REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 136 OF 2017

JOSEPH MBUGUA KARIRO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in criminal case number 8 of 2015 in the Principal Magistrate's Court at Githunguri Dated 24th of May 2017)

JUDGMENT

1. The appellant **Joseph Mbugua Kariro** was on the 27th July 2015 charged with the offence of defilement contrary to **Section 8(3) of the Sexual Offences Act No. 3 of 2006**, with an alternative charge of committing an **Indecent Act** with a child contrary to **Section 11(1)** of the said Act. After a full trial, the court found him guilty of the main charge of defilement, convicted and sentenced to serve twenty(20) years imprisonment on the 24th May 2017.

2. This conviction and sentence is the subject of this Appeal. Numerous grounds of appeal have been stated but the Advocate for the appellant condensed them to one, **the sufficiency adequacy and quality of evidence** adduced before the trial court, and has supported the said ground in written submissions and highlights.

3. The principles upon which an appellate court ought to consider are well stated in the case **Isaac Ng'ang'a** alias **Peter Ng'ang'a Kihiga -vs- Republic – Criminal Appeal No. 272 of 2005,** and quoted in **Republic -vs- George Onyango Anyang & Dennis Oduol Ongonjo Criminal Appeal No. 53 of 2016 – (2016) eKLR** thus

> ***"--- a court has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate could would give allowance of the same----"***

4. Further, in the earlier case **Okeno -vs- Republic (1972) EA 32, the East African Court of Appeal** rendered:

> ***"It is not the function of a first appellate court merely to scrutinise the evidence to see if there was some evidence to support the lower courts finding and the conclusion, it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported---"***

5. Upon the above principles I have considered and re-analysed the prosecution evidence against the grounds of appeal, said to have been manifestly insufficient, inconsistent and having glaring gaps incapable of sustaining a conviction.

6. **PW1's** Evidence was uncollaborated. The claimant, 14 years old girl evidence was that on the 22nd July 2015 between 4.00p.m.-5.00p.m, she met the appellant along a public road at a construction building to house a children's home where there were no other people who pulled her to the building undressed her and covered her mouth and raped her and after the act he left. It was her evidence that she did not tell anyone but went home, did her homework and slept. Her recorded evidence is that the next day she went to school and the head teacher called her and lead her to the building where she stated:

> ***"--- I was told to choose the person who raped me---I choose two people --- I was defiled on 22nd and 23rd --- they defiled me on different dates---"***

On cross examination, she testified that it was her father **(PW3)** who reported the incident at school and that the teacher called her on 24th.

7. On cross examination, the claimant's testimony was that on 22nd July 2015, the appellant was with another person, but on 23rd he was alone, that it was her grandmother **PW2** who saw her with the appellant after which she ran away together with the appellant.

8. **PW2** the claimant's grandmother who rented a house to the appellant testified that on the **23rd July 2015** about 7.00p.m. - 8.00p.m., she saw the claimant with the appellant near the building under construction but both ran away towards the construction site, then the following morning she reported the incident to her father. She testified that:

> ***"I know why they ran away --- he wanted to sleep with the child--- I went to the construction site. I did not go inside the house--- they left via another door, so I could not call the neighbours."***

9. **PW3** was the father of the claimant. He only reported to the school what he was told by **PW2**, that:

> ***"M was found at the site with an old man where there is construction--- I was not told when the incident happened--- she came back about 6.00p.m. - 6.30p.m."***

This witness testified that on the **24th July 2015,** the complainant came home at 5.30p.m. He did not say when she came home on the 22nd and 23rd July 2015.

10. I have looked at the medical report prepared by **PW7** – a clinical officer at Githunguri Health Centre.

It was his testimony that the

> ***"Complainant said she had sex regularly. Treated on 24th July 2015 at 4.00p.m. Genitalia – no injuries seen. No hymen since she had many intercourse episodes. No discharge around genitalia. Male accused not availed --- approximate age of injury was one week Remarks–young girl who had regularly penetrative sex. Signed on 27th July 2015."***

11. Cross examined by the appellant, the clinical officer had nothing to confirm whether the appellant was the one who had sex with the claimant as she had sex with two men. That is the evidence upon which the trial Magistrate based his conviction.

12. The conviction is grounded on **circumstantial evidence** as none of the prosecution witnesses saw the appellant commit the act. The appellant was well known to the claimant as well as to the witnesses as they all lived at the same neigbourhood.

13. The claimant and the appellant may have been seen together near the construction site by her grandmother(**PW2**) on the 23rd July 2015 about 7.00p.m. - 8.00p.m. The father of the claimant (**PW3**) in his testimony testified that on the same date, 23rd July 2015, the claimant came home about 6.00p.m. - 6.30p.m., yet the grandmother stated that she saw them between 7.00p.m.-8.00p.m, not in the act but near the construction site and deduced that the appellant wanted to sleep with the claimant.

14. By and large the evidence adduced in court is **circumstantial evidence** without corroboration.

For conviction to be based purely on such evidence, the court must warn itself of the credibility of the evidence more so where there are contradictions and inconsistencies.

15. The Court of Appeal laid down the test for circumstantial evidence to be admitted in the case **Abanga Alias Onyango -vs- Republic – Cr. Appeal No. 32/1990 (UR)** that:

> ***"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests that***:
>
> ***(i) the circumstances from an inference of guilt is sought to be drawn, must be cogent and firmly established***
>
> ***(ii) The circumstances taken cumulatively, should from a chain so complete that there is no escape from the conclusion that with all human probability the crime was committed by the accused and no other."***

16. The court must also draw inference that no other co-existing circumstances would weaken or destroy the inference of guilt See **Dhalay Singh -vs- R- Cr App. No.10 of 1997.** failing which the accused is entitled to an acquittal. The claimant's evidence against the appellant was by and large uncorroborated. **Proviso to Section 124 of the Evidence Act, Cap 80 Laws of Kenya** however exempts offences of a sexual nature from the necessity of corroboration when the only evidence is that of the alleged victim of the offence, but only if the court is satisfied that the alleged victim is telling the truth.

It is also trite that a minor has no legal capacity to give consent to any sexual activity even when it appears that the minor willingly involved herself to a sexual encounter.

17. From the analysis of the medical evidence it is evident that the claimant had been exposed to and had been having penetrative sexual intercourse with not only one man but many, over a period of time as confirmed by a broken hymen and absence of bruises or injuries on the genitalia and her statement to the doctor who examined her. If the only sexual encounters were on the 22nd and 23rd, and with the **appellant only on the 22nd,** evidence of injuries, bruises and tenderness on her genitalia would have been evident.

18. The clinical officer contradicted himself when he stated that there were no injuries on the claimant's genitalia and at the same time proceeded to conclude that the approximate age of injury was one week. I do not believe that the minor had any forced penetrative sex with the appellant two days before the examination as signs of injury or tenderness on the young girl's genitalia would have been evident and noted.

19. I agree with the clinical officer that the claimant had many sexual episodes prior to the 22nd July 2015 and that the only reason she pointed to the appellant was because **PW2**, her grandmother saw the two together on the 22nd July 2015 near the construction site but seeing the two together, in my considered view, is not evidence that they had, or were planning, or they thereafter engaged in sexual intercourse. The grandmother (**PW2**) only expressed her opinion that she knew they were planning to sleep together, but no evidence was adduced that they indeed engaged in sexual intercourse.

20. Circumstantial evidence to sustain a conviction must be clear, cogent and without doubt and should point at the guilt of an accused person. The chain of events in my view **do not point** to an indisputable inference and conclusion that the appellant defiled the claimant.

I am afraid numerous inferences exist in this appeal that go to weaken and completely destroy the inference of guilt on the appellant.

21. While the trial magistrate entered a conviction, there is evidence that he failed to analyse the numerous contradictions, more so on the dates and time the alleged defilement took place.

The claimant's evidence differs with that of the grandmother (**PW2)** and that of her father **(PW3)**. The trial Magistrate shifted the burden of proof to the appellant yet such proof always lies with the prosecution. **DMW – VS- Republic (2015) e KLR.**

22. An accused person does not have to establish that his *alibi* is true, but only to create reasonable doubt on the prosecutions evidence, which would then give the appellant the benefit of doubt – **HCRA No. 46/2011 Solomon M'rukana -vs- Republic – 2014 e KLR.**

23. Having carefully re-examined the entire evidence I find no cogent firm and credible evidence to enable me to come to a conclusion that with all human probability the alleged crime was committed by the appellant in view of the undoubted many sexual encounters the claimant had been involved in, which in my considered opinion destroyed all inference of quilt of the appellant.

24. I proceed to quash the conviction and set aside the sentence.

The appellant is set free unless otherwise lawfully held.

Dated and signed at Nakuru this 26th Day of July 2018.

J.N. MULWA

JUDGE

Delivered at Kiambu this 2nd Day of. August..2018.

J. NGUGI(PROF.)

JUDGE