the complainant. On 23rd June, 2017 he was summoned by the police and he explained his position informing the Investigating Officer where he was on the material day. He also availed his witness to the

police station and he recorded a statement.

18. According to the Respondent, PW1 was asked to frame him by his 1st wife with whom he had disagreed. However, PW1's daughter who was to be instrumental in doing so declined.

19. In support of his evidence, the Respondent called **Boniface Muinde Musau**, DW2 who confirmed that on 21st June, 2017 they were with the Respondent at his later brother's home making funeral arrangements from between 9am and 10 am throughout the day till shortly before 6pm when the Respondent left. He confirmed that he recorded his statement at Wamunyu Police Patrol Base.

20. In his judgement the learned trial magistrate found that the respondent's alibi defence was not displaced. According to him the complainant did not tell the truth when she stated that the Respondent inserted his penis into her vagina hence raising the issue of her credibility as a witness. He accordingly was found that a reasonable doubt had been cast on the prosecution's case and proceeded to acquit him under section 215 of the ***Criminal Procedure Code***.

Determination

21. This is a first appellate court, as expected, this court is obliged to analyse and evaluate afresh all the evidence adduced before the lower court and draw its my own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where 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."**

22. Similarly, in **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

> **1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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.**
>
> **2. 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 findings and 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.**

23. Section 5 of the ***Sexual Offences Act*** provides as follows:

(1) Any person who unlawfully -

(a) penetrates the genital organs of another person with -

(i) any part of the body of another or that person; or

(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

24. **Waweru, J** has had an opportunity to deal with this offence in **Charles Kibe Mwangi vs. Republic [2015] eKLR**, where he expressed himself as hereunder:

"Penetration by finger as the Appellant was charged would thus constitute the offence of sexual assault. However, the definition of "penetration" under section 2(1) of the Act poses a serious challenge. That definition is –

'*penetration* means the partial or complete insertion of the genital organs of a person into the genital organs of another person'.

According to this definition therefore, to constitute the offence of sexual assault the penetration must be by genital organs of a person into the genital organs of another person. Fingers are not genital organs. This conflict between the definition of penetration under section 2(1) and the offence of sexual assault as created under section 5(1) of the Act needs to be resolved first. I did not have the benefit of full submissions on the issue, and I will therefore not resolve the conflict now. Suffice it to say, for this present case, that because of the definition of penetration under section 2(1) of the Act, the particulars of the charge did not disclose the offence charged. The charge was thus incurably defective, and I so hold. The conviction cannot be upheld."

25. Going by that decision, the Respondent's acquittal cannot be faulted since the medical evidence rules out the possibility of penile penetration. Apart from that the Respondent could only be convicted if the trial court found that the complainant whose evidence was uncorroborated was telling the truth. I agree with the learned trial magistrate that by insisting that the Respondent inserted his penis into her vagina at a time when she was blindfolded and when the medical evidence rules out such a possibility dented the complainant's credibility and the Respondent's contention that the charge was fabricated against him cannot be ruled out. The Court of Appeal in **Lukas Okinyi Soki vs. Republic Kisumu Criminal Appeal No. 26 of 2004** expressed itself as hereunder:

"The appellant, as we have stated raised mainly two defences. The first was one of alibi and the second was that there were grudges between the appellant's father and the complainant. Our understanding of the appellant's defence is that he could

not be properly identified as he was not at the scene of the robbery and the complainant's evidence together with that of his wife and his grandson were all fabricated stories against him. On the other hand, the complainant and his wife were certain in their evidence that the appellant was one of the attackers. These were conflicting versions and demanded that the trial court had to carefully consider, analyse and evaluate the evidence that was before him both by the prosecution's witnesses and the appellant. He had to consider whether the circumstances for identification were favourable or not. He had to consider whether the defence of alibi was well founded and whether it was properly displaced by the prosecution case. The consideration had to clearly be borne by the record. Equally the first appellate court, as was stated in the case of Gabriel Kamau Njoroge vs. Republic (supra) had a duty to carefully analyse and weigh conflicting evidence and draw its own conclusion on the same, bearing in mind that it had not seen or heard the witnesses.

……

We have perused the entire record of appeal and particularly the proceedings. We cannot see any evidence adduced either by the prosecution or by the appellant that would justify the conclusion the learned Magistrate came to, namely that the appellant's alibi was an open lie and an indication of guilt. He may not have been truthful when he said that PW4 summoned him and asked him if he knew about the robbery at the complainant's home but the burden was on the prosecution to displace his alibi."

26. In this case the Respondent raised an alibi defence. It is trite that the onus is on the prosecution to displace the defence of alibi after the defence raises it at the trial since as was held by the Court of Appeal in **Victor Mwendwa Mulinge vs. Republic [2014] eKLR**:

"**It is trite law that the burden of proving falsity, if at all, of an accused's defence of alibi lies on the prosecution."**

27. The Court of Appeal in the case of **Wangombe vs. Republic [1980] KLR 149** held *inter alia* as follows:

""**…in *Ssentale vs. Uganda [1968] EA 365, 368* [Sir Udo Udoma CJ]…said that a prisoner who puts forwards an alibi as an answer to a charge does not thereby assume any burden of proving that answer; it is a misdirection to refer to any burden as resting on the prisoner in such a case; for the burden of proving his guilt remains throughout on the prosecution. We agree, we have ourselves said so on more than one occasion…The defence of alibi was put forward for the first time some four months after the robbery when the appellant made his unsworn statement in court. Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible."**

28. In the case of ***Adedeji vs. The State* [1971] 1 All N.L.R 75** it was held that:

"***failure by the police to investigate and check the reliability of alibi would raise reasonable doubt in the mind of the tribunal and lead to the quashing of a conviction imposed."***

29. In this case, it was unrebutted evidence of the Respondent that he not only raised the alibi defence at the earliest possible opportunity but also availed his witness to the investigating officer.

30. What then is the option available to the prosecution where, as was in this case, the defence calls witnesses in support of his alibi defense? section 212 of the ***Criminal Procedure Code*** states as follows:

If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter.

31. In this case the prosecution lost an opportunity to conclusively rebut the appellant's alibi defence. The objective of the investigators and prosecutors is not to obtain conviction at all costs. They are expected to be professional in the conduct of their investigations and ought not to be driven by malice or other collateral considerations. They must act impartially and independently on receipt of a complaint and are expected to carry out thorough investigations which would ordinarily involve taking into account the versions presented by both the complainant and the suspect. Neglect to make a reasonable use of the sources of information available or failure to take the necessary steps to secure evidence which ought to have been secured may well amount to the failure to prove the guilt of an accused person beyond reasonable doubt. The court, in the exercise of its judicial mandate is under a duty to point out slips on the part of the investigative agencies. Having so stated, it is not for the court to prop up cases which fail to achieve the threshold for conviction in criminal cases, - proof beyond reasonable doubt. Having so pointed out the gaps in the investigations, the only option for the court is to acquit since the court ought not to base its decision on speculations and conjectures. In the case of **Michael Mugo Musyoka vs. Republic [2015] eKLR** it was observed by the Court of Appeal that:

Without the evidence of the said or eye witness we find that the prosecution did not prove that the appellant had intentionally and unlawfully indecently touched the child...we find that the case against the appellant was based on a mere suspicion. In Mary Wanjiku Gichira v Republic, Criminal Appeal No 17 of 1998, this court held that suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Before a court of law can convict an accused person of an offence, it ought to be satisfied that the evidence against him is overwhelming and points to his guilt. This is because a conviction has the effect of taking away the accused's freedom and at times life".

32. Therefore, in acquitting the accused, the court does not necessarily make a definite finding that the accused is factually innocent of the offence with which he is charged. It simply makes a finding that the prosecution has failed to prove his guilt and he is therefore constitutionally deemed to be innocent.

33. Where, as in this case the prosecution had within its powers the opportunity to gather evidence that would either have rebutted the Respondent's alibi or confirmed it but failed to do so, the benefit of the prosecution's failure to present that evidence must benefit the accused, the Respondent in this case. In my view, it is the duty of the prosecution to direct the investigators properly. Where the investigations do not measure up to the required standards, it behoves the prosecution to point out the same and give appropriate directions particularly in a matter such as this where there may be a need to call for rebuttal evidence.

34. It therefore follows that the mere fact that the prosecution's case is believable does not amount to a rejection of the alibi defense. The South African case of **Ricky Ganda vs. The State, [2012] ZAFSHC 59**, Free State High Court, Bloemfontein provides useful guidance. In the said case it was held: -

"The acceptance of the evidence on behalf of the state cannot by itself be sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating him is true…the correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses…it is acceptable in totality in evaluating the evidence to consider the inherent probabilities…The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt."

35. In this case the sentence which the Respondent stood to serve if convicted was life imprisonment. The sentiments of the Court of Appeal with respect to heavy minimum sentences in the case of **Hamisi Bakari & Another vs. Republic [1987] eKLR** are worth taking note of. In that case the Court held that:

"We would note that where a heavy minimum sentence is involved, the lower courts should be particular to see that each ingredient in the charge is reflected in the particulars of the offence, and is properly proved. Seven years is a long time to serve in a case where the issues are not clear."

36. Therefore, as a result of the failure by the prosecution to rebut and displace the alibi defence as well as the lack of credibility of the complainant coupled with lack of corroboration, I find that the decision of the learned trial magistrate in acquitting the Respondent was sound and cannot be interfered with. Consequently, this appeal is hereby dismissed.

37. It is so ordered.

Read, signed and delivered in open Court at Machakos this 17th day of June, 2020.

G V ODUNGA

JUDGE

In the presence of:

Mr Ngetich for the State/Appellant

Respondent in person

CA Geoffrey