REPUBLICOF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 48 OF 2016

CHARLES MUKABI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Resident Magistrate's Court (Hon. Telewa, RM) delivered on the 14th day of March 2014 in Eldoret Chief Magistrate's Court Criminal Case No. 3718 of 2014)

JUDGMENT

[1] The Appellant herein was charged with and tried before the Resident Magistrate's Court for the offence of Defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act, No. 3 of 2006**. The allegation against him was that on the **3rd day of June 2014** in Lugari District within Kakamega County, he unlawfully and intentionally caused penetration by his genital organ, namely penis, into the genital organ, namely vagina of **LI,** a girl aged 5 years. In the alternative, the Appellant was charged with the offence of **Committing an Indecent Act with a Child,** contrary to **Section 11(1)** of the **Sexual Offences Act,** in that, on the **3rd day of June 2014** in Lugari District within Kakamega County, he unlawfully and intentionally caused his genital organ, namely penis, to come into contact with the genital organ, namely vagina of **LI,** a girl aged 5 years.

[2] The Appellant denied the charges and in proof thereof, the Prosecution called 5 witnesses before closing their case on **14 October 2015.** The Appellant also testified on his own behalf and called two other witnesses in proof of his case; and after applying its mind to the matter, the lower court found the Appellant guilty of the Alternative Charge of Indecent Act with a Child, convicted him thereof and sentenced him to 10 years' imprisonment. Being aggrieved by his conviction and sentence, the Appellant preferred this appeal on **24 March 2016** on the following grounds:

[a] That the Learned Trial Magistrate erred in law and fact in failing to address the defence of *alibi* raised by the accused person.

[b] That the Learned Trial Magistrate erred in law and fact in failing to evaluate the defence evidence generally.

Hence, the Appellant prayed that his appeal be allowed, and that the Judgment of the court of first instance be set aside.

[3] With leave of the Court, the Appellant filed an Amended Petition of Appeal on **16 May 2017** pursuant to **Section 350(2)(v)** of the **Criminal Procedure Code**, **Chapter 75** of the **Laws of Kenya.** In his Amended Petition of Appeal, the Appellant reiterated his initial Grounds of Appeal and raised the following additional grounds:

[a] That the Learned Trial Magistrate erred in law and in fact by convicting him based on the inconsistent evidence of the Prosecution;

[b] That the Learned Trial Magistrate erred in law and in fact by convicting him despite doubts in the expert and the documentary evidence presented before the court;

[c] That the Learned Trial Magistrate erred in law and in fact by finding that the Prosecution had discharged the burden of proof;

[d] That the Learned Trial Magistrate erred in law and in fact and further misdirected her discretion by preferring a sentence that

was too high in the circumstances;

[4] The Appeal was canvassed by Counsel for the Appellant, **Mr. Kigamwa,** by way of written submissions, which were filed herein on **24 July 2018** by **M/s Manani, Lilan, Mwetich & Co. Advocates.** It was the contention of the Appellant's Counsel that the Prosecution case was marred by grave contradictions as to the date and time of commission of the offence that had serious repercussions on the Prosecution case. One of the contradictions noted was in connection with the information on the P3 Form which indicated that the examination was done on **3 June 2014** before the incident complained of took place. Counsel further faulted the contradictions in the evidence of the Complainant, her mother and **PW3** as to the chain of events surrounding the commission of the offence and submitted that it was wrong for the Learned Trial Magistrate to base a conviction on the uncorroborated evidence of a minor without assigning any reasons for so doing. The cases of **Eliud Ouma Agwara vs. Republic [2016] eKLR** and **Alphonce Odhiambo Olwa vs. Republic [2017] eKLR** were cited in support of this argument.

[5] It was further the submission of Counsel for the Appellant that the Judgment of the Learned Trial Magistrate was defective in so far as it did not consider the *alibi* defence offered by the Appellant. Counsel submitted that the Appellant had called a witness, namely **DW2,** to prove that he was with him between 11.00 a.m. and 7.00 p.m. at his workshop, about 4 km away from the scene of crime; and therefore could not have committed the offence. He further submitted that the Prosecution did not call any witness to rebut the Appellant's *alibi*; and that the trial court was under obligation to consider that evidence and make a finding on its credibility or otherwise. Counsel relied on **Victor Mwendwa Mulinge vs. Republic [2014] eKLR** and **Karanja vs. Republic [1983] KLR 501** in support of his submissions. He was also of the view that **DNA** samples ought to have been taken for purposes of analysis pursuant to **Section 36(1)** of the **Sexual Offences Act**, to conclusively connect the Appellant with the crime; and that failure to do so, as was the case, ought to have led the trial court to the conclusion that the Appellant was not at the scene of crime.

[6] Ms. Mumu, Learned Counsel for the State, opposed the appeal. According to her, the Prosecution presented evidence before the lower court that proved the Charge of Indecent Act with a Child beyond reasonable doubt. She pointed out there was credible evidence to prove that the Complainant was 5 years old at the time, and that she had bruises in her genitalia, an indication that there was indecent contact with the minor. She further submitted that the Appellant was properly identified as he is a neighbour and a person well known to the minor. **Ms. Mumu** thus urged for the dismissal of the appeal.

[7] The Court has given careful consideration to the appeal. I have also taken into account the written and oral submissions made herein by the Appellant and Learned Counsel for the State. This being a first appeal, I am mindful of the obligation to reconsider afresh the evidence adduced before the lower court and the need for this Court to come to its own conclusions thereon. This was well explicated in **Okeno vs. Republic [1972] EA 32** by the Court of Appeal for East Africa thus:

> **"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 whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...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 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..."**

[8] A review of the evidence adduced before the lower court shows that the Complainant's mother testified as **PW1** and produced the Complainant's Certificate of Birth to confirm her evidence that the minor was 5 years old at the time of the incident. She further testified that on the **3 January 2014** the minor returned home and informed her that the Appellant, a neighbour of hers, had called her and tickled her in her genitalia. She took action by having the Appellant arrested by members of the public and taken to the police station. The following morning she escorted the Complainant to the hospital for examination and completion of her P3 Form.

[9] The Complainant, who was **PW2** before the lower court, testified that she had been sent to call her aunt when the Appellant called her into his house and, after removing her pants, placed her on his bed, removed his trousers and started tickling her on her genitalia. That when he released her, she went home and informed her mother and was taken to hospital.

[10] PW3 was a 16 year old Class 8 pupil and an aunt to the Complainant. She told the lower court that she was out looking for firewood on the **3 June 2014** when the Complainant approached her and reported to her that the Appellant had called her into his house, removed her pants and tickled her with his penis and ordered her not to reveal the matter to anyone. She in turn reported the matter to the Complainant's mother, **PW1**, who caused the arrest of the Appellant. She confirmed that the Appellant and the Complainant's family are close neighbours.

[11] Eunice Chebet (PW4) was then a Clinical Officer at **Lumakanda District Hospital.** She attended to the Complainant and filled the P3 Form and told the lower court that she noted that the minor's genitalia had bruises and that the hymen was intact. **PC Ann Jemutai (PW5)** was the investigating officer. She confirmed that the complaint was filed with the police at **Lumakanda Police Station** and she was assigned the Investigating Officer.

[12] The Appellant refuted the allegations by the Prosecution witnesses. His version was that he left his home at about 11.00 a.m. on **3 June 2014** for the local shopping centre to purchase a cupboard; and that when he returned home at 8.00 p.m. he was arrested by members of the public who beat him up before handing him over to the Police Station. He was taken to hospital for treatment and only got to know the allegations against him the following day. He blamed his arrest on a boundary dispute between him and the parents of the Complainant to whom he sold a portion of his land. He therefore denied having been at home at the time the incident is alleged to have taken place.

[13] The Appellant called two witnesses, **Charles Osomo Mbichi (DW2)** and **Charles Ben Oyeye (DW3). DW2**, a carpenter at Lumakanda, told the lower court that the Appellant was his customer and that he went to his business premises at 11.00 a.m. and sat there up to 7.00 p.m. as he prepared his cupboard**. DW3**, a neighbour of the Appellant, testified that he heard some screams from the home of the Appellant at around 8.00 p.m. on **3 June 2014**; and on going there, he found some youths in the process of arresting the Appellant. He got to learn the following day that the Appellant had been arrested for rape.

[14] The foregoing being the evidence, the question to pose is whether the findings of the lower court were well-founded. The Main Charge of Defilement was preferred pursuant to **Section 8** of the **Sexual Offences Act,** which states that:

> (1) **A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**
>
> **(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.**
>
> (3) **A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.**
>
> **(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.**

[15] Accordingly, the Prosecution needed to prove the following essential ingredients:

> **[a]** That the Complainant was, at the material time, a child aged 5 years;
>
> **[b]** That there was penetration of the Complainant's vagina;
>
> **[c]** That the penetration was perpetrated by the Appellant.

[16] There was credible evidence presented before the lower court as to the age of the minor at the time. Her Certificate of Birth was produced by her mother and marked **Prosecution's Exhibit No. 1**. It confirms, pursuant to **Rule 4 of the Sexual Offences Rules of the Court Rules**, that the Complainant was born on **19 July 2009** and was therefore approaching her 5th birthday by **3 June 2014**. That evidence was uncontroverted. Similarly, her allegation that she was subjected to an indecent act on the **3 June 2014** was corroborated by **PW1, PW3** and **PW4. PW4** carried out an examination and found that the girl's *labia minora* and *labia majora* had bruises and had reddened. Again, this evidence was uncontroverted.

[17] Whereas in his written submissions, Counsel for the Appellant argued that the Learned Trial Magistrate failed to comply with **Section 124** of the **Evidence Act** in her treatment of the evidence of the Complainant, it is manifest from the Judgment that the lower court had more than the evidence of the minor to go by. She was therefore satisfied that the Complainant's evidence had been corroborated in material respects by independent evidence and hence the need to specifically state the reason for believing the witness was thereby obviated.

[18] I note too that the evidence of **PW4** was faulted by the Defence Counsel on account of the confusion by her as to whether the examination occurred on the **3rd** or **4th June 2014**. Counsel made heavy weather of this apparent contradiction and argued that it rendered the evidence of **PW4** worthless, as it purported to show that the examination preceded the offence. Similarly, Counsel impugned the evidence of the other prosecution witnesses on account of inconsistencies in their testimonies. My view however is that, the lower court was under duty to give her attention to the entire body of evidence produced before it in making its determination. This is because contradictions and discrepancies are not uncommon in criminal prosecutions. Hence, the question the Court must bear in mind is whether their sum total is serious enough as to create reasonable doubt on the guilt of the person accused. Indeed, in ***Philip Nzaka Watu vs. Republic*** **[2016] eKLR** the Court of Appeal expressed the view that:

> **"...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."**

[19] Similarly, in **Joseph Maina Mwangi –Vs- Republic Criminal Appeal No. 73 of 1992** it was held that:

> **"An appellate court in considering those discrepancies must be guided by the wording of section 382 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."**

Thus, having given due consideration to the discrepancies pointed out by Counsel for the Appellant, I am not convinced that they are pertinent or that they could have affected the outcome of the trial before the lower court.

[20] Regarding the argument that the Prosecution ought to have taken advantage of **Section 36** of the **Sexual Offences Act** and subjected the Appellant to a DNA test to determine whether or not he was the culprit, I have no hesitation in holding that, given the facts that were disclosed by the evidence of the Prosecution witnesses, such a test would have been superfluous. Moreover, a plain construction of **Section 36** of the **Sexual Offences Act** shows that it is not mandatory provision. Thus, in **Evans Wamalwa Simiyu vs. Republic [2016] eKLR** the Court of Appeal had occasion to consider a similar argument and was of the following view:

> **"...section 36 of the Sexual Offences Act that gives the trial court powers to order an Accused person to undergo DNA**

testing uses the word ”may”. Therefore the power is discretionary and there is no mandatory obligation on the court to order DNA testing in each case. In our view, in the case of the appellant DNA testing was not necessary. This is because the minor complainant identified the appellant who was known to her as the person who sexually violated her. The trial magistrate who saw and assessed the demeanor of the witnesses believed the complainant that it was the appellant who violated her. Moreover the trial court found material corroboration of the complainant’s evidence in the evidence of Dr. Mayende a medical doctor (PW4) who examined the complainant and confirmed that vaginal swab taken from her had spermatozoa..." (see also **AML vs. Republic [2012] eKLR)**

[21] Hence, the only pertinent question for determination herein is the question whether the Appellant was sufficiently identified as the culprit and whether his defence before the lower court was taken into account. As pointed out hereinabove, the Prosecution adduced credible evidence before the lower court to show that the Appellant is not only a close neighbour of the parents of the Complainant, but also the person who sold to them their piece of land. The Complainant knew him well before this incident; and in her report about the incident, he mentioned him by name. Nevertheless, the Appellant did raise an *alibi* and called a witness in support thereof, namely, **DW2.** It was therefore imperative for the Prosecution to not only displace that *alibi*, but also to satisfy the court beyond reasonable doubt that the Appellant was the culprit. (See **Karanja vs. Republic [1983] KLR 501)**

[22] Whereas it is a requirement that an *alibi* defence be raised at the earliest possible opportunity, it is nevertheless a valid defence which the Prosecution is under obligation to effectively displace. Accordingly, in **Victor Mwendwa Mulinge vs. Republic [2014] eKLR** the Court of Appeal held that:

"...even assuming that the appellant raised the defence of alibi for the first time while in court, as rightly submitted by Mr. Oguk, pursuant to the provisions of Section 309 of the Criminal Procedure Code, the prosecution could have sought leave to adduce further evidence in reply to rebut the appellant's defence...The prosecution failed to do so...All in all, we find and indeed hold that for the reasons stated herein, the appellant's conviction was unsafe and accordingly allow this appeal..."

[23] Given the aforementioned duty of the Prosecution to disprove the Appellant's *alibi* defence, it was imperative for the lower court to give the matter specific attention and to make a finding on whether or not that obligation had been discharged by the Prosecution. A consideration of the lower court's Judgment reveals that there was no reference at all to the *alibi* defence offered by the Appellant and his witnesses. This was a grave misdirection.

[24] In the result therefore, it cannot be said that the conviction of the Appellant in respect of the Alternative Charge of **Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act** was just or safe in the circumstances. Accordingly, I would allow the appeal and set aside the sentence of 10 years imposed by the lower court, and direct that the Appellant be released forthwith unless otherwise lawfully held.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 24TH DAY OF JANUARY, 2019

OLGA SEWE

JUDGE