REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO.68 OF 2017

ELKANA NDERITU MAINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Sexual Offence

Case No.15 of 2015 of the Chief Magistrate's Court at Nyeri)

J U D G M E N T

The appellant herein **ELKANA NDERITU MAINA** was charged with defilement contrary to section 5 (1) (a) (i) (2) of Sexual Offences Act, and in the alternative, indecent act with a child contrary to section 11 (1) of the same Act.

It was alleged that he committed these offences against LWW, a child aged 9 years on 12th January 2015 at [particulars withheld], Nyeri County, Republic of Kenya.

The prosecution called 7 witnesses.

But before I go further I find the need to point out the manner of drafting charges. Where the offence and the penalty are defined by separate provisions of the statute, there was that small phrase that used to join the definition part of the charge and the penalty section. It would be section ***5 (1) (a) (i) as read with section 5(2).***

Be that as it may, upon the close of the case for prosecution the trial magistrate found that the prosecution had established a *prima facie* case to warrant the appellant being placed on his defence. He testified and called one witness

In the judgment delivered on 30th January 2017, the trial magistrate found that

> ***"the oral evidence supports the alternative charge of provisions of Section 11 (1) of the Act. The accused was able to react and touch the private parts of LW by manipulating her hand and using it to attempt as penetration couple (sic) with assaulting her physically. I will then proceed to convict him accordingly"***

He sentenced the appellant to 10 years' imprisonment.

The appellant was aggrieved and filed this appeal. He challenged the evidence of identification/recognition. He was of the view that the trial magistrate did not evaluate the evidence, dismissed his alibi without reason and convicted him on evidence that did not support the charge.

He was represented by Mr. Kiminda Advocate, and the state by Ms. Jebet, prosecuting counsel.

In a first appeal the appellant is entitled to a complete re-evaluation of the evidence and the court is expected to draw its own references. See **Kiilu and another vs. R (2005) 1 KLR 174 where the court held;**

> ***"an Appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions."***

It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.

The Case for the Prosecution

The trial magistrate conducted the *voire dire* examination and found the minor by the name M W to be of sufficient intelligence to give evidence on oath as she understood the meaning of an oath. The record however shows that the minor who testified was one **L W**.

She told the court that on the 12th January 2015, she was walking, coming from school at 4.30pm. There was a person ahead of her who crossed the road and went and sat under a tree on the road side.

This part of the road to her home went up a hill. As she went up that hill he followed her from behind. He asked for her name, and the name of her school, she told him.

Suddenly as she neared her home he grabbed her cupped her mouth, pulled he into a maize plantation. He then removed her inner wear and threw it away. He, removed her shoes. He inserted his fingers into her private parts. He stepped on her cheeks with his shoes, poured sand into her eyes, hit her on the nose and she started to nose bleed. He strangled her and turned her neck, telling her that she was about to die. He left her.

She got up and went home. She found her aunt and grandmother L N. Her cheeks were swollen. She told them what had happened. She was taken to hospital and in her testimony was admitted for one month. She identified the appellant as one Elkanah Nderitu whom she said she knew as he used to pass by her grandparent's home.

On cross-examination she told the court that she had recorded a statement where she said on the material day she met 'a person 'on the road. That in her statement she did not state his name. That it is only after his arrest that she was told his name. She said she never gave a description to the police. That although she knew him, she had forgotten about him, it is her mother who had pointed him out to her. She confirmed that it was other people who had identified him for arrest. She said she only knew the appellant's brother but did not know his name. That she was given the name of the appellant by her mother.

On re-examination she said she did not know when /or how the appellant was arrested. She said the police officer did not ask her the name of her assailant. She said that she knew the appellant by his physical appearance.

PW2, one M M told the court this incident happened during the period of the teacher's strike. The child was in a private school where the teachers were not striking and the children were learning.

On the material day the child came home with a swollen face. She could not talk, and could hardly eat. She observed that the child's school uniform was dusty, blood stained and stained with "male sperms". She testified that the child reported that someone had accosted her and inserted fingers in her private parts. She was taken to hospital, where she was admitted for a week and discharged on 16th January 2015. According to this witness the child spoke on the second day and told them that she was attacked by a person who, and she could identify him because he used to *"sell milk at* [particulars withheld] *and the grandfather used to engage him to do casual work"*. .

She produced the child's certificate of birth which showed that she was born on 25th January 2006.

On cross-examination she told the court that the incident happened approximately 200m away from their home. That there were some children who came calling saying that the child had been bitten by bees. She said the child told them the person who had assaulted her was someone she used to see at her grandfather's home. She also told the court that upon the appellant's arrest there was no identification parade. She said there was no need for an identification parade because the child knew the person who had accosted her, and in any event the child had told the doctor about the assailant. She went on to say that after the appellant was arrested she realized that appellant was related to her family.

PW3 L N M was the child's grandmother. She too testified how other children came calling her on the evening of 12th January 2015 to come out and see what "they" had done to the complainant. When she came out she saw the child who had blood shot eyes, swollen and bleeding. The child told her she had been beaten by someone. At some point she pulled up the child's dress and saw that she was bleeding from her private parts and there was "uchafu ya wanaume" on her. They took the child to hospital. The child was admitted in hospital for 5 days.

On cross-examination it turned out that she had recorded her statement the day before she gave her testimony, on 2nd September 2015. She was categorical of the certainty of her observations that that the child was defiled through penile penetration. She was adamant that there was no way the child was sexually assaulted with fingers because fingers "could not emit fluid".

She said that the child told them that she had been beaten and even demonstrated how she had been strangled. The child's face, nose and mouth were swollen, her eyes were full of dust and she was bleeding from her mouth.

PW4 was Charles Wangai Wachira the Assistant –chief Karia Sub-Location testified how he received a distress call on 18 January 2015 from a village elder that there was a youth being beaten by a mob. He rushed to the scene and found that it was the appellant who was being beaten on allegations of having defiled a minor. He rang the AP Inspector PW 5 who came 15 minutes later and took the unconscious mob injustice victim away.

On cross-examination he said he could not identify any of the members of the mob that had assaulted the appellant. He insisted that as soon as the mob saw his car they dispersed. He denied that he was shielding the mob. He said when he heard about the alleged defilement, he told the family of the victim to take her to hospital and report to the police.

PW5 IP Amos Nderitu was the officer who responded to PW4's call. He rescued the appellant from the mob, took him to the police station then to Nyeri Provincial General Hospital for treatment and back to Nyeri police station.

PW6 was Dr. Samuel Kagema. He testified on behalf of Dr. Mugambi who had signed the documents- the P3 and Post Rape Care form. He testified that the P3 was for one M W, who had swollen face red right eye, bruises and broken hymen, with active bleeding from external genitalia. Her clothes were blood stained. Urinalysis was done. She had no injuries on the neck, thorax or other limbs.

PW7 No.91343 PC Bokayo Barako was the investigating officer. His testimony was that 12th January 2015 a case of sexual offence was reported at Nyeri police station. He issued the child with a P3, escorted her Nyeri Provincial General Hospital where she was admitted from 12th January to 16th January 2015. The P3 was completed. He formed the opinion that it was the appellant who had committed the offence. He charged him with the offences before court.

The prosecution closed its case.

The record shows that the trial magistrate wrote in making a finding that the appellant had a case to answer, wrote:

> ***"I have perused the record and find that the child was able to identify the person who defiled and assaulted her. The medical report on record shows that the child was assaulted. The cross-examinations have not shaken the witness's testimonies called by police. I further find that prosecution has established a prima facie case to warrant the accused person to be put on his defence. I therefore proceed to place him on his defence".***

<u>The case for the defence</u>

The appellant made an unsworn statement. He told the court that on the material date he spent the whole day at mama M's shamba where they were planting cabbages. In the evening she asked him to go and milk her cow. He went to the home and milked the cow. He left her home about 7.30pm. and went home.

On 18th January 2015 he was going to another casual job when he met some guy who began to beat him. This guy was joined by others who continued to beat him, accusing him of having defiled a girl.

He denied but when the beating got worse he "admitted" the offence. An elder came and rescued him. He denied knowing the girl, and pointed out that the child had not even identified him.

He called one witness, J W W, aged 62 years, who testified that she had spent the whole day on 12th January 2015 with the appellant planting vegetables in her shamba. She testified she had carried food and they ate in the shamba. They left the shamba about 6.30pm- and she sent him ahead to go and milk her cow. When she got home she found him having finished. Her husband was at home. She paid him and he left about 7.00pm.

He closed his case.

<u>Appellant's submissions</u>

In his submissions Mr. Kiminda pointed out that the trial magistrate acquitted his client of the main court and convicted him of the alternative charge of indecent act with a child.

He argued the 1st and 2nd grounds together and the 3rd and 4th grounds separately.

On the 1st ground he submitted that it was an issue of identification /recognition. He drew the court's attention to the child's evidence in chief with regard to identity of the person who had assaulted her

She said she saw "a person". In her cross-examination she testified that she came to know who this person was after the appellant was arrested, that it was her mother who had pointed him out to her, and that it was other people who had identified him to the police. In fact, the record shows that the trial magistrate formed the opinion that the child had been coached. Counsel pointed out that that finding was irreconcilable with the finding that he found her evidence convincing. Hence the trial magistrate misdirected himself by relying on evidence he already found was tainted.

On the 2nd ground he submitted that the trial magistrate had not considered the appellant's evidence of an alibi. It was clear that at the point of making ruling as to whether the appellant had a case to answer, the trial magistrate had already determined that the appellant had been positively identified, was the one who had committed the offence. This was prejudicial to the appellant as it appeared the trial magistrate had placed him on his purely for procedural purposes. On the final ground he submitted that the case for the prosecution was full of contradictions and inconsistences, which ought to have been resolved in favour of the appellant. For instance, at no point did the child state that the person who attacked her had intercourse with her, or even lay on top of her. She said fingers were inserted in her private parts. Hence the testimonies of PW2 and PW3 that they were certain that the child had been defiled and that they had seen semen/seminal fluids on

her clothes/body appears out of place and contradictory to the testimony of the child.

This also applied to their testimony on the identity of the assailant. All that which they stated was never spoken by the child. It is PW2 and PW3 who tried to identify the appellant and connect him to the child. The child never said that the appellant used to do casual jobs for her grandfather. She never said that he used to work with a guy called Waithaka, all these statements were made by PW2. Even after his arrest, there was no identification by the child. None of the persons who arrested and beat him up testified as to why they arrested him.

Both the assistant chief and PW5 testified that they were told the appellant was being beaten because of having committed an offence.

He relied on two cases: -

1) **Michael Githinji Mathenge-Vs-Republic Court of Appeal (Nyeri) Cr. Appeal No.13/2014** and

2) **Paul Kanja Gitari –Vs-Republic Court of Appeal (Nyeri) Cr. Appeal No.13/2014**

He urged the court to find that the conviction was unsafe and to quash it.

The submissions of the State

In her response Ms. Jebet for the state was clearly conflicted and stated so honestly. She stated in her opening that this was one of those confusing cases where, upon reading the record of appeal, she was torn between conceding and opposing the appeal, and for good reason: Stating,

> **"This is one of those matters where I am confused as to whether to concede or oppose…….as per the analysis of the evidence by the trial magistrate I would be forced to concede but as for the evidence as presented I will not concede. I therefore with to proceed and oppose the appeal based on the evidence as provided".**

She pointed out that the case was heard by 2 magistrates- one who heard the child, PW2, PW3 and PW4 and the one who finalized the case after hearing PW5, PW6, PW7, the defence; and proceeded to write the judgment.

She submitted that she was not in support of the trial magistrate's judgment, but would go by the evidence as provided by the prosecution. To her mind it was clear from the evidence that the child was defiled, and this was clearly supported by the medical evidence. The child had been admitted in hospital. There was the P3 and the Post Rape Care form showing the broken hymen, the blood from the genitalia, the injuries on the child's face all consistent with the child's testimony.

Ms. Jebet submitted that there were discrepancies between the judgment and the evidence given by the witnesses; that the inconsistencies as pointed out by the appellant were introduced by the magistrate and were not supported by the evidence.

That the 1st magistrate had determined on voire dire examination that the child had the capacity to tell the truth, and hence her evidence was credible. She wondered how the 2nd magistrate could say in his judgment that there was no evidence of penetration yet the evidence was there. The magistrate had indicated that the evidence did not say whether the broken hymen was fresh. She queried what kind of freshness the magistrate expected yet there was bleeding. In her view the magistrate's conclusion was in total contradiction with the P3 and Post Rape Care form.

On the issue of identification of the appellant she submitted that the minor confirmed that she knew the assailant but did not know his name. That the child simply recognized the assailant, and therefore there was no need for an identification parade. That the appellant had followed her, spoken to her in Kikuyu language, asking questions. That it was 4.00pm, and hence she could not have been mistaken.

With regard to the appellant's alibi. She submitted that the law was very clear that an alibi should be introduced way early before, and not late in the day as the appellant had done. She wondered how the police could have gone looking for DW2 whom they did not know to record her statement.

She urged the court to find that the evidence before the trial magistrate was sufficient to support the conviction.

In the alternative she submitted that the court could order a retrial under Section 354 (3) of the Criminal Procedure Code.

Her final prayer was that the appeal be dismissed/order for a retrial.

Appellant's rejoinder

In his rejoinder Mr. Kiminda opposed the idea of a retrial. He submitted that a retrial was an issue of justice that a retrial could only be ordered in a case where the court had misdirected itself on issues of law not occasioned by the complainant or prosecution witnesses. That there were only 2 issues of law in this case; identification and the appellant's alibi, that the prosecution could not be heard to invite the court to conduct a retrial to fill a lacuna in the case for the prosecution.

With regard to the medical evidence he submitted that the doctor did not find any semen on the child's genitalia.

Analysis and determination

Three issues stand out: -

i. Who committed the offence: The identification of the appellant?

ii. Was there defilement or sexual assault?

iii. The appellant's alibi

iv. Should there be a retrial?

On the issue of the identification- the record shows that this child had a horrible experience in the hands of a person whom this court can only describe as inhuman. The attack on the young child in such a violent manner pouring sand into her eyes, stepping on her cheeks, strangling her and inserting fingers into her private parts, does not fit the profile of the ordinary child defiler. This was an evil person, who even appears to have had something against the child or her family. The most frustrating thing is the total absolute lack of investigations by the police. NIL!

The investigating officer simply stated that upon the appellant being brought to the police station and the P3 indicating that the child had been defiled he 'formed the opinion that the accused had committed the offence and charged him'. What was the basis of this opinion? There is no explanation in his evidence at all.

There was no effort made to visit the scene of the offence. No effort made to find out how the appellant was identified by the mob as the person who had committed the heinous offence; or even to question the persons he was alleged to have been seen with- the Waithakas et al.

Let us look at the child's testimony on identification vis a vis that of PW2 and PW3. The child said when she got home she told her grandmother and her aunt what had happened to her. There is no mention of the identity of the attacker. That is on day one. On day two she also spoke. Again there is no identity of attacker. When she recorded her statement she did not give any of the descriptions given by the two witnesses. In fact, PW2 indicated that the child told the doctor who the assailant was. However, the P3 indicates that the child said she was attacked by an unknown person.

Her description of what happened and how it happened also creates a doubt as to whether those circumstances were conducive to a positive identification. It was fast and very violent. Here is a child walking uphill almost getting home. The person speaks to her from behind her then, suddenly grabs her from behind and does all those violent things to her, including throwing sand in her eyes and stepping on her face.

Without evidence that she had ever spoken to this person before, or interacted with him in some way it is not easy to come to the conclusion of a positive identification, and the chances of getting the wrong person are there.

There ought to have been an ID parade, both voice and physical.

Did the child know the assailant before? She gave no evidence of how she knew him before. She alleged to know the appellant physically but did not give the police any descriptions Including the statement on re-examination he used to pass by her home with other boys.

In the same breath she said she knew him before but that it was her mother who pointed him out to her. That she was told his name after his arrest, and at the same time that she knew his name all along and it was the police who never asked her. It is in **Maitanyi v R [1986] eKLR** that the court stated the importance of testing the evidence of identification.

> *There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made. If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognise the person, then a later identification or recognition must be suspect, unless explained. It is for the magistrate to inquire into these matters. Hence the evidence on the identity of the assailant was not conclusive.*

The trial magistrate drew the conclusion that the appellant had been identified without conducting any inquiry on the evidence.

On the second issue, I start with the medical evidence which was presented through the P3, the Post Rape Care form, and the discharge summary. The discharge summary contains a diagnosis of "sexual assault" however a perusal of the same shows that the patient was assaulted by an unknown person while leaving school. There is something about the physical injuries, the lacerations, a clear discharge but nothing specific about the sex assault related injuries except the clear referral to the 'GVU clinic.

This was the first port of call. It was expected that having had the child in the ward for five days, it would be clear what the doctors had observed. The discharge summary was vague on the sexual assault.

The Post Rape Care form and the P3 form showed that there was the broken hymen, small perennial tear, swollen face, red right eye, active bleeding from the external genitalia. The same form said that the hymen was "not intact" and she had a swollen mouth. The conclusion was that the child had sustained penetrative per vaginal injury.

These descriptions fit the description of the attack as described by the child.

The question is where PW2 and PW3 saw semen on the child's clothes. PW3 was certain that the child had been defiled not with fingers but penis The certainty with which each testified that the child was defiled and semen left on her clothes contradicts the doctor's observations, who noted a penetrative vaginal injury, and sexual assault. Their evidence on this issue appears to have been exaggerated and loses credibility. Those clothes were seen by the doctor who observed dust.

Then there is the appellant's alibi. It is now settled that while an alibi should be brought up at the earliest possible in the trial, the moment an accused raises it, it cannot just be wished away.

The prosecution still bears the responsibility to unsettle it.

In **Victor Mwendwa Mulinge Vs. Republic [2014] eKLR** the Court of Appeal stated

> *It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see also* ***Karanja V Republic [1983] KLR 501****.*

In addition, Section 309 of the Criminal Procedure Code provides for circumstances such as this one

> *If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.*

In this case the appellant gave evidence of where he was the whole day of 12 Th January 2015 His witness, completely corroborated his evidence and he presented what appeared to be a water tight defence. The trial magistrate did not consider the effect of the appellant's defence on the case for the prosecution. The prosecution cannot be heard to say that the appellant introduced his alibi too late. The issue is whether it is capable of belief, and whether tested against the evidence adduced, the accused could be telling the truth. The trial court did not test the appellant's alibi.

This coupled with the shaky evidence of identification, and the shaky evidence of arrest, and the absolute complete absence of any investigations creates a shaky ground for the case for the prosecution. The prosecution conceded that the case had contradictions and inconsistences however it is not entirely correct that these were introduced by the 2nd magistrate. Evidently, they were put there by prosecution witnesses in the first place.

On the question of Retrial

The prosecution asked for a retrial. This was vehemently opposed by the counsel for the appellant. And for good reason. The principles upon which a retrial can be ordered are settled. In **Laban Kimondo Karanja & 2 others v Republic [2006] eKLR** Justice Khamoni, in determining the question as to whether the appellants should go through a retrial traced these principles through case law. He cited among other cases **Fatehali Manji – V- The Republic (1966) E.A. 343** where the court had this to say;

> *"……in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where* it is *likely to cause an injustice to the accused person."*

Hence although the High Court is vested with the jurisdiction and discretion to order a retrial, that discretion must be exercised judiciously and within certain parameters. Each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it. This will be in a case when the original trial was illegal or defective. In this case the trial was neither illegal nor defective. All the requisite processes of a criminal charge were followed and the charge is founded on existing law, see **P H N v Respondent [2016] eKLR. It** will not be in a case where the blame is on the trial magistrate. The prosecution blamed the second magistrate who handled the case for mistakes which amounted to creating issues with the case for the prosecution. Again this cannot be a ground to order for a retrial. See **Salim Muhsin –vs- Salim Bin Mohamed and others (1) 17 E.A.C.A. 128**, **Merali and others –V – Republic (1971) E.A.221**. Neither will it be allowed to give the prosecution the chance to fill up the gaps in their case, or where there is insufficient evidence. This is the state of the present case. An order for retrial would simply mean the prosecution once again going over the case and filling up the gaps pointed out in this judgement. That would be prejudicial to the accused person and is likely to cause injustice to him. Evidently, this is not a case fit for a retrial.

One may query the emphasis on the rights of the accused person when it comes to a retrial and ask, what about the interests of justice with regard to the victim? The clear principle here is that of presumption of innocence until proven guilty for the accused person. It is a principle central to the criminal trial.

I find that though the child appears to have been molested, this is not the kind of case that is sent for a retrial- the problem is with the evidence that was presented before court especially with regard to the identity of the assailant and the failure to consider the appellant's alibi.

Conclusion

I have no doubt that the little girl herein suffered a horrid attack from a person who cannot be described as human. I am not certain that any action was taken to ensure her psychological and emotional health. But as is bound to happen, over and over again, we failed her. We failed her by not taking our time to catch the culprit. We failed her by not providing her with the psycho- social support she needed to gather herself together to be able to tell us what happened in a way that would assist us catch the culprit. We failed her, for being in a hurry to finish this case and deal with the next one. We failed her, as we will surely do again, for not putting in place the appropriate systems for dealing with these cases.

That person may yet be out there waiting to pounce again, on an innocent victim. The evidence as presented did not meet the threshold of 'beyond a reasonable doubt' to found a conviction against the appellant herein.

After considering the evidence in totality, the submissions by counsel and the authorities cited I find that the appeal succeeds. The conviction is quashed. The sentence is set aside.

Appellant is to be set at liberty unless otherwise legally held.

Dated, delivered and signed in open court at Nyeri this 11th day of April 2018

MUMBUA T. MATHEKA

JUDGE

In the presence of:-

Court Assistant: A Atelu

Appellant present

Ms. Jebet for state

Ms. Mwangi for Mr. Kiminda for the appellant