REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL APPEAL NO. 49 OF 2019

JMM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 8 of 2016

in the Chief Magistrate's Court at Machakos delivered

by Hon K. Kibelion (SRM) on 7th March 2018)

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

JMM.....ACCUSED

JUDGEMENT

1. The Appellant herein, **James Mutie Muthoka**, was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act. He also faced an alternative charge of committing indecent act with a child contrary to section 11(1) of the said Act.

2. He was sentenced to serve ten (10) years' imprisonment for the alternative count which was to run from the date of his apprehension namely 19.8.2016.

3. The particulars of the charges were as follows:-

COUNT I

The appellant "On the 13th day of August 2016 at [Particulars withheld] village, Mango location in Mwala sub-county within Machakos County , intentionally and unlawfully caused his penis to penetrate the vagina of FMN a child aged 11 years."

ALTERNATIVE CHARGE

The appellant "On the 13th day of August 2016 at [Particulars withheld] village, Mango location in Mwala sub-county within Machakos County , intentionally and unlawfully touched the anus of FMN a child aged 11 years."

4. Being dissatisfied with the said conviction and sentence, the Appellant filed his Petition of Appeal which he amended and put forth the following grounds: -

1. THAT the prosecution failed to prove its case to the required standard.

2. THAT the whole of the prosecution's case is riddled with material contradictions.

3. THAT the trial court failed to consider and dismissed the appellant's defence.

5. The appeal was canvassed by way of written submissions.

6. The appellant submitted on each of the grounds raised in the appeal. On the ground of proof of the prosecution case, it was submitted that the complainant contradicted herself in cross examination by stating that the market was closer to her home whereas in examination in chief she stated her home was 25 metres from the appellant's home. Reliance was placed on the cases of **Pandya v R (1957) EA 336 and Pius Arap Maina v R (2013) eKLR.** It was submitted that there was no proof of penetration and that the appellant gave a strong alibi that the trial court disregarded. It was submitted that by dint of section 124 of the Evidence Act the evidence of the complainant ought to have been corroborated. The court was urged to consider the alternative charge. He prayed that the conviction be quashed and the sentence set aside and that he be set at liberty.

7. In reply, counsel for the prosecution conceded to the appeal. It was submitted that the evidence relating to the commission of the offence could not be believed because it was reported almost four days after the commission. It was submitted in placing reliance on the case of **R v David Ruo Nyambura & 4 Others (2001) eKLR** that the appellant's defence of alibi ought to have been believed and that the appellant bore no burden to establish his innocence. It was submitted that the appellant's alibi was not shaken by the prosecution and as such the doubt created in the prosecution case ought to be resolved in favour of the appellant. Counsel urged the court to interfere with the conviction and sentence meted on the appellant.

8. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo v Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

> **"On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

9. In support of the prosecution case, there were 6 witnesses lined up. **Pw1** was the **complainant**, and after a voir dire was conducted on her, the court was satisfied that she was possessed of sufficient intelligence and understood the meaning of an oath as well as of saying the truth; she was permitted to give a sworn statement. According to her testimony, she was an 11-year-old class three pupil who on 13.8.2016 went to Cadet lessons at [Particulars withheld] Wetaa church. She told the court that she left the lessons at 4 pm and went home to change her clothes and after changing, her uncle called her and she obliged; it was when she entered his house that the appellant removed her clothes, laid her on the bed, removed his clothes and placed his penis on her vagina. She told the court how she had screamed and called A whom she saw approaching. She stated that the appellant instructed her to dress and not to reveal what had happened. She told the court that she informed her mother what had happened that night and that she felt pain when urinating; that the following day, her mother took her to Hospital at Wetaa and after examination at the Hospital she was taken to Masii Police Station. On cross examination, she told the court that A heard her screams but did not know why she was screaming; she reiterated on re-examination that the incident occurred on 13.8.2016.

10. Pw2 was **RMN** who testified that on 17.8.2016 she noticed that Pw1 had difficulty walking and she revealed to her after much prodding and some beating that the appellant had called her to his house on Sunday where he undressed her and put his penis into her vagina. She told the court that she informed her husband and in turn an officer from Wetaa AP post was notified. She told the court that Pw1 was taken to Wetaa Dispensary where it was confirmed that she had been defiled; that the appellant was arrested and taken to Masii Police station. She told the court that Pw1 was examined at Mwala District Hospital and treated at Mango Dispensary. She tendered the P3 form, the treatment card issued at Mwala Hospital and at Mango dispensary. On cross examination, she testified that she knew the appellant as a lorry driver and a brother to her husband; that she learnt that the appellant had sold land to treat his mother and that Pw1 narrated to her the incident that occurred on 13.8.2016.

11. Pw3 was **AMN** who testified in the absence of a voir dire that he was a 14 year old class 6 pupil and that on 13.8.2016 he was herding cows when at 4 pm he heard Pw1 screaming. He testified that he found PW1 getting out of the appellant's house while crying, however she did not reveal why she was crying. On cross examination, he testified that Pw1's mother realized that she had been defiled after 4 days.

12. The appellant had prayed on 30.1.2017 that Pw1 and Pw2 be recalled for cross examination but the court declined to grant the request.

13. Pw4 was **Cpl Charles Njagi** who testified that he was an AP officer and that on 13.8.2016 a matter of defilement was reported to him; that the appellant was arrested and taken to Masii Police station. On cross examination, he testified that he arrested the appellant on 13.8.2016; that on 12.8.2016 the complainant called him informing him of the incident and he went to the complainant's home on the same day.

14. Pw5 was **Justus Wambua** who testified of a medical examination that was conducted on the complainant by his colleague who was on study leave but whom he knew her handwriting and signature. The examination observed that there were lacerations on the genitalia, lacerations on the labia and that the approximate age of injury was 6 days. The PRC form was produced as an exhibit, in the absence of an application to produce the same under Section 33 as read with 77 of the Evidence Act.

15. Pw6 was **Pc Joshua Osoi** who testified that he was at the Masii Police Station when two AP officers in the company of the complainant came and reported a defilement case against the appellant. He rearrested the appellant and noted that the birth notification in respect of the victim indicated that she was born on 11.11.2005; the birth notification was tendered as an exhibit. He testified that the offence was committed on 13.8.2016 and reported on 19.8.2016. On cross examination his testimony was that the offence was disclosed after 6 days.

16. The trial court found that the appellant has a case to answer and he was put on his defence. After section 211 of the Penal Code was read out to the appellant, he opted to give sworn evidence and call two witnesses. He testified that on 13.8.2016 he was at home waiting for his brother in law whom he was to meet at Wetaa Market. He told the court that he went for a function at Kitathai Market up to 5.30 pm then passed by a bar where he drunk till 6.30 pm and he went home. He told the court that he was arrested on 18.8.2016 when he was at home. He told the court that he had disagreed with Pw2 over a parcel of land and as a result he was framed. He testified that on 17.7.2016 he had asked Pw2 about the trees he had cut on his land and this was the basis of their disagreement with Pw2. On cross examination, he testified that on the day of the offence, he was at a function till 5.30 pm and at a bar till 6.30 pm.

17. DW2 was **Michael Kieni Masila** who testified that on 13.8.2016 he was with the appellant attending a ceremony and that they arrived at 10.00 am and left at 4.30 pm. He told the court on cross examination that he left the appellant at 6.30 pm.

18. Having looked at the evidence on record, the grounds of appeal and the submissions, I find the issues for determination are as follows: -

a. Whether or not the prosecution proved its case beyond reasonable doubt.

b. Whether there are contradictions in the evidence of the prosecution that will vitiate the conviction against the appellant.

c. Whether the trial court went into error in dismissing the appellant's defence.

19. The Appellant seems to have no qualms about one of the elements of the offence as encapsulated under section 11(1) as read with section 11(2) of the Sexual Offences Act, to wit that complainant was below 18 years of age. He challenged the evidence on the commission of the offence. The evidence that is on record that is consisted in the evidence of the complainant as corroborated by medical evidence confirms that she had lacerations on her genitalia. Pw1 wanted the court to believe that the appellant was the perpetrator. The appellant has denied the commission of the offence since at the time of commission he was at a function with Dw2 and later passed by for a drink at a bar. I am not satisfied that the sequence of events as recounted by the prosecution evidence point to the fact that the appellant was together with the complainant so as to have an opportunity to commit the offence. The medical evidence that was adduced by Pw5 exhibits to court that the complainant had lacerations but I find it hard to believe the complainant. This is because, the alibi raised by the appellant casts doubt on the prosecution case. In **Kiarie V Republic [1984] KLR** the Court of Appeal held:

> **"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge 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...**

20. The appellant's defence in the trial court and the evidence on record raised a reasonable doubt as to the identification of the appellant and the occurrence of the incident and as such the benefit ought to go to the appellant.

21. Secondly, the pain in passing urine is explainable by the fact that there were pus cells seen leading to my conclusion that the complainant had a urinary tract infection. The medication that was administered on the complainant, to wit erythromycin, ceftriaxone and flagyl are characteristic of the ones used to treat such infections. I am not convinced that the lacerations on her labia was occasioned by a male organ. In **Paul v Republic [1976-80] 1KLR 1622 at 1624**, the Court stated as follows:

> **"In a case depending exclusively upon circumstantial evidence the court must before deciding upon conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than of guilt"**

22. Thirdly, she told the court that she reported the matter to her mother on 13.8.2016 and she went to the hospital the following day that would be 14.8.2016; this is an inconsistency that goes to the root of the case and also points towards deliberate untruth on the part of the complainant who was the sole witness to the incident and as such her evidence would make or break the criminal trial. I am more inclined to believe the appellant's evidence; it is cogent, consistent and corroborated by Dw2. Because doubt had been created in the prosecution case, I am commended to resolve the doubt in favour of the appellant and so find merit on the ground raised by the appellant that the prosecution did not meet its standard of proof.

23. Having analysed the oral and documentary evidence that was adduced by the Prosecution witnesses, this court is not satisfied that the Learned Trial Magistrate arrived at the correct decision when he found and held that the Prosecution had proved its case beyond reasonable doubt. The appeal has merit and the same is allowed.

24. I have also found the evidence of Pw4 and Pw6 to be in complete contrast with that of the complainant and her mother. Pw4 stated on cross-examination that the complainant's mother called him on the 12.8.2016 at 9.00pm and informed him that her daughter had been defiled and that he visited their home and advised them to report to the police station the following day. Pw6 who was the investigating officer stated that the incident took place on 13.8.2016 but report was made to the police on the 19.8.2016. The arresting officer (Pw4) stated that he arrested the appellant on the 13.8.2016 yet the report to the police as confirmed by the investigating officer (Pw6) was made on the 19.8.2016. Clearly, it could not have been possible to effect arrest before the report was formerly lodged with the police. These contradictions in my view were major and weakened the prosecution's case. The alibi by the appellant further cast doubt upon the prosecution's case. There was thus doubts created as to whether or not the appellant was indeed the perpetrator of the alleged crime. Such benefit of doubt ought to be resolved in favour of the appellant in any event. The resultant conviction arrived at by the trial magistrate was therefore unsafe and it must be interfered with.

25. Having established that the conviction was not safe, I find that a determination on the issue of sentence imposed now becomes moot.

26. In the result, it is my finding that the appellant's appeal has merit. The same is allowed. The conviction by the trial court is hereby quashed and the sentence set aside. The appellant is ordered to be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Dated & delivered at Machakos this 30th day of September, 2020.

D. K. Kemei

Judge