



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL APPEAL NO. 31 OF 2016**

**GAILOD YAMBWESA LANDI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(From the Original Conviction and Sentence in Criminal Case No. 168 of 2016 of the Senior Resident Magistrate's Court at Lamu – Njeri Thuku, SRM)

**JUDGEMENT**

1. The Appellant, Gailod Yabwesa Landi, was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act, 2006 (SOA). The allegation being that on 25<sup>th</sup> March, 2016 in Lamu County he intentionally caused his penis to penetrate the vagina of D.K., a child aged eight years.

2. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the SOA. It was alleged that on the date and place mentioned in the main count he intentionally touched the vagina of D.K. using his penis.

3. The Appellant pleaded not guilty, was tried, convicted of the main count and sentenced to life imprisonment. The Appellant being aggrieved with both conviction and sentence filed a petition of appeal whose amended grounds, in summary, are:

- a) that the charge was defective;
- b) that the medical evidence was wanting: it was contradictory as to the age of the injuries and his blood samples were drawn without his consent;
- c) that there was mistrial and hence the proceedings are a nullity; and
- d) that the trial court did not consider his defence.

4. The parties agreed to dispose of the appeal by way of written submissions. The Appellant submitted that the charge was defective as it did not accord with the evidence adduced in court, in particular that hands or fingers and not a penis were used to penetrate the alleged victim. He referred to the Court of Appeal decision in **Yongo v Republic [1983] KLR 319; [1983] eKLR** and urged that the proper charge was one under Section 5(1)(b) of the SOA.

5. On his claim that the medical evidence was wanting, the Appellant submitted that although it was indicated that there was semen but no blood on D.K.'s panties, the semen was not tested so as to connect him with the same. Further, that the evidence of the intermediary was uncorroborated by the medical evidence thus contravening Section 31(10) of the SOA. According to the Appellant, the trial court misdirected itself on the application of Section 124 of the Evidence Act in relying on the evidence of the medical officer as the same did not corroborate that of the intermediary or the victim. The Appellant asserted that it was not the duty of the trial court to make a case against him but to base the conviction on the actual evidence and not theories that were advanced to the court. Reliance was placed on **Okothi v R [1965] EA 555** in support of this submission. The Appellant concluded his submission on this issue by stating that the medical officer testified that he examined the alleged victim on the same day, filled in the post rape care form (PRC-Form) which was relied upon to fill the P3 form yet the age of the injuries as captured in the P3 form did not corroborate the date of the alleged offence nor connect him to the crime thus making his conviction unsafe.

6 Turning to his assertion that the handling of the intermediary led to a mistrial, the Appellant submitted that the appointment of the intermediary was in breach of Section 31(6) of the SOA in that although the court declared the alleged victim vulnerable and appointed her

mother an intermediary, the trial magistrate did not adjourn the case and summon the mother to physically appear in court. In the Appellant's opinion, failure to summon the appointed intermediary to physically appear in court rendered the conviction unsafe.

7. As to the obtaining of blood samples from him, the Appellant submitted that this was done in contravention of Section 122(c)(1) of the Penal Code as no consent to draw his blood was obtained from him. He asserted that although Section 36(1) of the SOA allows the court to direct that an accused person's DNA be profiled, the prosecution is nevertheless required to obtain such an order, which it did not do in his case. He concluded that the trial court erred in admitting the results of the sample as evidence as the same was inadmissible and the mistake by the court prejudiced his right to a fair trial.

8. The Appellant contended that there was also mistrial as the trial court did not comply with Section 211 of the Criminal Procedure Code. Further, that the trial court did not record the language used when he was placed on his defence.

9. The Appellant also took issue with the manner in which the proceedings were recorded stating that it is not clear from the record whether he was physically present at the trial and cross-examined witnesses as the record only reflects that each witness was cross-examined without showing that he is the one who carried out the cross-examination.

10. On the ground that his defence was not considered, the Appellant submitted that the trial court failed to adequately consider his defence though it was duty-bound to consider it and make a decision on the same. Furthermore, the Appellant submitted that the evidence of the alleged victim being uncorroborated did not cast doubt on his *alibi* defence.

11. The Respondent through the Director of Public Prosecutions (DPP) opposed the appeal stating that the prosecution had proved all the ingredients of the offence charged. Reliance was placed on the decision in the case of **Josphat Muoki Muunda v Republic [2016] eKLR** in support of this submission. According to the Respondent, the mother of the victim testified that the Appellant inserted his fingers in the victim's private parts causing bruises. The victim was taken to hospital and age assessment revealed that she was eight years old. Further, that the father of the victim had filed a report with the police and the medical evidence had been produced in support of the prosecution case.

12. The DPP submitted that the testimony adduced confirmed penetration and investigations revealed that the victim was defiled in the bush. According to the Respondent, the evidence adduced showed that the victim's pair of under pants was soiled with blood, her hymen torn and injured and that there was presence of semen. It was further submitted that the victim's evidence was corroborated hence admissible.

13. As for the import of Section 36 of the SOA, the DPP submitted that it was not necessary to comply with the said section. The decision of the High Court in **Jackson Mwanzia Musembi v Republic [2017] eKLR** was cited in support of this argument.

14. The Respondent also submitted that the Appellant was arrested for the offence that was tried and as the issue of arrest was not raised during the trial, the same was an afterthought. The position taken by the Respondent is that the prosecution adhered to the provisions of Section 109 of the Evidence Act.

15. The final point taken up by the Respondent is that the trial court fully considered the Appellant's defence.

16. This being a first appeal, this court has the onus of looking into the evidence afresh, reconsidering it and re-evaluating it in order to reach its own independent conclusion. In doing so, the court must bear in mind that the trial court had the opportunity of hearing and seeing the witnesses as they testified – see **Okeno v Republic [1972] EA 32**. The court must also be guided by the principle that a finding of fact made by the trial court shall not be interfered with unless it was based on no evidence or there was a misapprehension of the evidence or the trial court acted on the wrong principles – see **Chemagong v Republic [1984] KLR 611** and **Gunga Baya & another v Republic [2015] eKLR**.

17. In order to discharge its onus, the prosecution was to prove beyond reasonable doubt the ingredients of defilement being the age of the victim, penetration and identification of the perpetrator of the alleged crime.

18. In order to discharge its obligation the prosecution called six witnesses. L G the victim's mother testified as PW1 and told the court that on 25<sup>th</sup> March, 2016 at about 5.30 p.m. she had gone to Manda town to sell foodstuff when a neighbor by the name Musyimi called to inform her that she was needed at home. She returned home where she found police officers, the village elder and a crowd of people in her compound. She also found her husband, PW3 D M at home. She was asked whether she knew what had happened to D.K. before they proceeded to the home of the Appellant from where he was arrested and escorted to the police station. They thereafter proceeded to hospital. She learned from her husband that the Appellant had taken their child to the bush, removed her clothes and inserted his fingers in her private parts. PW1 testified that she knew the Appellant as he had been a neighbor in Mombasa before she moved to Lamu. The Appellant also later relocated to Lamu where he often visited them and her children were familiar with him. Her testimony was that at the hospital D.K. was found with bruises in her private parts.

19. Cross-examined by the Appellant, PW1 stated that she had known the Appellant for over three years in Mombasa and that he often visited them where they currently reside in Lamu. She testified that she bore no grudge against the Appellant and had once gone to get back a bucket she had lent him. She also testified that her husband had also sold a bucket to the Appellant. PW1 also stated that she did not witness the incident and neither did she know the time it took place. She further stated that D.K. was taken to the police station in the same clothes she was wearing when she found her at home. At re-examination her testimony was that the bucket had been paid for.

20. D.K. testified as PW2. After conducting *voire dire* examination the trial court concluded that the child did not understand the nature of an oath though she understood the importance of telling the truth. The trial court therefore directed that D.K. gives unsworn testimony. The court further held that D.K. was a vulnerable witness on account of her age and saw it fit, under Section 31(4) of the SOA, for PW1 to act as her intermediary.

21. In her testimony, PW2 stated that the Appellant, whom she identified in court, came to their home and gave her brother money to go and

buy juice. She was left alone with the Appellant in the house after which he carried her to the bush where he proceeded to remove her panties and his trousers. He then used his hands and she experienced pain. D.K. knew the Appellant and where he resided. He swore her to secrecy about the incident but she told her father and was taken to hospital by her parents and a police officer. PW2 was able to identify her name on the treatment notes shown to her in court. She also identified the Appellant in court.

22. PW3 D M stated that he was D.K.'s father. On the material day at about 5.00 p.m. he left his two children by themselves and went to look for some change. When he came back at 7.00 p.m. he was informed by PW2 that the Appellant had carried her into the bush, removed her clothes and done bad things to her. She cried as she narrated the story and appeared afraid and empty. He headed to the police station to file a report but on the way he met a GSU officer and after explaining the ordeal to him they returned to the house together. PW3 found his wife and other police officers at home. While going to make a report PW3 had met Musyimi and the said Musyimi went to PW3's house where PW3's son told him what had transpired. Together with the police officers they went to the Appellant's house and arrested him. The Appellant was drunk at the time. PW3 further testified that D.K. cried throughout her examination in hospital and that a P3 form was filled for the child.

23. In response to questions put to him during cross-examination by the Appellant, PW3 testified that he had sent Musyimi to call his wife, PW1. He stated that D.K. narrated her ordeal at about 7.30 p.m. and the Appellant was arrested at 8.00 p.m. According to PW3 he bore no grudge against the Appellant though the Appellant had failed to return a phone he had lent him nor paid for it.

24. PW4 Joseph Nderitu, the clinical officer who filled the P3 form testified that D.K. was bleeding from her private parts and her pair of panties was moderately soiled with blood. Her hymen was torn with some injuries on the labia minora and labia majora. He concluded that D.K. had been defiled. PW4 stated that he also relied on the post rape care form (PRC-form) to fill the P3 form. The witness produced the P3 form, the PRC-form and the medical notes of the Appellant's blood tests as exhibits in this case.

25. When cross-examined by the Appellant, PW4 stated that the panties had semen and not blood and that he relied on the PRC-form to fill the P3 form. According to PW4 the victim was defiled at 6.30 a.m. and taken to hospital at 3.00 p.m. PW4 stated that he was the one who examined D.K. on the first day, treated her and also completed the P3 form.

26. On 26<sup>th</sup> March, 2016 PW5 police constable Margaret Bittok was assigned to investigate the matter at hand. She questioned D.K. and issued her with a P3 form before escorting her and the Appellant, who was in custody, to hospital. PW5 was present at the examination in hospital and also took statements from all the witnesses. PW5 also visited the scene of crime and confirmed that the victim was defiled in a bush.

27. Upon cross-examination, PW5 explained that the Appellant was arrested by a GSU officer who recorded a statement. Further, that D.K. was defiled in the evening and presented herself to the police station the following morning. She denied framing the Appellant. In re-examination it was clarified that PW5 was the investigating and not the arresting officer. PW5 stated that she did not frame the Appellant and that the Appellant did not know the reason for his arrest when asked about it.

28. The arresting officer Corporal Julius Kinga testified as PW6. His evidence was that on the material day at about 7.00 p.m. he received a call from their boss directing them to go to the area in question which was about 400 metres from their camp. Together with his two colleagues they passed by the village elder's place and proceeded to the home of the child. There, they found D.K. with her father and another child. There was also a crowd of people. They went and arrested the Appellant for the sake of his safety. They found him lying in bed with his shoes. The following day they escorted him, together with the complainant and her parents, to the police station where he recorded his statement. When cross-examined by the Appellant he stated that he knew him as an acquaintance. Further, that in his house the fly of his trouser was unzipped and his underwear messed up. He stated that the arrest of the Appellant was to ensure his safety and that they escorted him to the police station without handcuffing him.

29. In his sworn testimony the Appellant told the court that in 2005 he lived in Kwale where D.K.'s mother was his friend and a good neighbor. PW1 expressed and executed the desire to leave Kwale in 2008. In the year 2014 he was told that the place PW1 had shifted to was good and so he moved there. He met PW1 who was by then married and she welcomed him as a good neighbor would. In January, 2016 he bought buckets from PW3 and paid a deposit for the same. PW1 later threatened him about the unpaid buckets but he kept quiet. Turning to the alleged offence, he stated that on the material day he spent the day out in a different area and returned home at about 5.30 p.m. At 11.00 p.m. three administration police officers went and arrested him. He denied committing any crime but he was nevertheless taken to the police station before being escorted to hospital and later charged in court.

30. A perusal of the record before this court will show that the age of the complainant was eight years. The mother of D.K. told the court that D.K. was eight years old. PW1 was recalled to testify and she produced an age assessment report showing that the complainant was eight years old. The Appellant did not take up issue with the age of the complainant. On my part, I find that the fact that the complainant was eight years old was proved beyond reasonable doubt.

31. The other ingredient of defilement is penetration which is defined by Section 2 of the SOA as the **“partial or complete insertion of the genital organs of a person into the genital organs of another person.”** D.K. stated that the Appellant used his hand and she felt pain. She however did not explain what she meant by **“use of hand”** and where she felt pain. PW3's evidence was that the child told him that the Appellant did bad things to her. The medical evidence referred to injuries to her private parts and the mother talked of seeing injuries on the private parts of the complainant. It can therefore be safely concluded that the pain she experienced touched on her private parts and hence the use of hand was in reference to the same area.

32. The PRC-form and P3 form indicated that there was presence of semen on D.K.'s panties. This ties up with the evidence of PW6 who talked of the Appellant's clothes being messed up. PW4 who examined D.K. on the night of the alleged ordeal testified that there were blood stains on the panties but later retracted the statement upon cross-examination.

33. From the evidence it is not clear whether the complainant was taken to the hospital on the material night or the following day. The

impression one gets from the evidence of PW1 and PW3 is that the complainant was taken to the hospital on the same night. However, PW6 stated that the Appellant slept at their camp overnight. PW5 stated that she escorted both the Appellant and the complainant to the hospital and that she was present when they were examined. This means that the complainant was seen the following day. Nevertheless I do not read much into this contradiction knowing that in far-flung corners of Kenya accessing police stations and health facilities at night may be a nightmare.

34. The evidence adduced clearly shows that the child ended up in hospital and upon examination it was established that she was sexually abused. The evidence of the complainant, the parents of the complainant and the medical officer all point to a ruptured hymen. The child talked of pain. What is also clear is that the penis was at one stage used to penetrate the victim's vagina. This is explained by the presence of semen in the complainant's body.

35. The Appellant asserted that the evidence adduced established an offence under Section 5 and not Section 8 of the SOA. Whereas the child talked of the Appellant using his hand, the medical evidence indicated presence of semen in the child's vagina. The only known body part that ejaculates semen is the penis. The trial Magistrate was thus correct in reaching the conclusion that the complainant was penetrated with a penis. It is possible that the hymen was ruptured with fingers followed by penetration with a penis.

36. Was the Appellant the person who defiled the complainant? The Appellant faulted the trial court for not considering his *alibi* evidence. An *alibi* is a claim or piece of evidence that one was elsewhere when a criminal act is alleged to have taken place. In putting forth an *alibi*, an accused person is saying he could not have possibly committed the offence as he was elsewhere at the time of the alleged offence.

37. In **Saidi v R [1963] EA 6**, the Court of Appeal for Eastern African held that:

**“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.”**

38. Discussing the same subject of *alibi* evidence Chief Justice Sir Udo Udoma in the Ugandan case of **Sekitoleko v Uganda [1967] EA 531** stated that:

**“(i) as a general rule of law the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else....;**

**(ii) the burden of proving an alibi does not lie on the prisoner, ....”**

Where an *alibi* defence is raised, it is the duty of the prosecution to dislodge it.

39. Although the trial Magistrate did not directly address the Appellant's claim that he was not present at the time and place of the alleged offence, the conclusion reached shows that the Magistrate did not believe the *alibi* defence. I find no reason for reaching a different conclusion considering the evidence that was adduced before the trial court. The evidence connected the Appellant to the crime.

40. In this case, the only witness to the incident was the complainant. In her testimony she stated that:

**“I was home when Muingo came (points to the accused). He came and carried me to the bush. He did bad things to me in the bush. Muingo gave my brother Kshs.20/= and told him to go and buy juice.... I know Muingo. He had come to our house before. I know where he lives. I know his children. He told me not to tell anyone.”**

From that evidence it is clear that the complainant knew the Appellant. She identified him in court.

41. The complainant told her father (PW3) who her defiler was. PW3 testified that:

**“At 7.00 p.m. I got home when Mbadi said K told me K had something to say. She told me Muingo carried her into the bush and did bad things to her... K told me Muingo carried her to the bush and removed her clothes then did bad things to her.”**

42. Upon cross-examination PW3 stated that:

**“Mbadi said you gave him Kshs.20/= . K said you carried her on her chest. She narrated this to me at 7.30 p.m.”**

43. The evidence of PW3 confirms that the complainant and her brother reported the incident to PW3 immediately he arrived home. She only named one person by the name Muingo who was identified by the complainant and her parents as the Appellant.

44. Although the trial Magistrate, did not record the reasons for believing that the complainant was telling the truth as required by the proviso to Section 124 of the Evidence Act, the evidence of the complainant as captured on record shows a consistency that can only lead one to conclude that the child told the truth. Part of her story was corroborated by the medical evidence. Her testimony that she had been defiled was confirmed by the medical examination. A perusal of the record does not disclose that she had any reason for telling lies against the Appellant. The evidence also pointed to a relatively good relationship between the Appellant and the parents of the complainant. The evidence adduced by the prosecution therefore dislodged the Appellant's *alibi* defence. The evidence also unerringly pointed to the

Appellant as the person who defiled the complainant.

45. The Appellant raised other issues which in his view should lead to a declaration of his trial as a mistrial. He stated that Section 211 of the Criminal Procedure Code was never complied with and neither was the language used in placing him on his defence indicated.

46. When the plea was taken on 29<sup>th</sup> March, 2016 it was indicated that the language the Appellant understood very well was Kiswahili. The law requires that the proceedings be conducted in a language understood by an accused person. In the case of the Appellant that language was Kiswahili. There was therefore no need for the court to again state the language being used at the time the Appellant was being placed on his defence. The Appellant's claim therefore that the language used at the time he was being placed on his defence was not stated has no legal basis as the proceedings were conducted in Kiswahili.

47. The Appellant submitted that Section 211 of the Criminal Procedure Code was not complied with. A perusal of the court proceedings of 17<sup>th</sup> June, 2016 shows that Section 211 of the Criminal Procedure Code is not mentioned. However, the record shows the following proceedings

**“The court explains the three ways in which the accused can make his defence:**

**1) Sworn statement or;**

**2) Unsworn statement or;**

**3) By keeping quiet**

**To which the accused replies:**

**ACCUSED: I will give a sworn statement. I have no witnesses.”**

Those proceedings clearly show that the court complied with Section 211 of the Criminal Procedure Code. The Appellant's allegation that there was a mistrial due to failure to comply with Section 211 of the Criminal Procedure Code has no basis and this particular ground of appeal therefore fails.

48. The Appellant submitted at length that his blood samples were extracted without his consent or a court order thereby contravening Section 122 of the Penal Code and Section 36(1) of the SOA. A perusal of the judgement of the trial court does not disclose that the results of the blood samples drawn from the Appellant were used to make any finding of fact. Whether the blood samples were drawn with or without the Appellant's consent, the Appellant did not suffer any prejudice as a result of that act. I therefore need not pursue this ground of appeal any further.

49. The final point taken up by the Appellant is that the trial Magistrate failed to comply with the provisions of Section 31(6) and (10) of the SOA.

50. On Section 31(6), the Appellant stated that after appointing PW1 as an intermediary for the complainant, the trial Magistrate did not adjourn the proceedings so as to summon the intermediary to appear in court.

51. The answer to this is that there was no need to adjourn the case as the intermediary (PW1) was present in court at the time of her appointment. The record shows that the complainant gave her evidence through the intermediary.

52. The Appellant also claimed that an adjournment would have availed him enough time to prepare an informed defence. The record does not show that he applied for an adjournment and the same was denied. In any case, the intermediary was only a mouthpiece of the complainant, whose statement is deemed was already supplied to the Appellant. No prejudice was thus suffered in any manner by the Appellant.

53. Section 31(10) of the SOA states that:

**“A court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary.”**

In my view the said provision does not in any way overthrow the proviso to Section 124 of the Evidence Act which allows a court to convict an accused person of a sexual offence where the court believes that the victim is telling the truth. It is also my opinion that the cited provision is only applicable where a victim cannot talk for themselves.

54. In the case at hand, not only did the victim testify but there was also corroborative evidence like that of PW6 and the father of the complainant linking the Appellant to the crime. The medical evidence also confirmed the defilement. This ground of appeal fails.

55. The sentence imposed on the Appellant is the sentence provided by the law and there is no basis for disturbing it.

56. The conclusion I reach is that this appeal has no merit. I confirm the conviction and the sentence imposed by the trial court and dismiss the appeal in its entirety.

**Dated, signed and delivered at Malindi this 16<sup>th</sup> day of April, 2018.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**