IN THE HIGH COURT OF KENYA AT KAKAMEGA

(CORAM: CHERERE -J)

CRIMINAL APPEAL NUMBER 178 OF 2010

J A.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Criminal Case Number SO 356 OF 2010 in the Senior Principlal* Magistrate's Court at *Butere delivered by Hon. G.O.Oyugi (RM) on 26th August, 2010)

JUDGMENT

Background

1. **J A**, the appellant herein has filed this appeal againstconviction and a life imprisonment sentence on a charge of defilement contrary to section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006 allegedly committed against **R.M** aged 1 ½ years on 15th May, 2010.

The prosecution's case

3. The prosecution called 8 witnesses in support of the charge.**PW1**, **M A,** the complainant's mother stated that on the material date, the appellant who is her brother in law went to visit her home. That about 6.00 pm, she went to the poshomill and left the appellant in the house and asked one M W to keep watch of the complainant who was sleeping. She stated that she returned home about 7.30 pm, found complainant who was with her mother in law, crying and bleeding from her private parts and was informed that she had been defiled by the appellant. She stated that she took complainant to hospital where she was treated as an inpatient and the doctor confirmed that she had been defiled. **PW2 M W** recalled that on the material day, PW1 went to the poshomill and asked him to keep watch of the complainant who was sleeping. It was his evidence that later, the appellant called him and told him that complainant was crying and when he went to check found her bleeding from her private parts. He stated that he took the child to his father who said that complainant had been defiled. **PW3 A O** stated that the complainant was his son's daughter while the appellant was the son of his wife's sister. He recalled that he saw the appellant at PW1's home which is 20 metres from his.It was his evidence that he heard the appellant call PW2 to go pick the complainant and that when PW2 took the child to the witness; he noticed that she as bleeding from her private parts and suspected that the appellant had defiled her. He stated that he identified the appellant to the chief, PW4 Joseph Shikwayi the following day and appellant was apprehended. **PW5 Terry Wekesa**, a clinical officer examined the appellant on 15.5.10 and found that he was over 18 years. He had no injury. She produced the appellant's treatment notes and age assessment report as PEXH. 2 (a) and (b). **PW6 Emily Walema**, a clinical officer examined the appellant on 15.5.10 and due to the seriousness of the injuries on her private parts referred her to Kakamega Provincial Hospital. **PW7 PC Invilate Lumeti** accompanied complainant to Kakamega Provincial Hospital. She produced a blood stained blanket recovered from scene of crime, complainant's clinic card and appellant's blood stained blue as PEXH. 1, 3 and 6 respectively. **PW7 Dr. Jeremiah Kinuthia Ngugi** examined complainant on 16.5.10 and found her with vaginal tears which were bleeding. He produced complainant's P3 form and treatment notes (PEXH. 4 and 5 respectively) that confirm that complainant was defiled.

4. When the appellant was called upon to tender his defence, the appellant stated that he had nothing to say.

5. *In a judgmentdated 26.8.10*, appellant was convicted and sentenced to life imprisonment.

The Appeal

6. The conviction and sentence provoked this appeal. Inhis undated petition of appeal, the appellant raised 6 grounds of appeal which I have summarized into 3 grounds as follows: -

1. **That his constitutional rights under Article 50(2)(h) and (j) were violated**

2. That there was no eye witness to the offence

3. That his alibi defence was not considered

7. When the appeal came up for hearing on 7.9.18, the appellant stated that he was wholly relying on the grounds of appeal and on the written submissions filed 6.9.18.

8. Mr. Juma, learned State Counsel opposed the appeal and urged the court to fully refer to the evidence on record.

Analysis and Determination

9. This being a first Appeal, this Court has a duty to evaluate the evidence, analyse it afresh and draw its own conclusion, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses testify as did the trial Court, and give due allowance for that *(see **Okeno v Republic [1972] EA 32) and Isaac Ng'ang'aKahiga v Republic [2006] eKLR**).*

10. I have considered the appeal in the light of the evidence on record, the grounds of appeal and written submission on record. In dealing with this appeal, I will address the 3 grounds summarized above as follows:-

Violation of Article 50(2) (h) and (j)

11. Article 50 of the Constitution states: -

(2) Every accused person has the right to a fair trial,which includes the right—

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence

12. The appellant was never availed counsel by the State throughout the proceedings. Article 50 (2) (h) provides that an advocate ought to be assigned at State expense if substantial injustice would otherwise result. This issue first came up for interpretation before the Court of Appeal in the case of ***David Njoroge Macharia v Republic [2011] eKLR.*** The Court after reviewing the past and current law stated that as follows:-

"Article 50 of the Constitution sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence...We are of the considered view that in addition to situations where "substantial injustice would otherwise result", persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense."

13. The Court of Appeal was of the opinion that where the accused faced a capital offence, then the State ought to consider providing legal representation. In other instances, it would have to be through a case by case examination, such as where there are complex issues of law or fact, where the accused is unable to conduct his own defence, or where public interest requires that representation be provided.

14. In my view, a case such as this one where the appellant was facing a life sentence is a serious case, and I would indeed place it at the same level as a case in which the penalty is loss of life, so that ideally, legal representation ought to be provided at State expense if the accused cannot afford counsel.

15. However, the provisions of Article 50, part of which relate to the right to be provided with legal representation at State expense, are yet to be fully enforceable. This was indeed the basis of the decision in the case of ***John Swaka V DPP & 2 Others, Nairobi High Court, Constitutional Petition No. 318 OF 2011, [2013] eKLR***. I am therefore not convinced that there is any violation of the Constitutional rights of the appellant in not having been accorded legal representation at State expense given the above reasons.

16. Regarding supply of the prosecution evidence in advance, it is my considered view that this issue would have been better addressed by the trial court before which the investigating officer would have explained whether or not the evidence had been supplied.

There was no eye witness to the offence

17. Section **143** of the Evidence Actprovides as follows:-

"No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact"

18. There is no doubt that the complainant who is a 1 ½ year old could not testify and the court had to rely on circumstantial evidence linking

the appellant to the offence.

19. As we know from ***Republic –vs- Taylor Weaver and Donovan (1928) 21 Cr. App. R. 20***

> ***"Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence, to say, it is circumstantial."***

20. In ***SAWE –V- REP[2003] KLR 364*** the Court of Appeal held:

> ***"In order to justify, on circumstantial evidence, the inference of guilt, the in culpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused".***

21. In ***Abanga alias Onyango v Republic CA CR. A NO. 32 of 1990 (UR)***, the Court of Appeal set out the principles which should be applied in order to test circumstantial evidence as follows:

> ***It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:***
>
> ***1. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,***
>
> ***2. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused***
>
> ***3. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.***

22. In order to establish the appellant's culpability, the prosecution led evidence that PW1 left the appellant and the complainant in her house on the material date. PW2 told court that when the appellant called her to PW1's house to pick the complainant who was crying, he noticed that the child was bleeding from her private parts (vagina). Both PW1 and PW2 squarely placed the appellant at the scene of crime. Their evidence was not challenged since the appellant gave no evidence. Evidence that complainant was indeed defiled was corroborated by **PW7** whoexamined complainant on 16.5.10, which was a day after the alleged defilement and he found her with vaginal tears which were bleeding as a result of which he concluded that complainant was defiled.

23. From the totality of the evidence on record, I find that the circumstances in this case, taken cumulatively, form a chain so complete that there is no escape from the conclusion that within all human probability that the appellant was person that defiled the complainant.

Was the appellant's alibi defence considered

24. As observed hereinabove, the appellant did not tender any evidence. There was no evidence, alibi or otherwise for the trial court to consider.

Determination

24. Having considered this appeal, I am satisfied that the appellant was convicted on sound evidence. The upshot of this is that the appeal is dismissed and the appellant'sconviction and sentenceare upheld. It is so ordered.

DATED THIS 19TH DAY OF SEPTEMBER 2018

T. W. CHERERE

JUDGE

DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 26TH DAY OF SEPTEMBER 2018

WILLIAM M.MUSYOKA

JUDGE

In the presence of-

Court Assistant - Eric/Polycarp

Appellant -Present

For Respondent - Mr Juma