REPUBLIC OF KENNYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.19 OF 2015

(An appeal from original conviction and sentence of Kilgoris PM'S Case No. 1422 of 2014 by Hon. MONICA MUNYENDO (SRM) – Senior Resident Magistrate dated 6th March, 2015)

MESHACK KIMONGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. **MESHACK KIMONGO**, the appellant herein, was charged with the offence of defilement of a girl contrary to Section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 1st October 2014 at [Particulars withheld] village in Olalui Location, Trans Mara West District within Narok County intentionally caused his penis to penetrate the vagina of S M *(particulars withheld)* a girl aged 8 years.

2. The appellant also faced the alternative charge of indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act the particulars being that on the material date, being 1st October 2014, at [Particulars withheld] village in Transmara West District within Narok County, intentionally touched the vagina of S M a girl aged 8 years with his penis.

3. The appellant pleaded not guilty to both the main count and the alternative count and a trial was conducted in which the prosecution presented the evidence of 5 witnesses. At the close of the prosecution's case the trial court found that the prosecution had established a prima facie case against the appellant who was then placed on his defence.

4. The appellant gave an unsworn testimony in his defence and at the close of the case, the trial court found that the prosecution had proved its case beyond reasonable doubt and convicted the appellant on the main count of defilement contrary to section 8 (1) (2) of the Sexual Offences Act and sentenced him to life imprisonment thereby triggering the instant appeal in which the appellant faulted the trial court for convicting him against the weight of the evidence. The appellant also took issue with the trial court's failure to note the glaring contradictions in the prosecution's case especially in respect to the identification of the appellant as the perpetrator of the offence. The appellant also contended that the complainant's age was not proved.

5. Parties agreed to canvass the appeal by way of written submissions which I have perused and considered. As the first appellate court, my duty is to re-analyze the evidence tendered before the trial court afresh and re-evaluate the same with a view to arriving at my own independent conclusion while bearing in mind the fact that I neither heard nor saw the witnesses testify. In the case of **Collins Akoyo Okemba & 2 Others vs Republic [2014] eKLR** it was held:

> ***"It is a duty to re-evaluate and re-analyze the whole evidence in afresh and exhaustive way before arriving at its own independent decision."***

6. As I have already stated in this judgment the prosecution tendered the evidence of 5 witnesses starting with the testimony of PW1, L S S *(particulars withheld)*, the complainant's aunt. Her testimony was that the appellant worked for her as a herds boy and on 30th September 2014, she left the complainant, then aged 7 years, in the care of the appellant, as she had to go to the hospital to deliver a baby only to return home the following day and learn, from PW2, that the appellant had defiled the complainant. The complainant was escorted to hospital for treatment and the matter reported to the police at Kilgoris.

7. PW2, L S, a minor aged about 3 years old, testified that he saw the appellant, defiling the complainant. He later reported the incident to his mother, PW1. On cross examination and re-examination, he changed his testimony and stated that the complainant was defiled by one Willy, also an employee of PW1, and not the appellant.

8. PW3, S M *(particulars withheld)* was the complainant. Her testimony was that she was 7 years old and a pupil in class 1 at K *(Particulars*

withheld) DEB primary school. She recalled that on 1st October 2014, she had gone out to play with PW2, but that when she came back home to drink some water, the appellant got hold of her and defiled her. She added that PW1 was not at home on the material day as she had gone to hospital to deliver a baby and that she had been left in the care of the appellant. She added that PW2 witnessed the sexual assault.

9. PW4, FESTUS KURGAT, was a medical officer who treated the complainant at Transmara District Hospital and filled the P3 form which was produced at the trial as Pexhibit 1a. The complainant's treatment notes were also produced as Pexhibit 1b. He examined the complainant and noted that she had bruises on both Labia minora and majora and that her hymen was broken. He observed that the complainant was aged between 7-8 years.

10. PW5 was NO. 73726 P.C. NICK ODHIAMBO the police officer who received the defilement report and arrested the appellant. He also issued the complainant with a P3 form (P exhibit 1a) and produced the complainant's clinic card as an exhibit in court. The said card indicated that the complainant was born on 24th October 2005.

11. In his unsworn testimony before the court, the appellant denied any involvement in the crime and only explained how he was arrested on 2nd October 2014.

Analysis and determination

12. I have carefully considered the record of appeal and the submissions made by both parties. The issues for determination are whether the ingredients of the offence of defilement were proved and if so, whether the sentence passed against the appellant was lawful.

13. The critical ingredients to be proved for a successful prosecution and conviction on a defilement charge are the age of the complainant, penetration and positive identification of the appellant. On the complainant's age, Mr. Abobo, learned counsel for the appellant, submitted that the same was not proved in view of the fact that her birth certificate was not produced as an exhibit in court and further, that the prosecution did not subject the complainant to age assessment. The above submissions by the appellant raises the question whether the failure to produce the complainant's birth certificate or an age assessment report is fatal to the prosecution's case in defilement cases. The Court of Appeal observed as follows in the case of **Francis Omuroni –vs- Uganda Criminal Appeal No.2 of 2000**:-

> ***"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense….."***

14. From the above decision, it is clear that there are many ways of determining the age of a victim apart from the production of a birth certificate or an age assessment report. In determining age, the court is at liberty to use common sense or even observation. In the instant case, the trial court after observing the victim, conducted a *voir dire* before taking her evidence. This means that right from the outset, the court was of the view that the complainant was a child of tender years. In her evidence, the complainant stated that she was 7 years old and a pupil in class one.

15. The trial court made the following findings at the end of the *voir dire*:-

> **"From the examination and evaluation of the child, I find that she is suited to give sworn testimony as she understands the value of telling the truth."**

16. The above finding that the complainant was a child was not contested by the Appellant. PW1, the complainant's aunt, testified that the complainant was 7 years old while PW4 the medical officer assessed and estimated her age to be between 7 – 8 years. A clinic card which was produced by PW5 as Pexhibit2 showed that the complainant was born on 24th October, 2005 which means that she was 8 years old at the time she was allegedly defiled.

17. Under **Section 2** of the **Children Act**, age means apparent age where the exact age is not known. In the instant case, I find that there was sufficient proof of the age of the complainant and therefore, the mere fact that the complainant's birth certificate was not produced as an exhibit does not take away the fact that the complainant was a child aged 8 years.

18. On penetration, I find that the prosecution tendered credible, consistent and uncontested documentary and oral evidence to prove that the complainant was defiled. PW2 witnessed the sexual assault while PW1 noticed that the complainant was walking with difficulty after the assault. The complainant gave a moving testimony on how she was defiled by the appellant. She was escorted to hospital for treatment and PW4, the medical officer, testified that an examination of the complainant's vagina revealed that she had sustained a broken hymen and bruises on the labia minora and majora. The P3 form was produced as an exhibit before the trial court. PW4 concluded that that the complainant had been defiled. My finding is that penetration also established through the complainant's own testimony which was corroborated by the medical evidence of PW4. I therefore find that the prosecution proved, beyond reasonable doubt, that the complainant was defiled.

19. On identification of the appellant and whether or not it was established that the appellant indeed defiled the complainant. PW1 had the following to say about the appellant;

> **"He had worked for me since February, 2014. S has lived with me for 2 years. S knows Meshack well. It was not the first time that I was leaving the accused with the children. "**

20. The complainant stated as follows in her evidence in chief;

"When it started raining that is when we went back to the kitchen. Maasai was on the bed. He put me on the bed. He removed my skirt, and did bad manners to me. He had a condom he put on his 'chuchu'. Chuchu is the thing he uses to urinate. He slept on top of me and put his chuchu in the place I use to urinate. I tried to scream, he closed my mouth. He did it."

21. From the above foregoing extracts of the witnesses' testimonies regarding the identity of the appellant, it is clear that the complainant knew the appellant very well as he had lived with them for several months. The offence was committed in broad daylight at about midday and so she was able to see him clearly. There was however the testimony of PW2 which substantially contradicted the complainant's testimony on very critical points thereby opening a completely new angle to the case.

22. The appellant's case on appeal was that his identification was not foolproof in view of the fact that PW2, who had initially stated both in his evidence in chief an in cross-examination that he saw the appellant defile the complainant changed this bit of his testimony during cross examination and stated that it was one Willy who defiled his sister. The appellant argued that the trial court erred in convicting him even after finding that PW2 was not a credible witness. The appellant cited the case of **Roria vs Republic (1967) E.A. 583** wherein it was held:

"A conviction resting entirely on identity invariably causes a degree of uneasiness. Therefore the danger is, of course greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld, it is the duty of this court to satisfy itself that in all the circumstances, it is safe to act on such identification."

23. At the close of the prosecution's case, the trial court on its own motion and while citing the provisions of **Section 150 of the Criminal Procedure Code,** ordered the Investigating Office to record the statement of the said Willy so that he could be summoned to testify in the case as a witness for the prosecution. To my mind, the move by the trial court to summon Willy was intended to clear the doubt created, by the testimony of PW2, regarding the true identity of the perpetrator of the crime.

24. **Section 150 of the Civil Procedure Rules stipulates as follows:**

"150. Power to summon witnesses, or examine person present A court may, at any stage of a trial or other proceeding under this Code, summon 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 and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case: Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness. Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness."

25. It would appear that at this point in the trial, the trial court exercised extreme caution by requiring the appearance and testimony of the said Willy in order to shed more light on the case. Quite unfortunately, I note that the investigating officer did not file any concrete report in court regarding the whereabouts or the availability of the said Willy even though he was reported to be one of the employees of PW1. My humble view is that the abrupt change in testimony of PW2 regarding the identity of the person who defiled the complainant from the appellant the said Willy was the turning point in the prosecution's case and is what informed the trial court's decision to summon the attendance of the said Willy as a witness. The scenario would have been completely different if PW3 was the only eye witness to the crime as in that case, the court would be bound to consider only her evidence in determining the case in line with the provisions of Section 124 of the Evidence Act which stipulates as follows:

124. Corroboration required in criminal cases

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

26. In the instant case however, there was the evidence of PW2 who was an eye witness to the crime which exonerated the appellant from the blame. PW2 was categorical about the identity of the culprit during re-examination when he stated:

"It is Willy who did bad manners to C. It is not our Maasai who did bad manners to the girl. When I told you- I had forgotten. That is all."

27. In cross examination, PW2 narrated that he was in the kitchen with the appellant, the complainant and Willy. He stated:

"It was noon when bad manners was done to C. When it rained we were in the kitchen with you and Willy and C. Mother came when we were in the kitchen, she came with a child. It is Willy who did bad manners to the girl."

28. I note that the trial court did not adequately address the impact of testimony of PW2 regarding the true identity of the person who defiled the complainant. The trial court observed as follows in the judgment:

> **"Though he gave an unsworn testimony, I gave the accused a chance to cross examine PW2 who changed his statement and said that the person who defiled his sister was another called Willy. The young boy kept shifting his testimony, I thus found him not to be a credible witness. The said Willy was also a member of the same household. I invoked Section 150 of the Criminal Procedure Code and summoned the said Willy to testify. Up to the time the trial was concluded the investigating officer could not trace the said Willy who had since quit working for PW1. I will therefore evaluate the evidence on record as it is."**

29. I have carefully perused the court record and I note that on 21st January 2015 the investigating officer made a report to the trial court that he needed more time to enable him trace the said Willy and produce him in court. There was no other subsequent report made to court regarding the whereabouts of Willy so as to justify the trial court's holding that Willy could not be traced because he had left his employment with PW1.

30. My finding is that Willy was a very crucial witness to the case even if not a suspect going by the testimony of PW2 that he was present in the kitchen at the time that the offence was committed. Courts have severally held that failure by the prosecution to present the evidence of a crucial witness, entitles the court to make an adverse conclusion against the prosecution case and acquit the accused person. **(See Bukenya Vs Uganda [197] E.A. 549).**

31. In the instant case, I find that the gap created by failure to call the important witness, Willy, is a doubt whose benefit I must give the appellant. The absence of reasonable explanation for the non-attendance of Willy**,** leads to the only reasonable inference that had he been called, his evidence would probably have been adverse to the prosecution's case.

32. I note that even though the trial court properly warned herself of the dangers of convicting on the evidence of one witness, she did not apply this warning to the evidence before her. There was a huge, unexplained gap created by the prosecution and by extension the investigating officer in failing to avail a crucial witness, Willy, who could have shed more light on the case by breaking the tie created between the evidence of PW2 and PW3. The decision by the trial court to *suo moto* invoke the provisions of Section 150 of the Criminal Procedure Code, in requiring the testimony of Willy, was a clear demonstration that the court had doubts about the prosecution's case which could only be dispelled by the said Willy's testimony. Needless to say, in a criminal case, the standard of proof is beyond any shadow of a doubt, in which case, even the slightest doubt, such as whether the perpetrator of the crime was the appellant or Willy should automatically result in the acquittal of the accused person.

33. I find that there was no doubt that the complainant, a girl of the tender age of 8 years, was defiled in a very callous manner by one of her aunt's workers in whose care she had been left at the time the said aunt had to go to hospital to deliver a baby. This court is however appalled that the prosecution did not do everything in its power to secure all the evidence of the witnesses necessary to prove the case even after noting that PW2 had contradicted himself and the court was magnanimous enough to give the prosecution a lifeline by summoning the crucial witness, Willy.

34. While it is quite unfortunate that a young girl was brutally assaulted and defiled, the court's duty is to uphold the conviction only when satisfied that the standard of proof has been achieved. In instant case, the testimony of PW2 coupled with the failure by the prosecution to avail the evidence of Willy makes me entertain a doubt in my mind as to the guilt of the appellant. Even though PW2 was reported to be a young child of about 3 years, I find that his age alone or the fact that he changed his initial testimony was not enough ground for the trial court to disregard his testimony. Given the severity of the mandatory minimum sentences provided for in our laws upon conviction for sexual offences, I wish to state a truism in our criminal jurisprudence that; out of 100 suspects, it is better to acquit 99 criminals than to convict one innocent person. In the instant case, the appellant was, by dint of the provisions of **Section 8 (2) of the Sexual Offences Act** liable to a minimum mandatory life sentence and therefore the reason why there should be no room whatsoever for even a single speck of doubt in the prosecution's case. It is because of this reality that our law requires that for a conviction to result, the prosecution must prove beyond reasonable doubt, the case against an accused person.

35. Consequently, and having regard to my above findings and observations, I allow the appeal, quash the conviction, set aside the sentence and direct that the appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

Dated, signed and delivered in open court this 8th day of March, 2018

HON. W. A. OKWANY

JUDGE

In the presence of:

- Mr. Otieno for the State
- Appellant in person
- Omwoyo court clerk