REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 41 OF 2018

ANTHONY KYALO MUTUKU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal from the conviction and sentence by Hon E. Agade(Ms.) Resident Magistrate in Kangundo Senior Principal Magistrate Court in Criminal Case S.O. 23 of 2017 delivered on 16.4.2018*)

JUDGEMENT

1. The appellant was charged, tried and convicted for an offence of defilement contrary to **section 8(1)** read together with **section (8)(2) of** the **Sexual Offences Act, 2006**. There was also an alternative charge of indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act**. The appellant was also jointly charged with his co-accused on a second count of conspiracy to defile contrary to Section 157(2) of the Penal Code. The appellant was sentenced to life imprisonment in respect of the 1st count, 2 years in respect of the 2nd count and no finding was made on the alternative count. The particulars of count one were that the appellant on the 16th Day of June, 2017 in Matungulu Sub-County, intentionally caused his penis to penetrate the anus of JNM a child aged 12 years.

2. The evidence was as follows; **Pw 1 JM.** After the court conducted a *voir dire* and was satisfied that he understood the nature of an oath testified that he is 13 years old and on 16.6.2017 his mother sent him to buy paraffin. It was his testimony that on the way back he met the appellant and his wife and they walked together and then the appellant disappeared. He told the court that suddenly someone who identified himself as Muema held him from the back and pulled him to a bush and threatened to kill him if he screamed and that he removed Pw1's trouser and inner wear and also removed his and forced him to the ground and used his penis to do bad things to him. He told the court that he was able to see that it was the appellant when he removed the shirt that he used to cover his face and he was later able to run home and report the matter to his mother who took him to St Marks and later Kangundo Hospital where he was treated. On cross examination, he told the court that the appellant used to send him and he would refuse and this would make the appellant insult him. On examination by court he testified that on the material day they slept outside the whole night and he felt pain in his behind as the appellant did bad things to him.

3. **Pw 2 RNM** testified that on 15.6.2017 the appellant informed her that she and her children were proud because they refused to be sent and that her boys would be sodomized and her girls defiled. She testified that the appellant's wife asked her why she refused people to send her children. Pw2 reported this incident to the police vide OB 10/16/06/2017. She told the court that on the 16.6.2017 she sent Pw1 to buy paraffin and at 9 pm he was not back so at 11 pm she initiated a search for him but did not find him. She told the court that by 1.00 am her son was not back and she could not sleep and that the appellant's wife informed her not to lock the gate for the appellant was outside. However she locked it and at 4.00 am, the appellant's wife opened the padlock. It was her testimony that at that time she saw the appellant entering and later she was informed that Pw1 was outside prompting her to go and find out and she found Pw1 crying and he was bleeding and had difficulty in walking. She reported the matter to Tala police post and took Pw1 to the Kangundo Hospital where Pw1 was examined and the doctor informed her that Pw1 was sexually assaulted in the anus. It was her testimony that the appellant's wife had indicated to her that her children would be sexually assaulted because Pw2 refused them from being sent. She told the court that the appellant's wife knew that the incident was going to happen. On cross examination, she stated that Pw1 informed her that the appellant had defiled him and that it was abnormal for the appellant to come back at 4.52 am. On re-examination, she stated that the dispute that she had with the appellant's wife was because she refused her children to be sent by the appellant and his wife.

4. **Pw 3 PMK** was the father of Pw1 and who testified that on 15.6.2017, the appellant and his wife informed him that his girls would be defiled and that his son (Pw1) has an anus and he would be defiled hence he and Pw2 reported the matter to the Tala police station on 16th and on the same day at night Pw1 disappeared after being sent to buy paraffin. He stated that he locked the gate to the home with a padlock and the appellant's wife came and broke the padlock and left the gate open then at 4.52 am the appellant came back home. It was his testimony that he went to work and received a call from Pw2 that Pw1 had been raped and could not walk and she was crying. He told the court that Pw1 was treated at Kangundo Hospital and the doctor informed him that Pw1 had been defiled and further stated that his son informed him that the appellant was responsible. On cross examination, he told the court that the appellant came back home at unusual hours of the morning yet he works at a hotel and leaves for work at 6.00 am.

5. **Pw 4 Dominic Mbindyo** a Clinical Officer at Kangundo Level 4 Hospital told the court that he attended to Pw1 on 17.6.2017 and who

had the P3 form and PRC form. Examination revealed that there were bruises in the anus and that Pw1 could not walk well or sit well; the muscles in the anus were loose and there were faeces. Pw4 collected a rectal swab which showed presence of pus and yeast cells. He told the court that he filled the P3 form and produced it as P. exhibit 9 together with the PRC form. His conclusion was that the bruises were as a result of sexual assault.

6. The prosecution presented fresh charges in respect of the appellant's wife and that Pw1 to 3 testified afresh and reiterated their earlier testimonies.

7. **Pw 5 was Cpl James Nganga** who told the court that on 17.6.2017 he received instructions to investigate a report by Pw1 that he had been defiled and narrated to court that the appellant and his wife had informed him to wait for them when he was on his way back home but however midway the appellant disappeared and was later attacked from behind and defiled twice by a person whom he saw as the appellant. He told the court that he was informed that the appellant came back home at unusual hours and his wife opened the gate for him and that Pw1 went home at 6.00 am and reported the incident to his mother who took him to hospital and further that on 15.6.2017 the appellant's wife had threatened Pw2 that her children would be defiled and this was reported to the police via OB 10/16/06/17. He told the court that he issued a P3 form to Pw1 and he was taken to Kangundo Hospital and later arrested the appellant on 22.6.2017 and his wife on 6.9.2017. On cross examination, he told the court that the appellant was identified as the perpetrator.

8. The court found that a prima facie case had been established against the appellant sufficiently to require him to make a defence and he was placed on defence. Section 211 was explained to the appellant who elected to give a sworn statement and called five witnesses. **Dw1** the appellant testified that he was arrested on 22.6.2017 while at work.

9. **Dw2 Josephat Wambua Kaveke** testified on oath that the appellant was at work on 16.6.2017 and on cross examination, he told the court that he left work at 9 pm.

10. **Dw3 was Mary Muthike Kyalo** who told the court that Pw2 promised to frame her.

11. **Dw4** was **Lucas Ngotha** who testified that he was the appellant's neighbor and he witnessed Dw3 and Pw2 quarrelling frequently and that he did not see the appellant on the material night.

12. **Dw5 was Grace Nduku Kyalo** told the court that her father did not defile Pw1 and that he came home at 9 pm.

13. **Dw6 was Mary Muthike Kyalo** who reiterated her earlier testimony.

14. The trial court found that penetration of Pw1's anus was proven vide his account as well as the medical evidence; further that the appellant was positively identified by Pw1 who was his neighbor and that they walked back together on the material night and placed reliance on the case of **R v Turnbull (1976) 2 All ER 549**. The court discredited the alibi for the same was inconsistent and noted the reluctance of the appellant's wife to close the gate on the material night as well as her threat that had been reported to the police.

15. The appeal was canvassed vide written submissions. It is the appellant's case that there inconsistency in the age of Pw1 in the charge sheet and the oral evidence; there was inconsistency in the names of Pw1 in the oral testimony and the charge sheet hence stating that the charge sheet was defective. Further he assailed the failure to call essential witnesses and the failure of the trial court to analyze the alibi that he raised. This ground was not raised in the memorandum of appeal and only popped up in the submissions.

16. The state submitted on six issues. On the issue of defectiveness of the charge sheet, counsel submitted that the same ought to have been raised earlier in the proceedings and the defectiveness shall only be material if it occasioned a failure of justice as per Section 382 of the Criminal Procedure Code. Counsel further submitted that the appellant understood who the complainant was and the nature of the charges that were facing him and therefore the ground raised on inconsistency in names lacked merit. On the issue of whether penetration was proven, counsel submitted that Section 2 defines penetration as insertion of a genital organ into the genital organ of another and the account of Pw1 as well as the medical evidence proved penetration under Section 2 of the Sexual Offences Act. On the issue of contradictions, counsel placed reliance on the case of **Philip Nzaka Watu v R (2016) eKLR** and submitted that the contradictions in the name of the victim did not prejudice the appellant. On the issue of the defence of alibi, counsel submitted that the prosecution evidence watered down the appellant's defence and this ground lacked merit. On the issue of failure to call crucial witnesses, counsel submitted that the prosecution evidence covered all the essential ingredients of the offence of defilement. On the issue of fair trial, counsel submitted that the appellant did not raise the issue before the trial court and therefore this ground lacked merit. Counsel urged the court to dismiss the appeal and uphold the conviction and sentence of the trial court.

17. This being a first appeal, the court is under legal obligation to re-evaluate, re-assess and re-analyze the evidence on the record and make its own findings and conclusions except having in mind that it did not have the advantage of hearing or seeing the witnesses testify.

18. The court has carefully considered the petition of appeal as amended and submissions presented by both parties. The grounds of appeal may be collapsed into three grounds:

a. That the trial Magistrate erred in law by convicting the Appellant for the offence of defilement in the absence of proof of the elements of the offence to the required standard.

b. That the trial magistrate erred in convicting the appellant and yet the charge sheet was defective.

c. That the trial magistrate failed to consider the defence of alibi raised by the appellant.

19. Having considered this appeal, the evidence on record and the rival submissions, the issues for determination are firstly whether the prosecution proved its case beyond reasonable doubt; Secondly whether the appellant was convicted of the offence of defilement on the basis of a defective charge sheet; Thirdly whether the trial court considered the defence of the appellant.

20. I shall combine the resolution of the 1st and 2nd issues. In cases of defilement the following are to be proven:

1. The age of the child.

2. The fact of penetration in accordance with section 2(1) of the Sexual Offences Act; and

3. That the perpetrator is the Appellant

21. The age of the child was proven vide the health card that was tendered in evidence to which the appellant did not object to its production. The said card marked Pex7 is in the names of JW who was born on 22.10.2004 meaning that at the time of commission of the offence, he was aged 12 years as indicated in the charge sheet. Penetration is defined under section 2(1) the Sexual Offences Act as the partial or complete insertion of the genital organs of a person into the genital organs of another person and "genital organs" includes the whole or part of male or female genital organs and for purposes of this Act includes the anus. From the evidence of Pw1 as corroborated by the P3 form and the rectal swab, as well as the evidence of Pw2 and Pw4 who saw that Pw1 had difficulty in walking, there was penetration of his anus and hence the 2nd element of the offence was proven.

22. On the issue of identification of the appellant, the account of Pw1 that he was the neighbor of the appellant as well as his account of the unfortunate happenings of the day as corroborated by the evidence of Pw2 and Pw3 of the threats by the appellant's wife all created circumstances favourable for identification. The only witness to the incident was Pw1 and he was the only eye witness to the incident. I**n Abdalla Bin Wendo and Another v. R. (1953), 20 EACA 166** cited with approval **in Roria v. R. (1967) EA 583** the court made a number of observations with regard to the evidence of a single eye witness:—

(a) The testimony of a single witness regarding identify-cation must be tested with the greatest care.

(b) The need for caution is even greater when it is known that the conditions favouring a correct identification were difficult.

(c) Where the conditions were difficult, what is needed before convicting is 'other evidence' pointing to guilt.

(d) Otherwise, subject to certain well known exceptions, it is lawful to convict on the identification of a single witness so long as the judge adverts to the danger of basing a conviction on such evidence alone.

23. I note that the appellant has assailed the fact that the prosecution did not call the doctor at St Marks Hospital, the woman at the gate, the gate keeper, Muema and the arresting officer. There is clear statutory provision that for the proof of any fact, a plurality of witnesses is not necessary: see s. 143 of The Evidence Act (cap.43). Secondly, there is no particular magic in having two or more witnesses testifying to the identity of the appellant in similar circumstances. What is important is the quality of the identification. If the quality of the identification is not good, a number of witnesses will not cure the danger of mistaken identity, hence the requirement to look for 'other evidence'. Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence disputes, the court ought to warn itself of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the special caution is that there is a possibility that a mistaken witness can be a convincing one and that even a number of such witnesses can all be mistaken. The court should then examine closely the circumstances in which the identification came be made, particularly, the length of time the accused was under observation, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good, the danger of a mistaken identity is reduced but the poorer the quality, the greater the danger.

24. In my view, when the quality of identification is good for example when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused well before, a court can safely convict even though there is no 'other evidence to support the identification evidence; provided the court adequately warns itself of the special need for caution. If a more stringent rule were to be imposed by the courts, for example if corroboration were required in every case of identification, affronts to justice would frequently occur and the maintenance of law and order greatly hampered.
When, however, in the judgment of the court the quality of identification is poor, as for example, when it depends solely on a fleeting glance or on a long observation wade in difficult conditions; if for instance the complainant did not know the appellant before and saw him for the first time in the dark the situation is very different. In such a case the court should look for 'other evidence' which goes to support the correctness of identification before convicting on that evidence alone. The 'other evidence' required may be corroboration in the legal sense; but it need not be so if the effect of the other evidence available is to make the trial court sure that there is no mistaken identification.

25. Finally the coincidence of the appellant who was identified as behaving strangely and putting up a fabricated alibi of his movements at the time the offence was committed or telling lies in some material aspect of his evidence can, in a proper case, amount to 'other evidence' sufficient to support a conviction. The appellant's coming home at unusual hours of the morning as given in the account of Pw2 and his failure to give an account of his movements on the material day together with the evidence of Dw5 that attempts to set up an alibi all point towards dishonesty on the part of the appellant and support his identification as the perpetrator. I find that the appellant was properly identified as the perpetrator.

26. The appellant has averred that the charge sheet is defective because there is inconsistency in the names of the victim. The law on inconsistencies and contradictions was observed in **Alfred Tajar v Uganda, Cr. Appeal No. 167 of 1969 EACA** where it was held among others that "grave contradictions unless satisfactorily explained may be considered, but will not necessarily result in the evidence being rejected and minor contradictions and inconsistencies, unless they point to a deliberate untruthfulness, will usually be ignored....."A perusal

of the evidence on record indicates that the rectal swab is in the names of JW aged 11 years; the Child health card is in respect of JW and so is the P3 form and the outpatient card from Kangundo Hospital; the PRC form is in the names of JWM. I see no reason to find Pw1 untruthful and will ignore the inconsistency in the versions of names of the complainant. I find also considering the other evidence on record, though the charge sheet is defective because the name of the victim is indicated as Julius Nyelele Muli and the same is not consistent with the evidence presented in form of the rectal swab; the Child health card, the P3 form, the outpatient card from Kangundo Hospital and the PRC form is in the names of JWM, it cannot be said that the appellant was occasioned injustice because he attended the trial, he understood the nature of the charge he was facing and it is undisputed that he was a neighbor of the complainant and therefore he was aware of the person who complained against him.

27. The appellant has popped up the issue of breach of his constitutional rights in his submissions and yet the same appear nowhere in the grounds of appeal and in this regard I shall not belabor addressing the same.

28. The appellant has faulted the trial court for failing to consider his defence of alibi. First of all, I note that the appellant did not give an account of where he was on the material day. He only told the court that he was arrested on 22.6.2017. The alibi was set up by his 13 year old daughter who seems to have come to court only to say that on the material day the appellant was at home at 9 pm. I agree with the trial court because the prosecution evidence places the appellant at the scene of the crime and therefore his alibi cannot be relied upon. Further though I did not see the witness, I am not convinced that he was telling the truth and in this regard I am guided by the case of **Dinkerrai Ramkrishan Pandya v R [1957] EA 336** where the East Africa Court of Appeal cited the case of ***Coughlan v Cumberland (3) (1898) 1 Ch. 704 where Lindly MR, Rigby and Collins L.JJ observed*** that "when the Question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; **and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on credibility of witnesses whom the court has not seen**.

29. In light of the foregoing analysis I am satisfied that the prosecution evidence proved their case beyond reasonable doubt; that the appellant's defence of alibi is not credible and I support the rejection of the same and dismiss the appeal against conviction.

30. The Sexual offences Act provides under Section 8(3) that "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." From the record and as observed in paragraph 21 above Pw1 was born on 22.10.2004 meaning that at the time of commission of the offence, he was aged 12 years as indicated in the charge sheet. In this regard the sentence provided for under the law is 20 years and not life imprisonment. The sentence therefore was manifestly excessive and the same must be interfered with.

31. In the result the appeal partially succeeds. The conviction by the trial court is upheld while the sentence of life imprisonment is set aside and substituted with a sentence of twenty years from the date of arrest namely 22.6.2017.

It is so ordered.

Dated and delivered at Machakos this 25th day of November, 2019.

D. K. Kemei

Judge