REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 172 OF 2016

CORAM: D. S. MAJANJA J.

BETWEEN

N O O..................................APPELLANT

AND

REPUBLIC.................... RESPONDENT

(Being an appeal against the original conviction and sentence of Hon.C. N. Wanyama, RM dated 10th November 2016 in Criminal Case No. 266 of 2015 at Ukwala Senior Resident Magistrates Court)

JUDGMENT

1. The appellant, **N O O**, was charged with the offence of **defilement** contrary to **section 8(1)** and **(3)** of the ***Sexual Offences Act***. The particulars were that on 12th June 2015 in Ugenya District within Siaya County, he intentionally caused his penis to penetrate the vagina of CA, a child aged 14 years. He also faced an alternative charge of committing an indecent act with a child contrary to **section 11(1)** of the ***Sexual Offences Act*** based on the same facts. He was also charged with a second count of deliberate transmission of HIV contrary to **section 26(10(a)** of the ***Sexual Offences Act*** in that on 12th June 2015 in Ugenya District within Siaya County, he, having actual knowledge that he was infected with HIV, intentionally had unprotected sexual intercourse with CA which infected her with HIV.

2. Upon conclusion of the matter, the trial magistrate found the appellant guilty of the alternative charge of committing an indecent act with a child and the second charge of deliberate transmission of HIV and sentenced the appellant to serve 10 years imprisonment for the alternative charge and 15 year imprisonment for the second charge. The sentences were to run concurrently.

3. The appellant has now appealed to this Court and contests the conviction and sentence the grounds set out in his petition of appeal and written submissions. He contends that the trial magistrate erred by arriving at a decision against the weight of evidence on record. The appellant faulted the trial magistrate for relying on extraneous factors and for failing to analyse the evidence hence arriving at a wrong decision. Mr Okach, learned state counsel, opposed the appeal on the ground that the prosecution proved its case.

4. This being a first appeal, it is the duty of this court to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see or hear the witnesses testify as to form its own opinion on their demeanour (see ***Okeno v Republic*** **[1972] EA 32**).

5. The facts of this case are that on the Friday, 12th June 2015 the complainant's aunt, PW 2, asked her to go to the home of her sister, PW 3, to assist her in farm. The complainant (PW 1) left her aunt's home at around 5:00pm. She testified that she did not know the area so well and so when she found the appellant burning charcoal by the road side she decided to ask him for directions. The appellant was not known to her and this is the first time she was seeing him. The appellant requested her to wait for a while as he prepared the charcoal then he would take her to PW 3's home. After sometime, the appellant, who was carrying a panga, asked her to follow him into a maize plantation.

6. PW 1 narrated how the appellant grabbed her by the collar, removed her skirt and inner wear. He also took off his clothes and forced her to the ground. He lay on top of her and proceeded to sexually assault her. PW 1 also recalled that the appellant threatened to kill her if she raised alarm. After sometime the complainant was able to escape and she ran to a nearby homestead to ask for help. The owner of the home ordered his sons to escort her to PW3's house which was not far off. She informed PW 3 about what had happened. PW 3 then informed PW 2 about the occurrence. When she went to school three days after the incident and her teacher organized for her to be taken Ukwala Hospital where medical examination was carried out and a P3 form filled. On cross examination, PW 1 stated that she arrived at the place the appellant was burning charcoal early enough and it is the appellant who delayed her. She insisted that she saw the appellant's face very well and could not forget him.

7. PW 3 testified that on Sunday, she took PW 1 on the route she had followed and they found the appellant removing charcoal. PW 1 was able to identify him while PW 3 recognised him as they were from the same village. The area Assistant Chief, PW 4, testified that on 23rd June 2015 he received information from the head teacher of the school that PW 1 was a student that PW 1 has been sexually assaulted by the appellant. He proceeded to the appellant's home and arrested him.

8. The Investigating Officer, PW5, testified that after receiving report about the defilement, he recorded witness statements and escorted PW 1 to Ukwala Sub-county hospital where she was treated and a P3 form filled. PW 5 produced PW 1's baptismal card which indicated that she was born on 24th July 2001. PW 6, a clinical officer at Ukwala Sub-county hospital produced a P3 form signed filled by the said the doctor who examined PW 1. According to the report, PW 1 was traumatised and anxious while giving information and medical examination revealed that the hymen was absent and there was presence of a white/brown vaginal discharge. The complainant was HIV negative.

9. When placed on his defence the appellant denied defiling the complainant. He stated that he was not a charcoal burned and the was not the person who defiled PW 1 and that he saw her in court for the first time.

10. The thrust of the appellant's appeal is that the trial court decision was based on inconsistent, uncorroborated and contradictory evidence. From the extensive submissions, the question for this court to answer is whether the prosecution proved its case beyond reasonable doubt.

11. The first issue is whether the appellant is the person who sexually abused the appellant. PW 1 confirmed that on the material day the person who assaulted her was burning charcoal when she was proceeding to PW 3's home. She was only able to identify him because, PW 3 took her to the same route where they found the accused removing charcoal and identified him.

12. In dealing with the issue of identification, I hark back to the words of the Court of Appeal in ***Wamunga v Republic*** **[1989] KLR 424** where it stated that;

> *Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification*.

13. In this case, conducting an identification parade would have been ideal had PW 1 reported the matter to the police before any steps were taken to confront the appellant. *While it may not be mandatory to conduct an identification parade, the Court of Appeal has underscored the utility of identification parades in order to minimize the danger of mistaken identity. In* ***James Tinega Omwenga v Republic*** **Criminal Appeal No. 143 of 2011**, *the Court of Appeal observed that:*

> *The law is settled, that in general, identification of a suspect who was a stranger at the time the offence was committed, which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identification by pointing out the suspect, is a dock identification which in some cases is regarded as worthless.*

14. In ***Muiruri & Others v Republic*** **[2002] 1KLR 274** the Court of Appeal noted that:

> *It is believed because an accused sits in the dock while witnesses give evidence in a criminal case against him, undue attention is drawn towards him. His presence there may in certain cases prompt a witness to point him out as the person he identified at the scene of a crime even though he might not be sure of that fact. It is also believed that the accused's presence in the dock might suggest to a witness that he is expected to identify him as the person who committed the act complained of...we do not think it can be said that all dock identification is worthless.*

15. What these cases underscore is that in all instances of identification must be approached with caution and while a dock identification is not in all circumstances worthless, the duty of the court to carefully examine the evidence to avoid cases of mistaken identity remains. The evidence that PW 1 was with the assailant for some time before the she was sexually assaulted and she reported this to PW 3 where they returned three days later to look for him. What is not explained and what the trial magistrate did not consider in the judgment is the fact that PW 3 was not arrested immediately thereafter though he was known in the village. Even when it was disclosed to the school on the next Monday, there is no evidence that PW 1 was taken for examination and treatment and the incident reported to the police. The incident was reported on 25th June 2015, over a week after the incident had taken place. PW 5 did not give any explanation or account of the delay.

16. Even though the court was entitled to convict the appellant on the basis of the child's testimony without corroboration under the proviso to **section 124** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** if the trial magistrate, for reasons to be recorded, believed the child was telling the truth, such belief or reasons cannot override gaps in the evidence. All this evidence taken together is enough to convince me that the evidence of identification is suspect and although there is evidence that the child was sexually assaulted, I am unable to fix liability on the accused. I find the appellant's conviction unsafe.

17. The appeal is allowed. The conviction and sentence are hereby quashed and the appellant is set free unless otherwise lawfully held.

SIGNED AT KISUMU

D. S. MAJANJA

JUDGE

DATED and DELIVERED at SIAYA this 20th day of April 2018.

J. A. MAKAU

JUDGE

Appellant in Person

Mr Okach, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the State

Court Assistants: L. Odhiambo and B. Ochieng