REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 136 "B" OF 2019

PETER KALIA KIMEU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the Senior Resident Magistrate Hon. C. A Mayamba dated 28/02/2019 in KilunguSRM Criminal Case No. 33 of 2018.)

JUDGMENT

1. **Peter KaliaKimeu**was charged and convicted of the offence of defilement contrary to section 8(1)(3) of the Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant on the 29th day of May 2018 in Kilungu division within Makueni county intentionally caused his penis to penetrate the vagina of **DMR** a child aged 13 years.

2. Upon conviction he was sentenced to twenty (20) years imprisonment. He was dissatisfied with the judgment and filed this appeal through Mr. A. Makundi advocate, raising the following grounds:

a) **That,** the trial court erred in both law and fact by convicting the Appellant when the case against him had not been proved beyond reasonable doubt.

b) **That,** the trial court erred both in law and fact by failing to find and hold that the prosecution's evidence was full of doubts which doubts ought to have been resolved in favor of the Appellant

c) **That,** the trial court erred in law by dismissing the Appellant's defence and shifting the burden of proof to the Appellant.

d) **That,** the trial court erred both in law and fact by reaching conclusions based on his own opinions rather than on evidence.

e) **That,** the learned trial Magistrate erred in law by convicting and sentencing the Appellant herein on a charge sheet that was defective.

f) **That,** the learned trial Magistrate erred in law by making and delivering a judgment that was not consistent with the provisions of section 169 of the Criminal Procedure Code.

g) **That,** the learned trial Magistrate erred in law by failing to find and hold that the Appellant's defence of alibi which was not falsified or contradicted was watertight and acquit the Appellant herein.

h) **That,** the trial Magistrate erred in law and in fact by failing to appreciate that indeed there existed bad blood between the complainant's father and the Appellant herein.

i) **That,** the learned trial Magistrate erred in law by failing to appreciate that the demeanor of the accused on its own does not corroborate the prosecution case which was weak.

j) **That,** the trial Magistrate misunderstood the defence of alibi tendered *viz* a *viz*the commission of the offence is clearly evident under paragraph 19 of his judgment.

k) **That,**he learned trial Magistrate erred in law and in fact by failing to make a finding and hold that the offence allegedly having been committed in a lodging in a market during the day, there was no evidence to corroborate that Pw1 and no witness or document was presented to show that indeed the accused person visited the said lodging on the material day.

l) **That,** the trial court erred in law and fact by failing to find and hold that the prosecution evidence did not support the charges facing the Appellant. The patent inconsistencies thereof created doubts which ought to have been resolved in favour of the Appellant.

m) **That,** the learned trial Magistrate erred in law by failing to give weight to the evidence of Pw6 who on cross examination stated that the accused was stable and unworried during his medical examination which was not normal to mean that the Appellant herein was not worried as he knew he did not conduct the offence.

n) **That,** the learned trial Magistrate erred in law by sentencing the accused person to a sentence that was excessive in the circumstances.

3. The prosecution case is premised on the evidence of six (6) witnesses. Pw1 (DMR) is a minor then aged 13 years. The Appellant was a teacher in her school. She was in standard eight then. It was her testimony that on 29th May 2018 at around 11:00 am she was participating in school games at Akatch stadium Kyambeke. She and the Appellant took a motorbike to Kalamba where they went to Kalamba off road lodging and had sex.

4. Thereafter they went to Muaani and she went back for the games and she did not tell anyone. On 30th May 2018 her classmate **ENN** (Pw4) informed their teacher to whom she confessed. The matter was reported and she was taken to hospital.

5. Pw2 **AMM** is Pw1's teacher. She was on 30th May 2018 informed by the head teacher of a pupil who had been defiled. Pw1 was called and she explained what had happened between her and the Appellant. She was tasked to take her to Kilungu hospital for examination. She confirmed that Pw1 is a daughter to the former head teacher.

6. Pw3**PMM** is the school head teacher. He said on 30th May 2018 at 8:00 am, he had received a report from Pw4 that Pw1 had disappeared when games were ongoing. Inquiries were made by senior teachers who found out that Pw1 had been involved in sex with the Appellant. She confirmed the same to him. He reported to the Ministry of education and the police and they had her taken to Kilungu hospital.

7. In cross examination, he said he attended the zonal games but he did not see Pw1 since she was not participating.

8. Pw4 (**ENN**) is a pupil in the same class with Pw1. She testified that on 29th May 2018 she left Pw1 with her bag as she entered the playing field as she was in the school team. Upon completion, she did not find Pw1 but her bag was there. The next day in school Pw1 asked her what she could do if she was pregnant. She notified Pw3 of what Pw1 had told her.

9. In cross examination she said she walked to the games at Kyambekewith Pw1. That Pw1 was wearing home clothes and she did not see her leave Akach stadium. She reported Pw1 for talking in class.

10. Pw6 **EricKasiamani** is a clinical officer at Kilungu sub-county hospital. He examined Pw1 following a report of defilement. His findings were:

· No physical injury on external genitalia.

· Hymen was perforated but not fresh.

· No discharges

· P3 filled on 12/6/2018

The witness produced Pw1's outpatient card and PRC form which in summary highlights the contents of the P3 form. (EXB1 and 2). He also produced the Appellant's outpatient card (EXB4) which had no significant finding. He also produced her birth certificate (EXB5).

11. In cross examination, he said perforation meant it had taken time as the wound was not fresh. He confirmed that there was no discharge or infection.

12. Pw5 **No. 106942 P.C Florence Menza** was the investigating officer. She testified that upon examination the medical officer confirmed that the child had been defiled and was bleeding from her private parts. She then arrested the Appellant.

13. When placed on his defence, the Appellant gave a sworn statement denying the charge. He confirmed attending the sports as a teacher on 29th May 2018 but he denied seeing Pw1 that day. He said he did not know a hotel called Kalamba off road.

14. He stayed at the games until 4:00 pm and was with his colleague **TMM** (Dw2). He was informed of the allegations by the D.O and he surrendered at Kilome police station. It was his evidence that he had issues with Pw1's father who was his former head teacher.

15. Dw2 **TMM**is a teacher at [Particulars withheld] primary school andthe Appellant is his neighbor anda friend. He taught in a different school. It was his evidence that 29th May 2018 was zonal games day. The games were at NdoloAkach stadium. He went for the games together with the Appellant. He was refereeing the girls football while the Appellant had no role to play.

16. He therefore gave him his bag as he refereed the match.They went together for lunch after he finished his duty. They later left together at

3:00 pm after the match.

17. It was his evidence that from the stadium to Kalamba by foot takes two (2) hours and one (1) hour by car. He knew the father of Pw1 who was a head teacher and had worked with the Appellant. That when the Appellant lost his father he was being denied permission to organize for the burial and that could have caused a problem between him and Pw1's father.

18. The appeal was canvassed by written submissions. Learned counsel Mr. Makundi for the Appellant has submitted on grounds **1,2,12** and**13** mentioning several inconsistencies in the evidence of **Pw1, Pw2, Pw3, Pw4**, **Pw5** and**Pw6**. He statesthat Pw1 was reported by Pw4 for talking in class and not for the defilement claim.

19. On grounds **3,7,10**, and **11** he submits that the Appellant gave a plausible defence and called a witness, who supported him. That the learned trial Magistrate misapplied and misunderstood the defence of *alibi* by what he stated in his judgment at page **19**. He cites the cases of **Michael MumoNzioka –vs- Republic (2019) eKLR and Karanja –vs- Republic (1983) KLR 501** in support.

20. Mr. Makundi in submitting on grounds **5** argues that the charge sheet reads that the complainant was 13 years whereas the evidence shows she was born on 10th January 2004 and was over 14 years. His submission is that age was not proved yet it is crucial when it comes to sentencing. He cited Jason **AkumuYongo –vs- Republic (1983) eKLR** and said the charge was therefore defective.

21. It's his further submission on grounds **4, 8** and **9** that the learned trial Magistrate reached some conclusions which were not backed by evidence but his own opinion. That the trial court descended into the arena to fill gaps for the prosecution. He pointed out that this was particularly in respect to the Appellant's witness (Dw2).

22. On grounds **6** and **14** he argues that the judgment and sentence are not in compliance with the provisions of section 169 (1) and (2) of the Criminal Procedure Code. Further that the sentence is excessive as discretion was not exercised in line with the **FrancisMuruatetu** case.

23. Citing the cases of **P.K.W –vs- Republic (2012) eKLR and KavooKimonyi vs Rep (2018) eKLR** counsel submits that the broken hymen *per se* was not proof of penetration. Referring to **paragraph 6** of the judgment he submits that penetration was dislodged by the *alibi* presented by the Appellant.

24. Still on the *alibi*defence counsel submits that the prosecution failed to rebut it, through cross examination nor calling rebuttal evidence under section 309 criminal procedure Code. He

referred to the case of **Karanja –vs- Republic**(*supra*) where the Court of Appeal said:

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

25. Counsel further submitted that it is the duty of the court to consider the evidence adduced in totality including the alibi. To support this, he has cited the case of **Ricky Ganda –vs The State, (2012) ZAFSHC 59 – Free State High Court Bloemfontein S.A.**

26. While relying on the cases of, **Victor MwendwaMulinge -vs- Republic (2014) eKLR; EliasKiamatiNjeru –vs- Republic (2015) eKLR; AndrewMulikaKithusi –vs- Republic 2014 eKLR;**Mr. Makundi contends that the trial court shifted the burden of proof to the Appellant which was an error

27. The appeal was opposed by the Respondent through learned counsel Mrs. Anne Gakumu who submits that the three ingredients of age, penetration and identification of the perpetrator were proved by the prosecution. That Pw1's evidence on penetration was corroborated by the evidence of Pw6 the clinical officer who produced EXB1, 2 and 3.

28. She argues relying on the case of **Geoffrey Kioji –vs- Republic Criminal Appeal No. 270 of 2010 (Nyeri)** that even in the absence of the medical evidence the court can still convict based on the *proviso* to section 124 of the Evidence Act.

29. It is her argument that even where there are some inconsistencies it's not all of such inconsistencies that can lead to a prosecution case to fall below the required standards of proof. She cites the case of **Richard Munene –vs- Republic Criminal Appeal No. 74 of 2016 (Nyeri)** where the court stated:

> ***"It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."***

30. On the *alib*i and grudge defence, she submits that the said defence was a mere after thought just introduced at the defence stage. He did not expound on the alleged grudge between him and Pw1. Since he said Pw1's father was the former head teacher of the school she argues that the prosecution did not get the chance to interrogate this defence.

31. In response to the submission on section 169 CPC counsel states that this is a first appeal and the court will re-evaluate and re-assess the evidence inorder to reach its own conclusion.

32. Counsel has argued that the proved age of the complainant was 14 years though the charge sheet indicated 13 years. She calls

on this court to invoke the provisions of section 179 CPC and find that no prejudice was caused to the Appellant who knew the offence he was facing. She submits that the Appellant ought to have been penalized under section 8(3) of the Sexual Offences Act.

Analysis and determination

33. This is a first appeal and this court has a duty to re-evaluate and re-consider the evidence and come to its own conclusion. It must also consider the fact that it did not have the opportunity to see or hear the witnesses. See **Okeno –vs- Republic (1972) E.A 32; Boru& Another –vs- Republic (2005) I KLR 649** where it was held:

> **(4) A duty is imposed on a court hearing of first appeal to consider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld, as well as to deal with any questions of law raised on the appeal.2**

34. I have duly considered the evidence on record, the grounds of appeal both submissions and the authorities cited. I find the issue for determination to be *whether the case against the Appellant was proved beyond reasonable doubt.* In other words, it is whether all the ingredients of the offence of defilement were proved.

35. Section 8(1) of the Sexual Offences Act No. 3 of 2006 provides: -

> ***(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***

Section 8(3) provides: -

> ***(2) A person who commits an offence of defilement with a child between the ae of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.***

From these provisions the ingredients to be proved by the prosecution can be identified as:

- Age of the complainant

- Penetration of the complainant's genital

- Identification of the perpetrator

Age of the complainant

36. It is clear from the charge sheet that the age of the complainant reads 13 years. Pw1 also told the court that she was aged 13 years. The birth certificate (EXB5) shows she was born on 10th January 2004. The alleged offence was on 29th May 2018. Meaning she was fourteen (14) years, four (4) months and three (3) weeks. She was therefore fourteen (14) years and that is the established age. Does this error make the charge defective as submitted? My view is that it does not. The reason is that the offence and the particulars are clear.

37. Section 8(3) Sexual Offences Act covers victims whose ages are between 12-15 years and anyone convicted of defiling a child falling under that age bracket suffers the same sentence. The Appellant has not stated how he was prejudiced by this error. I find that the correct age of the complainant was 14 years.

Proof of penetration and identification of the perpetrator

38. Penetration is defined under section 2 of the Sexual Offences Act as:

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

It was Pw1's evidence that the Appellant took her to "Kalamba off road lodging" from where he had sex with her. She did not say anything more than that. It was therefore assumed by the prosecution and the court that by "sex" Pw1 meant that there had been penetration of a penis into her vagina as per the definition under the Sexual Offences Act. She never gave these details to the court.

39. Pw6 examined her and found no physical injuries on the external genitalia; The hymen was perforated but not freshly perforated. He explained that the wound had taken time and was not fresh. (EXB1 and 3). The treatment notes (EXB1 and PRC form (EXB3) show that there was bleeding in her genitalia. Pw1 confidently told the court that SHE DID NOT BLEED. Pw6 who examined her confirmed that. So where did the bleeding in EXB 1 and 3 come from?

40. The Appellant has raised a number of issues in respect to contradictions in the prosecution case. It is not disputed that this alleged incident occurred in broad daylight. Both Pw1 and the Appellant were at Akach stadium for games/sports.

41. This is what Pw1 says in her evidence at page 9 lines 18 -25, page 10 lines 1-3 of the Record of Appeal

"*On the 29/5/2018 at around 11:00 am, I was participating in school games at Akatch stadium Kyambeke. We took a motorcycle from the stadium and went to Kalamba. We went to a lodging in Kalamba. We played sex. I was wearing clothes. Accused only had his vest on. I was only wearing my dress but had removed my pant. I went back with him uptoMuani. He left me to go back for games. I did not inform anybody."*

42. It is true that the Appellant was a teacher in the school. Pw1 is one of the many pupils in that school. They were not in their classrooms on this day. So how did Pw1 and the Appellant meet and arrange to leave the Akach stadium? They could not just out of nowhere have taken a motorbike without having planned on something. Nobody saw them leave?

43. Her evidence is that they boarded a motor bike from the stadium. This is not something that can be done in secret and there were other pupils and even teachers there including the head teacher (Pw3). None of them testified to having seen Pw1 and the Appellant leave together or just being together. Even Pw4 never saw them together. Pw1 never explained to the court what happened before they allegedly left on a motorbike. This was important.

44. In Kalamba Pw1 says they went to a lodging whose name she gave as "Kalamba off road lodging". In his defence the Appellant said there was no hotel in Kalamba by that name. The lodging was the scene of the alleged defilement. Did Pw5 (the investigating officer) ever visit the alleged scene of crime to satisfy herself of the report? She did not find it necessary to record statements from employees of the said hotel/lodging.

45. Pw2 **AMM**gave details of what Pw1 apparently told them. Pw1 who is supposed to have been the origin of those statements never told the court what Pw2 testified on. Pw2's evidence was hearsay evidence and could only be of value if it was supported by Pw1's evidence.

46. Pw6 produced EXB1 andEXB3 which indicate that Pw1's hymen was perforated and she was bleeding. He explained that by perforation it means the wound is old and not fresh. So, if the wound was not fresh, where was the bleeding coming from? Even Pw5 (*investigating officer*) said the child was bleeding. Strange enough, Pw1 herself in cross examination says at page 10 lines 18-19

"*I did not bleed. It was my first time."*

47. If indeed it was the first time she was indulging in sex she would have surely bled and her hymen would have been freshly broken. The medical evidence shows a perforated hymen which contradicts her own evidence. Further if she did not bleed as she stated in court, then where did the blood that was allegedly seen as recorded in EXB1 and 3 come from? This does not just add up. Pw6 in cross examination explained saying "Bleeding

can result as a result of the test we carry using our equipment which can touch the cervix."

48. Pw1 said she did not inform anyone what had happened. When she went to school the next day this is what she says happened – **page 10 lines 3-5**

On 30/5/2018, I went to school and my classmate ENN *informed Mr. Musyoki our teacher. I confessed to the teacher.*

So it is ENN (Pw4) who told the head teacher. On the other hand, this is what Pw4 states at **page 15 lines 3-9-**

"*The following day, I went to school. DMRasked me what she and do if she was pregnant. I informed her that I will take care of the situation. I went to inform the head teacher as it was illegal to talk during preps time. The head teacher asked me what she had told me of which I informed him. I have been a friend to Diana from pre-school level."*

In cross examination she states at **page 15 lines 17-18**

"*It was during preps time. I went to report Diana for talking in class"*

49. When the head teacher (Pw3) testified this is what he said at **page 12 lines 16- page13 lines 1-3**

"*I do recall on 30-5-2018 at around 8:00 am a pupil namely ENN reported that DMRwas not in attendance of school games. They were going to the games when she disappeared. She searched for DMR to give lunch money to her brother. I called senior female teachers and tasked themto enquire from her. I was informed that the complainant had opened the up to having sex with teacher Kimeu. I called the girl who confirmed the same. I called Ministry of education and was advised to take the girl to the hospital."*

50. According to Pw4, her friend (Pw1) only asked her what she can do if she is pregnant. She never told her she had done anything with the teacher. And she only reported to the teacher what Pw1 told her for the reason that it was illegal to be talking in class during preps time. Looking at Pw3's evidencethe report he received from Pw4 was about Pw1's disappearance from school games and not talking in class.

51. The issue of the teacher only came after Pw1 was called for interrogation by the teachers, Pw2 and the head teacher included. It is not lost to this court's mind that Pw1's father was a teacher by profession. When Pw1 went home she never informed her parents or family that she had been defiled.She never complained to Pw4 of any defilement.

52. The Appellant in his defence denied having committed the offence and explained how he had remained at the stadium throughout and his friend (Dw2) was witness to that. He alludedto there being issues between him and his former head teacher who happens to be Pw1's father.

Dw2 **TMM** gave evidence to the effect that he was with the Appellant on this day at the stadium upto the time they left for lunch together between 3:00 pm – 4:00 pm.

53. In brief the Appellant was saying he was never at Kalamba with Pw1 onthe material day and time. He testified and called a witness. This evidence could not just be dismissed as an afterthought. It had to be considered alongside the evidence adduced by the prosecution. Section 309 Criminal Procedure Code provides:

> ***"If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it."***

54. This provision allows the prosecution to bring up rebuttal evidence. In its submissions the Respondent has submitted that the *alibi* was raised late in the day and thereby inhibiting it from working on the same to obtain evidence in rebuttal.

55. In the case of **Kiarie –vs- Republic (1984) KLR** the Court of Appeal stated the following on an *alibi*defence:

> *"An alibi raises a specific defenceand an accused person who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.* ***Said –vs- Republic (1963) E.A 6****The judge had erred in accepting the Senior Resident Magistrate's finding in the alibi because the finding was not supported by any reasons."*

56. The *alibi* raised by the Appellant cannot be said to have been an ambush to the prosecution because from the date of plea the Appellant denied having committed the offence. All he stated in his defence was that he never left Akach stadium for Kalamba on 29th May 2018. Secondly that there was no hotel in Kalamba known as Kalamba off road lodging.

57. All that this court has to do is to consider the totality of the evidence of the prosecution and the defence to determine whether there is sufficient evidence to sustain a conviction.

58. There are notable inconsistencies in the prosecution case which inconsistencies I have pointed out above. In the case of **Joseph MainaMwangi –vs- Republic Criminal Appeal No. 73 of 1993** the Court of appeal Stated thus

> ***"In any trial there are bound to be discrepancies. An Appellate court in considering those discrepancies must be guided by the wording of section 382 of the Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence"***

59. Further in **Philip NzakaWatu –vs- Republic (2016) eKLR** the Court of Appeal stated:

> ***"However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."***

60. As pointed out above the medical evidence is not at par with the evidence of Pw1 and so does not squarely supportPw1's evidence on penetration. However, under the*proviso* to section 124 of the Evidence Act the court can still convict solely onthe evidence of Pw1 if it believes her and reasons must be given.

61. All that Pw1 told the court was that she had sex with the Appellant. Contrary to what is at paragraph 21 of the judgment, Pw1 never said the Appellant removed her pant and left her clothes on. What she said was this-

> *"I was only wearing my dress but had removed my pant." The particulars are clear on what the Appellant is alleged to have done "intentionally causing his penis to penetrate the vagina of DMR"*

62. Time and again courts have been asked to ensure that the witness explains in detail what was done to her or him. Having sex could mean anything besides what is stated in the particulars. That's also the reason why such evidence is taken in camera if a witness is found to be shy.

63. On the defence, I have pointed out that the prosecution should have tendered evidence to show that:

i. Pw1 and the Appellant were seen together or left together fromAkach stadium

or

ii. They were seen at the Kalamba off road lodging or just the existence of the said lodge.

iii. That indeed the Appellant inserted his penis in Pw1's vagina.

64. There are inconsistencies in the evidence of Pw1 – Pw4 and even the way Pw3 handled the case. It makes one wonder whether there was something more to it or not. How a report of making noise in class turned to disappearance from school games to defilement is not just not clear. Further how the hospital claims Pw1 was bleeding on the 2nd day of the alleged defilement while Pw1 herself denies ever bleeding is another issue. Even Pw6 (clinical officer) said there was no bleeding in Pw1's genitals.

65. All in all, I find that had the learned trial Magistrate maintained an open mind and considered the entire evidence on record, he would not have convicted the appellant. I find merit in the appeal which I allow.

66. The conviction is quashed and sentence set aside. The Appellant to be set at liberty unless otherwise lawfully held under a separate warrant.

Orders accordingly.

Delivered, signed & dated this 29th day of July 2020, in open court at Makueni.

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H. I. Ong'udi

Judge