REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NUMBER 177 OF 2014

(From original conviction and sentence in Machakos Chief Magistrate's Court Criminal Case No. 1796 of 2012, **L Simiyu, Ag. SRM** on 4th July, 2014)

M M N……..…...……APPELLANT

VERSUS

REPUBLIC……....……RESPONDENT

JUDGEMENT

Introduction

1. The appellant, **M M N**, was charged in the Chief Magistrate's Court at Machakos in Criminal Case No 1796 of 2012 with the offence of defilement contrary to section 8(1)(3) as read with section 8 of the ***Sexual Offences Act. No. 3 of 2006***. The particulars were that the appellant on the 28th day of December, 2012 at [particulars withheld] Estate, Township Location, in Machakos District within Eastern Province, intentionally and unlawfully caused his penis to penetrate the organ namely vagina of E S, a child aged 12 years. Alternatively, the appellant was charged with the offence of indecent act with a child contrary to section 11(1) of the ***Sexual Offences Act. No. 3 of 2006,*** the particulars being that on the 28th day of December, 2012 at [particular withheld] Estate, Township Location, in Machakos District within Eastern Province, intentionally and unlawfully touched the vagina of ES, a child aged 12 years with his penis.

2. After hearing the Learned Trial Magistrate found the appellant guilty of the main count of defilement of a minor aged 12 years, convicted him accordingly and sentenced him to serve 30 years imprisonment.

Grounds of Appeal

3. Not being satisfied with the conviction and sentence the appellant has lodged the instant appeal based on the following grounds:

> **1. That, the evidence relied upon by the Learned Trial Magistrate as a basis of the appellant's conviction was not sufficiently trustworthy to have been acted upon.**
>
> **2. That the entire case for the prosecution was not proved beyond reasonable doubt as required in law.**
>
> **3. That the appellant's defence statement was not properly considered in light of section 169(1) of the CPC.**
>
> **4. That the Learned Trial Magistrate made an error in law and misdirected himself by shifting the burden of proof upon the appellant whereas in law the same never shifts.**
>
> **5. That the medical evidence was obtained in breach of Article 50(4) of the Constitution.**

The Appellant's Submissions

4. It was the appellant's case based on the case of **Joseph Musyoki HCCRAPP. No. 26 of 2007** that by finding that the appellant had not explained why he was in the company of the minor at the material time or why he would buy her clothes and further why the complainant and hr siblings would fabricate a case against him, the Learned Trial Magistrate shifted the burden of proof upon him.

5. As regards non-compliance with section 169(1) of the ***Criminal Procedure Code***, the appellant relied on **Kimotho Kiarie Criminal Appeal No. 93 of 1983**, **Joseph Njaramba Karura vs. R (1982-88) KAR 1165**, **Eliud KAMAU Njuguna vs. Republic Cr. App. No. 82 of 2010**, **Sebyala vs. Uganda (1968) EA 2006** and **Ramadhani Ahmed vs. Rep Vol. 22 (1955) EACA 395**.

6. It was the appellant's contention that had the Learned Trial Magistrate keenly considered his sworn statement, he could have found that the prosecution had not proved its case hence the Learned Trial Magistrate misapprehended the evidence.

7. According to the appellant, the Learned Trial Magistrate erred by relying on the medical evidence of PW3 which was unsatisfactory and which was obtained in breach of Article 50(4) of the Constitution in that PW3 was not present during the examination of the complainant but merely filed in the P3 form and signed the same.

8. It was the appellant's case that he was not allowed to cross-examine PW3 hence he was unjustly treated. In this respect the appellant relied on **Woolmingtin vs. The DPP (1935) AC**.

The Respondent's Submissions

9. On behalf of the Respondent, it was submitted that the case against the appellant was proved to the required standards since the complainant was able to positively identify the appellant as the person who defiled her as the offence occurred in broad daylight and the appellant was her cousin.

10. It was he Respondent's position that the Learned Trial Magistrate complied with section 169 of the ***Criminal Procedure Code*** as the judgement was properly written in the language of the Court, which Court discredited the appellant's defence. It was the Respondent's submission that the Court duly analysed the evidence led by the prosecution and the defence and was satisfied that the same led to irresistible conclusion that the appellant committed the offence. According to the Respondent, the decision was well reasoned and supported by the evidence and ought to be upheld.

The Evidence for the prosecution Before the Trial Court

11. According to PW1, **A N S**, the complainant herein, **E S**, was her little sister while the appellant was a distant cousin. On 25th December, 2012 when she returned from work at 7.00pm she did not find the complainant in the hose where she and left her taking care of PW1's baby. PW1 instead found the baby with one **M,** PW1's house mate, who informed her that the complainant had been sent by the appellant to buy for him chips and cigarettes. After searching for both the appellant and the complainant, PW1 stated that they eventually found them wet with mud though it had not rained on that day. The complainant at first however declined to disclose what had transpired but later revealed that the appellant had cheated her that he was going to give her clothes but ended up defiling her near Baptist Church. The complainant further disclosed that the appellant had pretended to send her to buy for him chips and cigarettes but ended up luring her out of the house and defiling her. Thereafter the appellant was taken to Machakos Police Station where the complainant was issued with a P3 form. Accordingly, a blood stained jeans trouser together with a kanga and a pant covered with mud was produced.

12. According to PW1, the complainant was aged 12 years at that time and was in class 5 while the appellant was older than PW1 who at the time of her testimony was aged 19 years. PW1 however knew the appellant since her youth. In support of her testimony as regards the complainant's age pw1 referred to the age assessment report. Pw1 however testified that she had no grudge with the appellant.

13. In cross-examination by the appellant, PW1 explained that she met the appellant and the complainant at about 8.00pm and that she assaulted the appellant when the appellant declined to speak. According to her, when the appellant was apprehended they were 5 people and that the appellant's friend, one **Kajay**, was the one who directed them to where the appellant was. She explained that the appellant's grandmother was a sister to her grandmother.

14. When recalled for further cross-examination by the appellant PW1 explained that there were other tenants in the compound where she was staying and that the appellant convinced the complainant to go with him. She explained that Baptist School was 3 km away from her house.

15. The witness was further recalled presumably on the order of the High Court. At that hearing she repeated her earlier testimony and stated that there were several housing units on the plot though the plot had no fence. According to her a criminal case of this nature cannot be negotiated being a sexual offence. She agreed that she used to stay with the said **M** in the same house while her brother, **M** had his own house. While admitting that the complainant was under hr care and respected her, she denied that she instructed the complainant to complain against the appellant. She testified that the complaint informed her about what transpired and showed her the scene.

16. After *voire dire*, the complainant, **ES**, was sworn and testified as PW2. According to her, she was living with PW1 and a brother known as **D M** though the brother was not staying in the same house as PW1 but they were within the same compound. They were also staying with PW1's baby, **M S**. The complainant disclosed that she knew the appellant as **M N** and not **Mutuku Musyoki** and that he was their cousin.

17. According to PW2, on 28th February, 2012 at about 6.00pm she was in the house while PW1 was at work when the appellant went and found her with the said baby. The appellant then gave her Kshs 100.00 and sent her to go and buy for him chips and cigarettes. At that time the baby was asleep. However when the complainant returned, the appellant was not in the house but was instead standing next to a store building. When the complainant took to him the said chips and cigarettes together with the balance of the money, the appellant informed her that he had clothes in his house at Athi Lodge that could fit the complainant. However, they found the house locked and the appellant informed her that the clothes were I another woman's house. When the complainant declined to follow him, the appellant pulled the complainant into Baptist School near a mango tree, spread the complainant's kanga on the ground, pulled down the complainant's trouser and removed one leg, removed his penis and inserted it inside her vagina. This area according to her was muddy and one of her legs was covered in mud. The time according to the complainant was 8.00pm.

18. After the ordeal, the appellant asked her to accompany him to the appellant's house so that she could clean herself. However they met PW1 and her brother **M**, **F M** and other people the complainant did not know. According to her, she was covered in mud, wore jeans and inner pant and the kanga was blood stained but without mud which items she identified. The complaint then explained to her said brother

what had transpired in the presence of the appellant who was assaulted by the public and was taken to Machakos Police Station. The complainant was then taken to Machakos Level 5 Hospital by the police and later taken home for the change of clothes which the police took. She identified the appellant as the person who had sex with her.

19. According to her testimony, she felt pain when the appellant inserted his penis into her vagina. She confirmed that at the time of the incident she was aged 12 years.

20. In cross examination, PW2 stated that she went to the Hospital three times. Apart from reiterating what she had said, she disclosed that she had seen the appellant when he was accompanied by his wife when they came from Kitengela. She explained that firstly, the appellant held her by hand but later pulled her by force to Baptist School. According to her she did not scream as she was not aware of the appellant's intention. She testified that the appellant gave her the chips to eat while he smoked the cigarettes. She insisted that the appellant had sex with her.

21. In re-examination, she stated that the appellant informed her that he was her cousin and she believed that he was a good relative hence the reason she followed him to his house.

22. Upon being recalled presumably based on an order from the High Court, apart from repeating her earlier testimony, PW2 testified that on their way with the appellant, they passed one **M** who was a prostitute. However at the scene there were no people. She however denied any knowledge of who pays rent for the said person and denied that the said person urged PW1 to frame the appellant with the case. According to her, her brother hit her because he was not saying the truth. She insisted that her evidence was truthful that the appellant had sex with her and that she was not tod to lie to the Court.

23. In further re-examination, pw2 confirmed that the appellant was a distant relative that she trusted him because he used to visit them hence she was convinced that the appellant wanted to give her clothes which could nolonger fit his wife. According to her, her brother slapped her because she could not explain how her clothes came to be soiled and why she was with the appellant. It was her evidence that she feared disclosing that the appellant had had sex with her since the act was forbidden among young girls.

Evidence for the Defence

24. The appellant gave sworn testimony but did not call any witness. According to him, on the day in question, he went to Machakos and met PW1 and they went to her house where PW1 asked him to buy clothes for her sister. After he left he saw many ridders at Athi Lodge who apprehended him and roughed him up. He also sawPW1, PW3 and PW2 while PW3 was questioning PW2. He was then taken to Machakos Police Station where blood sample was taken from him but no results were availed to him concerning the same.

25. In cross-examination, the appellant testified that when he entered PW1's house, he found the complainant therein and was informed by PW1 to buy her clothes since it was Christmas and she was orphaned. In his evidence, on 27th December, 2013, he bought the complainant a shirt, jacket, trouser and shoes, took the same to Athi Lodge. On 28th PW1 told him to take the same to her and he went to Athi Lodge to pick them up while leaving the complainant at PW1's house. It is then that he was the ridders alluded to and saw the complainant wearing the said clothes soiled with mud. Initially, the complainant was wearing different clothes at her house.

26. It was his evidence that the complainant was not related to him and that he did not buy the clothes in exchange for sexual favours. He however disclosed that PW1 was his friend and was a sister of the complaint. According to the appellant he used to buy chips from PW1. H he however admitted that he knew the complainant who similarly knew him prior to the case. Though on that day it had not rained, he stated that it was muddy. He however disclosed that on 28th he was the complainant.

The Judgement

27. In his judgement, the Learned Trial Magistrate found that the age of the complainant was not disputed and from the evidence concluded that she was aged 12 years at the time of the offence. It was further the Learned Trial Magistrate's finding that the complainant was defiled and that there was evidence of penetration as her hymen was not intact at the time of examination by the doctor. It was therefore the Court's finding that the circumstances pointed to the guilt of the appellant.

Analysis and re-evaluation

28. This being a first appeal, this Court is, as a matter of law, enjoined to analyse and re-evaluate afresh all the evidence adduced before the lower court and to drawn own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** and **Kiilu & Another vs. Republic [2005]1 KLR 174.**

29. In this case, the prosecution evidence was that complainant was left in the house by PW1 to look after PW1's baby when the appellant, a cousin, went to the house, asked the complainant to go buy for him chips and cigarettes. When the complainant returned, the appellant lured the complainant away from the house with the promise that the appellant was going to give her clothes which the appellant's wife had outgrown. However when they reached the appellant's residence they found it locked. The appellant then suggested that they go to another woman's house but upon refusal by the complainant, the appellant forcefully dragged the complainant to Baptist School where the appellant spread the kanga she had on the ground, removed her trousers and defiled her.

30. After the ordeal, the appellant proposed that the complainant should go to his house to clean herself but as luck would have it they met with the PW1 and PW3 who upon seeing the state of the complainant slapped them at which point the complainant opened up and disclosed what had transpired.

31. On the part of the appellant, he testified that on the material day he met PW1 who took him to her house and requested that the appellant buys clothes to the complainant, an orphan, since it was Christmas season. According to the appellant he eventually purchased the said clothes which he took to his house and it was when he went to pick them up that he was confronted by a mob who roughed him up and beat him up before he was arrested.

32. From the appellant's evidence, he was not related to the complainant. While the prosecution's evidence was largely consistent despite the appellant recalling PW1 for further cross-examination twice over and the complainant being recalled once. Despite all these the evidence of PW1 and the complainant was unshaken. In his evidence, the appellant said that he had returned to his house to get the clothes he had bought. At the same time he testified that the complaint went to his house dressed in the same clothes that he had bought which clothes were muddy. While the prosecution was coherent and consistent, the appellant's case was not. This Court appreciates the old hat principle of law to the effect that the burden of proof in criminal matters lies with the prosecution. This Principle is well captured in the time honoured English case of **Woolmington vs. DPP (1935) A. C 462** where the court stated:-

> **"Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt, subject [to the qualification involving the defence of insanity and to any statutory exception].If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."**

33. However the Court of Appeal dealt with what amounts to "reasonable doubt" in **Moses Nato Raphael vs. Republic [2015] eKLR** where it expressed itself as follows:

> **"What then amounts to "reasonable doubt"? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-**
>
> > **'That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.'"**

34. In other words proof beyond reasonable doubt is not the same thing as proof beyond a scintilla of doubt. What the Court is required to determine is whether the case raises reasonable doubt that the offence may not have been committed at all or not have been committed by the accused. If that is the case then the benefit of that doubt must inure to the accused.

35. As regards the ingredients of the offence of defilement in **Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013** it was held that:

> **"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."**

36. In this case there was no doubt that the complainant was aged 12 years at the time of the incident in question. This was supported by both oral and documentary evidence which was in form of the age assessment report. With respect to penetration, the evidence was clear that there was penetration which is defined in section 2 of the ***Sexual Offences Act*** as:

> ***"the partial or complete insertion of the genital organs of a person into the genital organs of another person;"***

37. In this case, the complainant testified that the appellant had inserted his penis into her vagina as a result of which she underwent pain. On her clothing were blood stains. Apart from the complainant's oral evidence the medical evidence was clear that the complainant's hymen was not intact at the time of the examination, a clear indication of penetration. There cannot therefore be any doubt that there was penetration.

38. As regards the issue whether or not it was the appellant who had sex with the complainant, it was the complainant's case that the appellant was a person well known to her. That the complainant knew the appellant was also conceded by the appellant himself. The complainant was taken from her house at 6.oopm. The appellant admitted that he had seen the complainant on the day of the incident. In **Okeno vs. R, [1972] EA 32** the Court expressed itself as follows:

> **"I have considered the evidence as a whole, and found no fault with the manner in which the learned magistrate made her assessment of the same. The trial court had entertained no doubts at all as to the truthfulness of the complainant as a witness and her demeanour had commended itself as a demeanor of candour. The complainant did not go missing from the view of her parents for nothing, she had been abducted and detained by 2nd appellant who held her for some 16 days; during that period the appellants herein committed unrelenting defilement upon her particularly so, 2nd appellant; after the most severe sexual harm had been occasioned to the complainant, 2nd appellant dumped her near a clinic; the complainant very well saw her molesters, these are men she knew, and she gave their names to the police."**

39. I have considered the evidence of PW2 and just like the Learned Trial Magistrate I have no reason to disbelieve her as her evidence was never shaken throughout her testimony and in the cross examination.

40. The mere fact that the doctor who filled in the P3 form was not the one who treated the complainant cannot be a basis for finding that her evidence cannot be relied upon. In my view the doctor was clearly competent to fill in the P3 form based on the medical notes that were placed at her disposal.

41. As regards the consideration of the appellant's defence I do not agree that the same was not considered. In any case I have, as I am legally bound to do, reconsidered the appellant's defence and I have come to the conclusion that it did not dislodge the prosecution case which was consistent, tight and convincing. I am also not satisfied that the Learned Trial Magistrate shifted the burden of proof upon the appellant as contended by the appellant.

42. In the instant case I find that the ingredients of the offence with which the appellant was convicted were proved to the required standards, proof beyond reasonable doubt, which is not the same thing as proof beyond a scintilla of doubt. In my view where the prosecution's evidence is consistent and water tight, it requires a strong evidence to dislodge the same. This is not to say that the burden of proof shifts. What it means is that where the prosecution evidence taken on its own is strong enough to give rise to a conviction, unless some other evidence emanates from the defence which would have the effect of dislodging the prosecution case, there would be no reason to interfere with the conviction. In those circumstances it is then said the evidence of the prosecution proves the case beyond reasonable doubt.

43. In the premises this appeal fails and is dismissed.

44. Right of appeal 14 days.

45. Judgement accordingly

Judgement read, signed and delivered in open court at Machakos this 26th day of June 2018.

G V ODUNGA

JUDGE

In the presence of:

The Appellant in Person

Miss Mogoi for the Respondent

CA Geoffrey