REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 53 OF 2015

SIMON BIRA MUKUNGU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence of the Senior Resident Magistrate's Court (E. H. Keago) at Baricho, Criminal Case No. 310 of 2014 delivered on 8th December, 2015)

JUDGMENT

1. The appellant **Simon Bira Mukungu** was charged with the offence of defilement contrary to **Section 8 (1) (2)** of the **Sexual Offences Act** before the Resident Magistrate's Court Baricho in Criminal Case No. 310 of 2014. It was alleged that on 5th February, 2014 at [Particulars withheld] village in Mwea West District within Kirinyaga County he intentionally and unlawfully caused his penis to penetrate the vagina of A W W a child aged 11 years. The Appellant was tried and after a full trial he was convicted and sentenced to serve life imprisonment.

2. The Appellant was dissatisfied with the conviction and lodged this appeal raising the following grounds:

> ***(a) Not considering that the evidence adduced did not support the charges.***
>
> ***(b) Failing to consider that there were gaps and discrepancies regarding the evidence tendered.***
>
> ***(c) Failing to consider that the evidence adduced was uncollaborative (sic).***
>
> ***(d) Failing to consider that the Appellant was never taken for medical examination to verify that he was the one responsible for the charged offence.***
>
> ***(e) Failing to consider that some exhibit (pant) was already tampered with by the time it was being presented in court.***
>
> ***(f) Not being accorded constitutional right of fair hearing under Article 50 (2)(m) of the Constitution. There was no interpretation in some parts during the hearing of the case.***
>
> ***(g) Failing to consider his defence.***

He therefore prays that the conviction be quashed, the sentence imposed be set aside and he be set at liberty.

3. Directions were given to the parties that the appeal be disposed off by way of written submissions. The parties relied wholly on the submissions. This is a first appeal which puts a duty on this Court to reconsider the evidence, evaluate it and make its own independent finding while bearing in mind that unlike the trial magistrate, it had no opportunity to see the witness and assess their demeanor, make inferences and conclusions and therefore leave room for that. The first appellate Court essentially conducts a retrial based on the evidence tendered before the trial Court and makes its own independent finding. The Court of Appeal in **Ajonde -V- R. (2004) 2 (KLR** held:

> ***"In law it is the duty of the first appellate Court to weigh the same conflicting evidence and make its own inferences and conclusions but bearing in mind always that it has neither seen nor heard the witness and make allowance for that."***

Similarly in the case of **Ogeto -V- Republic (2004) 2 KLR 14** where the Court of Appeal cited with approval the case of **Okeno -V R (1972) E.A. 32 Ngui -V- R (1984) KLR 729 and Njoroge -V- R (1983) KLR 197** it was held:

> ***"On a first appeal the Court has a duty to reconsider the evidence which was before the superior Court, evaluate the evidence and draw its conclusions giving due allowance for the fact that it has neither seen nor heard the witnesses."***

So an appellant on a first appeal is entitled to a fresh and exhaustive examination of the evidence and a decision on it. I will now embark on that duty and analyse the evidence.

4. **The Evidence**

P.W. 1 was a minor girl A W aged twelve years a pupil in class 4 at [Particulars withheld] Primary School. She gave her date of birth as 24th June, 2002, proved by her birth certificate which was produced as exhibit 1. She testified that on the material day, 5th February, 2014 at about 5.00 p.m. she was coming from school in company of W and M when the Appellant grabbed her from behind and led her to maize plantation. The Appellant who was armed with a knife penetrated her vagina with his penis and threatened to kill her if she screamed. After he defiled her, the Appellant left her in the maize farm. She had sustained injuries and could not walk. Some people helped her to walk home. The matter was reported at Sagana Police Station. The complainant was treated at Sagana Health Centre. Treatment notes and P3 form were filled exhibit 2 and 3 respectively. The complainant identified the Appellant was the person who defiled her.

5. The testimony of P.W. 1 was not shaken in cross-examination. The child was aged twelve years. No *'voire dire'* examination was conducted. Under Section 19 of Oaths and Statutory Declarations Act where a child of tender years is called as a witness the Court is supposed to form an opinion as to whether the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth. Section 2 of the Children's Act defines a child of tender years as a child under the age of ten years. The Appellant was given a chance to cross-examine P.W.1 after she gave evidence on oath. The Appellant did not suffer any prejudice.

6. The evidence of P.W. 1 was not shaken in cross-examination. She maintained that the Appellant is the one who defiled her. My view is that her evidence left no doubt as to who defiled her. The offence was committed in broad daylight, the Appellant was known to her as she had seen her before. There was no possibility of mistake. Her testimony was given on oath and is credible.

7. P.W. 2 A W is the complainant's mother. She confirmed that on 5th February, 2014 at 5.00 p.m. when her daughter returned home from school she informed her that she was defiled by the Appellant. She went and reported to the Police at Kiamiciri Police Post and later at Sagana Police Station. She then took her to hospital and she was treated and a P. 3 form was filled. P.W. 2 confirmed that the complainant was born in the year 2002 as shown on the birth certificate exhibit 1.

8. Evidence of P.W. 2 shows that it is the Appellant who was identified by the Complainant as having committed this offence. She denied that the Appellant was her lover or that she threatened him for refusing to give her firewood. I am of the view that these allegations are far-fetched and afterthought. One cannot be a lover and at the same time is issuing threats. In any case as it will be seen from the evidence of P.W. 3 there was evidence that the P.W. 1 was defiled. The person who defiled her is the Appellant who was known to P.W. -1-. There is no reason to doubt P.W. 2.

9. P.W. 3 John Mwangi is a senior clinical officer at Sagana Sub-County hospital who examined the complainant. He found that the hymen was slightly broken, there was blood discharge on the vagina and spermatozoa were seen. She was treated and counseled. He filled the P. 3 form exhibit 3 and treatment notes exhibit 2.

10. I am of the view that the fact that hymen was slightly broken, bleeding from the vagina and the presence of spermatozoa is proof beyond any reasonable doubts that there was penetration of the complainant's vagina. Medical evidence has therefore well corroborated the testimony of the complainant that she was defiled. There is no doubt that the person who defiled her is the Appellant.

11. P.W. 4 Anne Achieng a Police Officer attached at Sagana Police Station testified that she received the report from the complainant and her mother that the complainant was defiled by somebody known to her. She later arrested the Appellant and charged him.

12. The appellant gave unsworn defence and stated that 'I was not aware of the one who committed the alleged offence.' This defence as the trial magistrate found was a mere denial. The Court was right to reject the defence.

13. The Appellant applied to recall the prosecution witnesses after he had given his defence. He brought the application under **Article 50 (1) (g)** of the **Constitution** which provides:

> ***"Every accused has the right to a fair trial which includes the right to choose and be represented by an advocate and to be informed of this right promptly."***

The Court did allow the advocate Mr. Ndegwa to come on record and to proceed with the defence case. He however, declined to allow the recalling of the prosecution witnesses at that stage. The Magistrate relied on **Section 150** of the **Criminal Procedure Code** which gives Court power to summon or call any person as a witness. The provision deals with summoning and calling of a witness as well as recalling of a witness. It provides:

> ***"A court may, at any stage of the trial or other proceeding under this Code, summons or call any person as a witness or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the Court shall summon, examine or recall and re-examine any person if his evidence appears to it essential to the just decision of the case."***

14. The provision is discretionary. The trial magistrate declined to allow the application as it was made too late in the day and the right to fair trial was not prejudiced. The trial magistrate exercised his discretion fairly after considering that the application was brought a year after the prosecution closed its case and the accused had already given his defence. Where the Court exercised its discretion fairly, the Court should not interfere with the decision. The right of accused to fair trial was not violated. He was given the right to legal representation. He had a counsel who came on record but sought adjournment for lack of instructions as shown on the proceedings of 26th September, 2014 when Mr. Nduku appeared on record as representing the Appellant (page 6 of the proceedings). After that the advocate did not appear in Court though the hearing date was given in his presence and the case proceeded. He never applied for time to engage another advocate. He made the application after he was put on his defence and though he was given time, he proceeded to give his defence without an advocate. It was at that stage that Mr. Ndegwa appeared representing the Appellant.

15. I am of the view that the Appellant was given an opportunity at every stage of the trial to be represented by an advocate and his right to fair trial was not violated.

16. The trial magistrate proceeded to give a judgment and concluded that the complainant was defiled and that the Appellant was identified as the person who defiled the complainant. I find that based on the evidence adduced before the trial magistrate, the conviction of the Appellant was proper. In my view the evidence was cogent and was not shaken in cross-examination. The fact of defilement was corroborated by the medical evidence. The conviction was therefore proper.

17. I will now deal with the issues which arise for determination.

(1) DELAY IN REPORTING THE INCIDENT

The Appellant submits that the offence occurred on 5th February, 2014 but P.W. 1 first reported it on 27th March, 2014 and he was arrested the same day. This is far from the truth as the record shows that the report was made the same day. The P. 3 form shows that the Complainant was sent to hospital on 5th February, 2014. The treatment notes show that she was treated on 5th February, 2014 and 6th February, 2014. The P. 3 form shows the Occurrence Book Number was No. 18 of 5th February, 2014. P.W. 1 and 2 testified that the report was made on 5th February, 2014. P.W. 4 confirmed that the report was made on 5th February, 2014 and P.W. 1 was escorted to Sagana Hospital the same day. The Appellant was arrested on the 27th march, 2014. There is proof that the incident was reported the same day.

18. **(2) IDENTIFICATION**

The Appellant alleges that there was no identification parade conducted and the Police were directed to the Appellant by P.W. 2. The Complainant testified that she knew the Appellant before. Though she said she did not know him by name, she was candid when she gave evidence in Court that the person who defiled her is the Appellant. P.W. 2 testified that it is P.W. 1 who informed her that the accused is the one who defiled her. It is trite law that where a suspect is known to the complainant an identification parade is not necessary. The Complainant is a minor and she is not expected to go about making the report on her own. It was confirmed and this the Appellant does not deny that she was a neighbour of P.W. 1 and 2. A child of twelve years cannot fail to know her neighbours and especially one she used to see. P.W. 2 was just confirming to P.W. 4 was a neighbour and well known. It is cogent evidence to show that right from the time the offence was committed the identity of the perpetrator was known and not in doubt. There is no doubt that the offence was committed in broad daylight and P.W. 1 could not fail to recognize a person she used 'to see gather grass for animals'. She also stated that the Appellant has a bad leg, a fact which the Appellant confirmed. My view is that as stated by the prosecution the descriptions clearly indicate that the complainant positively identified the Appellant as the person who defiled her. In the case of **Peter Musau Mwanzia V Republic [2008] eKLR** the Court of Appeal dealt with the issue of recognition and stated:

> ***"In the well known case of R vs Turnbull (1976) 3 ALL er 549 at page 552, it was stated: "Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made." We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger……..."***

19. I am of the view that the P.W. 1 recognised the Appellant as the person who defiled her. She informed her mother who in turn reported to the Police and the only person arrested for this offence was the Appellant. This ground must fail. The Appellant was identified as the person who committed this offence. He had no plausible defence and in his defence he said he knew exactly why he was in Court.

20. **(3) VITAL WITNESSES NOT CALLED**

The Appellant submits that vital witnesses that were mentioned by the complainant during the trial were not summoned to testify that is a teacher, and schoolmates D W and E M. The State submits that according to P.W. 4 the two classmates refused to go and record statements. That the fact that they did not testify does not weaken the prosecution case as the complainant identified the Appellant as the person who defiled her and medical evidence corroborates her testimony that she was defiled. That Section 124 of the Evidence Act allows Court to convict on the evidence of a single witness in Sexual offences where the victim is the only witness so long as the Court is satisfied that the witness is telling the truth.

"In the case of **Erick Onyango Ondeng' V Republic [2014] eKLR** the Court of Appeal held:

> ***"In Bukenya & Others VS Uganda (supra), the former East Africa Court of Appeal held that the prosecution has a duty to call all the witnesses necessary to establish the truth even though their evidence may be inconsistent; that the court itself had the duty to call any person whose evidence appears essential to the just decision of the case;……***

While fully in agreement with the above statement, it should be remembered that the context in which it was made is that of a case in which the evidence called is barely adequate. In the present case, the proviso to section 124 of the Evidence Act and the medical evidence must be borne in mind as well as Section 143 of the Evidence Act (cap 80) which provides that, in the absence of any requirement by provision of law, no particular number of witnesses shall be required for the proof of any fact. In this appeal, it is not clear to us what value the evidence of Violet would have added to the evidence of P.W. 2, which the court found trustworthy, as well as the medical evidence. In our opinion, violet would have been a peripheral witness as she was said to merely have happened to pass by when the appellant was with P.W. 2 on a different occasion".

Looking at the roles of these witnesses, the teacher was told while the schoolmates are said to have ran away when the Appellant held the complainant. Their evidence was not material particulars. They are witnesses who are not said to have witnessed the defilement. Their evidence would not have added value to the case. As submitted by the State……. The proviso to **Section 124** of the **Evidence Act** therefore allows the Court to convict on the sole evidence of a victim of a sexual offence if it is satisfied that the victim is being truthful. Accordingly, the prosecution need not call all witnesses who may have information on a fact. Failure to call a witness will only be fatal if the evidence presented by the prosecution is insufficient to sustain a conviction and contains gaps which could have been filled by a witness who was not available.

In this case, though P.W.1's teacher, D W and E M were called, the evidence of the prosecution witnesses together with the medical evidence also proved that P.W. 1 had been defiled and it was the Appellant who had defiled her.

21. **(4) RIGHT TO FAIR HEARING UNDER ARTICLE 50 (2)m OF THE CONSTITUTION**

The Appellant is stating that there was interpretation in some parts during the hearing of the case. From the record, there was interpretation from English to Kiswahili. There was a court assistant (clerk) who teamed up as an interpreter. The Appellant does not show in his submissions on which occasions he did not understand the language used. **Article 50 (2) (m)** of the **Constitution** provides:

"Every accused has the right to a fair trial which includes the right-

-to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial."

22. The right was not violated as there was always an interpreter at every sitting of the Court. When P.W. 4 testified when it was not indicated whether there translation, after the witness testified, the appellant cross-examined her at length and in his submissions he has made reference to the evidence of the witness. It is therefore clear that the Appellant followed the proceedings. It is too late to claim violation of the right as he did not raise the issue with the trial magistrate. The Appellant made several applications before the trial magistrate which shows that he could follow the proceedings. He has not stated the language he understands. It is possible that he understood Kiswahili which was the interpretation in Court. It is not sufficient to allege violation of the right. The Appellant must show that he was not able to understand the language of the Court. In this case it is clear from the record that he understood the language used and there was an interpreter at every stage of the proceedings who could assist him. This ground is without merit.

23. **(5) CONTRADICTORY EVIDENCE**

The Appellant submits that P.W, 2, 3, and 4 gave contradictory evidence as they gave different versions of the incident. He states P.W. 1 testified that she reported to the teacher who informed P.W. 2 but P.W. 2 stated P.W. 1 reported to her and she in turn reported to the teacher. He further submits that P.W. stated that she washed her clothes she had on the incident date and did not take them to hospital. P.W. 3 stated that on examination of P.W. 1 her clothes were torn but her underpants had blood stains.

24. The State submits that the evidence was free of material contradictions to warrant the Court to interfere with the finding of the trial magistrate. On the issue of the pant P.W. 1 indicated that she was putting on her school uniform when she was defiled, that she washed the clothes and later handed to the Police. The evidence of P.W. 3 who said he examined a blood stained pant does not affect the prosecution case materially especially so having all the other evidence put together points out to the accused as the person who committed the offence.

25. My view is that for the Court to interfere with the judgment of the trial Court based on the contradictions in the evidence, they must be such that they raise doubts on the credibility of the witnesses. Where the contradictions are minor and not on material particulars, they are excusable. The contradictions pointed out are minor and not material. They do not affect the finding of the trial Court. In the case of **Erick Onyango Ondeng' V Republic [2014]eKLR** the Court of Appeal held:

"Nor do we think much turns on the alleged contradictions on the time of commission of the offence. The trial court, after hearing all the evidence accepted that the offence was committed at "about 7 pm" in accordance with the evidence of P.W.2. As noted by the Uganda Court of Appeal in TWEHANGANE ALFRED VS UGANDA, Crim. App. No. 139 of 2001, [2003] ugca, 6 it is not very contradiction that warrants rejection of evidence. As the Court put it:

"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The Court will ignore minor contradictions unless the Court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

I am in agreement with the submissions by the State that the contradictions pointed out by the Appellant are not on material particulars and do not affect the main substance of the prosecution which was proved beyond any reasonable doubt that P.W. 1 was defiled and the defiler was identified as the Appellant in this case.

26. **(6) *'VOIRE DIRE'* EXAMINATION**:

I have dealt with this issue above. *Voire dire* examination of P.W. 1 was not done. When dealing with the evidence of a child, **Section 19 of the Oaths and Statutory Declaration Act** is applicable which states:

> ***"Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with Section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section."***

In the light of **Section 19** of the **Oaths and Statutory Declaration Act** above, if the Court is receiving evidence of a child of tender age, it must be of the opinion that she/he is possessed of sufficient intelligence to understand the duty to speak the truth. In the case of **Maripett Loonkomok V Republic [2016] eKLR** the Court of Appeal held:

> ***"It is firmly settled that not in all cases that voir dire is not administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has recently reiterated what has been said many times before that question will depend on the peculiar circumstances and particular facts of each case. See James Mwangi Muriithi V R Criminal Appeal No. 10 of 2014……..***
>
> ***It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination. It follows from a long line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that:***
>
> ***"In appropriate case where voir dire is not conducted, but there is sufficient independent evidence to support the charge……..the court may still be able to uphold the conviction."***

27. In this case *voire dire* was not conducted. The trial magistrate may have considered that a girl of twelve years was not a child of tender years in view of the definition of a child of tender years. It is not clear from the record as to what informed the trial Court not to conduct voire dire examination. The P.W. 1 was however, sworn and gave evidence. The Appellant cross-examined her without difficulties and he does not state what prejudice he may have suffered. As pointed out in the above authority, each case must be considered on its own merits. The minor was sworn and cross-examined. Her testimony was well corroborated by the medical evidence (P.W. 3) and her mother on the particulars concerning the Appellant. There was sufficient evidence adduced to corroborate the evidence of P.W. 1 and it was therefore safe for the trial magistrate to rely on the evidence of the complainant to convict.

28. **(7) DID THE PROSECUTION PROVE ITS CASE BEYOND ANY REASONABLE DOUBTS?**

The evidence adduced was cogent and proved the charge beyond any reasonable doubts. The age of the minor was proved with the production of the birth certificate exhibit 1 she was born on 24th June, 2002. The offence was committed on 5th February, 2014 meaning that she was then aged eleven years and eight (8) months. Proof of the age of the complainant under **Section 8** of the **Sexual Offences Act** which deals with the defilements is crucial as it determines the sub- section under which the accused is charged and the punishment. **Section 8 (1) (2)** of the **Sexual Offences Act** provides:

> ***"(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 between the age of twelve and fifteen years is liable upon conviction to be sentenced to imprisonment for life."***

The age of the complainant was proved beyond any reasonable doubts. Defilement of the complainant was proved beyond any reasonable doubts. In **Woolmington -V- D.P.P. (1935) A.C. 462** it was held that it is the duty of the prosecution to prove the case beyond any reasonable doubts and where the burden is not discharged the accused is entitled to an acquittal. It was held:

> ***"Throughout the web of the English Criminal Law, on the golden thread is always to be seen that, it is the duty of the prosecution to prove the prisoner guilty. If at the end of the whole prosecution case there are reasonable doubts created by the evidence brought forward by the prosecution, the prosecution has not proved the case……"***

In this case I am of the view that the prosecution discharged its burden and proved the case beyond any reasonable doubts. The trial magistrate having considered the evidence and the law arrived at the proper conclusion and sentence. There is no ground upon which this Court should interfere with the conviction. The appeal is without merits and is dismissed.

Dated and delivered at Kerugoya this 9th day of February, 2018.

L. W. GITARI

JUDGE

Read out in open Court, appellant present, Mr. Sitati Prosecution counsel for the State, court assistant Naomi Murage this 9th day of February, 2018.

L. W. GITARI

JUDGE

9.02.2018