REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO.126 OF 2016

KAZUNGU KATANA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the conviction and sentence in criminal case No. 1330 of 2012

in the Chief Magistrates Court by Hon. I Ruguru (SRM) sitting

in Mombasa Law Courts on 20.12.2013)

JUDGMENT

1. The Appellant was charged, tried, convicted and sentenced to serve a life imprisonment for the offence of defilement of a child contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act, No 3 of 2006 in the main count.

The particulars were that;

> **"On the 15th day of March, 2012 at [Particulars withheld] area in Bamburi Division in Kisauni District within Coast Province, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of MK, a girl aged seven years".**

2. The Appellant had also been charged with an alternative charge of indecent act with a child contrary to section 11 (1) of the Sexual offences Act, No 3 of 2006.He was not convicted for this.

3. The appellant was aggrieved by the judgment, conviction and sentence of the trial court and preferred this appeal citing four (4) grounds, which he later amended as follows;

(a) That the learned trial magistrate erred in law and fact in convicting me (the appellant) without considering that the AGE of the complainant was not ascertained beyond reasonable doubt by contravening section 8 (2) of the Sexual Offences Act.

(b)That the learned trial magistrate erred in law and fact on convicting the appellant without considering that the burden of proof in the present case was not established beyond reasonable doubt as the P3 form and the evidence of Pw3 (clinical officer) which would have formed an integral part of proving their case had no substantial evidence to warrant the conviction of the appellant contrary to section 36 of the Sexual Offences Act and sections 107 and 109 of the Evidence Act.

(c)That, the learned trial magistrate erred in law and in fact in convicting me (the appellant) while relying on the prosecution evidence that had some contradictions and variance's which did not reconcile with evidence in the charge sheet as was adduced in the court of law contrary to section 153 as read with section 154 of the CPC.

(d) THAT the learned trial magistrate erred in law and in fact in convicting me the appellant without considering that the credible witnesses who were mentioned in the evidence were never compelled to testify to clear the doubt upon the prosecution case contrary to section 144 as read with 150 of the CPC.

(e) THAT the learned trial magistrate erred in law and in fact in convicting me the appellant without giving due weight to the alibi defence advanced by the appellant which would have vindicated him contrary to section 212 as read with section 235 of the CPC.

4. The appeal proceeded for hearing on 24.10.2016 whereby he appellant opted to rely on his written submissions which he presented to court on 22.8.2016, while M/s Mutua, the prosecution counsel made oral submissions, opposing the appeal.

5. In his submissions, the appellant stated that contrary to the requirement that the age of a victim must be proved as an ingredient of the offence of defilement, the prosecution failed to do this beyond reasonable doubt. He pointed out that the particulars of the charge put the complainant's age at seven (7) years while in her evidence she said she was 8 years. Pw4 said he did not know and Pw5 said that when she was assessed at the Coast General Hospital, she was found to be 10 years old. In her judgment, the trial magistrate put the complainant's age at 8 years .He opined that because of these variances, the exact age of the complainant was not proved and therefore there was no legal basis for which the life sentence that was imposed upon him.

6. The appellant submitted that there were inconsistencies, evasive contradictions and variances in the evidence of the prosecution's witnesses that failed to reconcile with the offence as charged so as to warrant the conviction and sentence he received. The appellant also submitted that there were people who were mentioned by the prosecution's witnesses and would have cleared some doubts in their evidence but they were not called.

7. Further, the appellant submitted that he raised an alibi defence which was adequate to vindicate him.

8. M/s Mutua, counsel for the state opposed the appeal and contended that the prosecution proved the victim's age by producing an age assessment report (Exhibit P1) which proved the complainant's age at 10 years. She said that Pw1 confirmed that she didn't know the victim's age and so an age assessment had to be conducted. Her evidence was supported by Pw4, who is her husband.

9. M/s Mutua also submitted that from the P3 form (Exhibit P2) the fact of penetration was clinically proven where the doctor confirmed that the "hymen was not intact". She also stated that the provisions of section 36 of the Sexual Offences Act are not mandatory and since there were no special circumstances in this case to warrant directions that samples be taken to prove the fact.

10. She also submitted that there were no variances and contradictions in the prosecution's evidence, hence the case was proved beyond any reasonable doubt. She submitted that section 150 of the Criminal Procedure Code which provides for the court to compel witnesses to be called if it appears they have credible evidence, is also not couched in mandatory terms. She contended that all the ingredients of defilement were proved beyond any reasonable doubt.

11. And on the issue of alibi defence, M/s Mutua submitted that of the five witnesses the appellant called, none did anything to rebut the prosecution's witnesses and that they contradicted each other and misled the court.

12. As the first appellate court, my duty is to re-evaluate the evidence that was adduced before the trial court and draw up independent conclusion as has become tradition from the principle that was established in the celebrated case of OKENO VRS REPUBLIC (1972) E.A 32 and referred to by the court today. However I must state that I am alive to the fact that I did not have the advantage of seeing and listening to the witnesses, an advantage enjoyed by the trial court (SOKI VRS REPUBLIC (2004) 2 KLR 21 and KIMEU VRS R (2003) 1 KLR 756 and BENJAMIN MBUGUA GITAU VRS REPUBLIC (2011) e KLR .

EVIDENCE

13. PW1, AMK, gave evidence that on 15.3.2012, she sent her daughter, MK to the shop to buy charcoal. That on standing up, PW1 noticed the daughter's dress was wet at the back. The complainant went and on return, she noticed that the spot had enlarged. She then asked her to change the clothes inside. Pw1 followed the complainant and asked her to remove her pant (inner wear) and she saw it also had water. She then asked to lie on the mattress and examined her. She noted that the complainant had been defiled and was removing discharge from her private parts.

14. Pw1 then called her husband, (herein referred to as Pw 4) who she asked to take the complainant to hospital at Mtwapa for treatment. The husband came and took the complainant to Mtwapa for treatment and that on examination it was confirmed that she had slept with someone.

15. Pw1, stated that the complainant is her cousin, K's daughter but that she was her guardian having started living with her in 2009. She then said that she did not know the complainant's age and so an age assessment was done at Coast General Hospital on 28.6.212. The complainant's age was assessed at 10 years.

16. It was Pw1's further evidence that on Friday, the complainant told her that she was feeling unwell and said that Kazungu had slept with her on Thursday. She said that the complainant told her that the said Kazungu sells water and he is their neighbour. The matter was reported to Bamburi police station.

17. In cross examination, pw1 told court that she saw the clothes the complainant had been wearing and they were "watery" but had no blood stains. In re- examination, Pw1 said that the complainant showed her the kiosk where she had been defiled but she did not know the owner. She said it was used for storage of cement and other construction tools.

18. As for PW2, M, a voire dire examination was conducted whereby the court concluded that the complainant, though possessed sufficient intelligence, she was of tender age and therefore should give unsworn statement. She told court that on the material day, the appellant held her hand and took her to another house which was made of iron sheets.

19. That he took her inside the house and closed the door. He then put her on the floor, removed her pant and his, then removed his "urinating organ" and put it into her "urinating organ". She made noise but he covered her mouth and told her that if she told anyone about

what was happening, he would beat her.

20. Pw2 said that she felt pain when he put his penis inside D's vagina she felt pain. She then went to her home, where she found her mother (Pw1). She then said that was taken to hospital by her father where she was treated. She identified the medical notes from Coast General Hospital but said that she could not remember which hospital she went. She said that the appellant's name is Kazungu, although that was the first time she knew him. She identified the accused to court.

21. Upon being cross examined, Pw2 told court that she was with her small brother, Shem when the appellant called and she walked away. That he then pulled her away and left Shem with her grandmother. She also said that shem was at the scene and saw what the appellant did to her. She also said that it was the first time to be defiled and she felt pain but there was no blood. She said that the appellant beat her and she screamed but no one heard her. She then said that she had not told her mother about it as the appellant had threatened to beat her if she told anyone about it. She however told her father the name of the appellant and what he had done to her and her father beat her.

22. PW3, Dr. Lawrence Ngone, a medical attendant at the Coast General Hospital stated that he examined, Pw2, the complainant on 17th March, 2012 having complained of having been defiled by a person known to her. He found the hymen was perforated and the vagina wall red and inflamated but no signs of spermatozoa in her vagina. He concluded there was evidence of defilement which is a serious injury and assessed the degree of injury as maim. He produced the P3 form which he filled and signed on 17.3.2012.

23. On cross examination, Pw3 admitted that he saw the complainant on 17.3.2912 and that her clothes were not stained and neither was there spermatozoa.

Upon being re-examined, Pw3 said that the history was that Pw2 had been defiled by a person known to her and explained that there was no spermatozoa, attributing this to the appellants probable use of a condom.

24. PW4, PMK, a security officer stated that the complainant, M was given to them by her parents and they had stayed with her for four (4) years. He said that on 15.3.2012, he was at work when his wife (Pw1) called and told him that M had been defiled. He went and found the child lying on a mattress in a state of shock .He then took the child to Mtwapa where a nurse examined and confirmed that she had been defiled. That the child was in a state of shock but she told him that there was a person called Kazungu who sells water who had taken her to an iron sheet house and defiled her. He knew Kazungu and so he went to the Bamburi police station with the child and reported the matter. They were referred to Coast General Hospital where she was treated and P3 form filled. The accused was arrested by police

25. Pw 5, No 821637 CORPORAL EMILY ANGAYA told court that on 15.3.2012 she was at the office when on Peter Musyoki (Pw4) came in with KM (Pw2). That they reported that the complainant had been defiled. Upon interviewing the complainant, she told her that she was playing with her brother when the appellant called her to an iron sheet house whereupon he asked her to lie down while threatening her not to tell anyone. She referred the complainant and her father to Coast General Hospital for medical further examination as she proceeded to Shanzu to make a report. That an age assessment was conducted and the complainant's age put at 10 years old. Pw5 recorded the statements of all the witnesses and interrogations of the accused person.

26. In cross examination, she claimed that the report was made on 17.3.2012 while the incident took place on 15.3.2012. She said that her clothes were not stained. She again said that the Pw1 was defiled by the accused. She also said that she visited the scene of crime and established that the appellant was a caretaker.

27. The prosecution closed its case and submissions rendered on whether the appellant had a case to answer by both sides.

28. The trial magistrate placed the appellant on defence. He opted to give unsworn defence and called four (4) witness. The Appellant, KAZUNGU KATANA (DW1) in his unsworn defence told court that he is a water vendor at Mikoroshoni and was charged with the offence of defilement. He stated that on 12.3.2012, he received a call that his aunt had demised. On 15.3.2012 at 7.00 am he left to Kaloleni for her burial. He went on to state that the body was removed from the mortuary on Friday and burial happened on Saturday. He returned to Mikoroshoni on Sunday and therefore he did not defile the complainant for he was not at his home.

29. Dw2, KAHINDI KATANA, who is a son to the appellant's landlord told court that the appellant had gone to attend a burial and so he was selling water on his behalf on 15.3.2012. He said that the appellant returned on 18.3.2012.

30. Dw3, IDI KARISA told court that the appellant was his cousin and on 12.3.2012, an aunt of theirs passed away. He and the appellant, left to attend their aunt's burial on 15.3.2012 at Kaloleni and she was buried on 17.3.2012. They returned home on 18.3.2012. Dw3 said that after sometime, a certain man came to the appellant's kiosk and asked him to look for the appellant. He looked for the appellant who he accompanied to the man's house . The man entered the house with the appellant and after sometime, the appellant emerged from there crying. That the appellant told him that the man was alleging that he was courting his daughter. Dw3 was then given a letter to take to Mr. Peter by the village elder but he did not know its contents. To prove that they attended the funeral, Dw3 produced photographs,death certificate and burial permit. On cross examination, Dw3 recounted where and how they live with the appellant and confirmed that he was arrested three days after the letter was delivered.

31.DW4, HAMISI MASHA MPWELA, is the village elder and he told court that he was the author of the letter dated 10.4.2012 in which he summoned one Peter to attend his office in connection with the offence alleged against the appellant. He said that the said Peter went to see him on 15th and told him he would go back on Tuesday. But on Monday, Peter had the appellant arrested and did not see him on Tuesday. He identified the letter he took to Peter and produced it as exhibit D5.

32. The defence counsel filed their submissions while the prosecution relied on the evidence on record with regard to whether the prosecution had proved their case against the appellant beyond reasonable doubt to warrant him be convicted for the offence he had been charged with.

33. In her judgment, the trial magistrate summed up the evidence and came to the conclusion that the same was overwhelming to support the conviction and sentence against the appellant as charged. She made a finding of fact that the complainant was consistent in her testimony in her version of the events to the mother and father. She then dismissed the defence of "Alibi" raised by the appellant and stated as follows;

> **"I find the accused and his witnesses untruthful and in turn find no merit in the accused's defence"**

THE DETERMINATION

34. I have considered the grounds of appeal and the arguments made thereon by going through the evidence that was adduced before the trial court. I find that the issues for determination are;

(a) Whether the complainant's age was proved beyond reasonable doubt to warrant the sentence the appellant received.

(b) Whether the appellant's conviction and sentence was based on sufficient and satisfactory evidence.

(c)Whether the appellant raised a reasonable alibi.

35. With regard to the first issue, the appellant alleges that the complainant's age was not conclusively resolved and yet the nature of punishment meted in sexual offences is dependant on the age of a victim.

In her judgment, the learned magistrate stated as follows;

> **" The complainant's age was assessed at 10 years and an assessment report produced as an exhibit"***(* emphasis mine)

This is the last sentence on paragraph 2 of page 4 of the judgment which reveals that the assessment of the evidence basically concentrated on one aspect only; the narrative of the incident and by whom. It is the appellant's submissions that various witnesses gave different ages for the complainant. The particulars of the charge indicated the complainant's age as 7 years. Her guardian, Pw1 said that the she did not know her age.

> **"Her mother is called K. She stays upcountry. I started living with her in 2009. I don't know her age.**

An age assessment was conducted at Coast General Hospital on 28.6.2012 and her age assessed at 10 years. Hence Pw1's testimony placed reliance on the age assessment report.

Pw2 in her testimony during the "voire dire "examination said that she was aged 8 years old.

Pw 5, the investigating officer from Bamburi police station stated that the complainant was alleged to be 7 years old. And stated as follows;

> **"The complainant was alleged to being 7 years. As a result an age assessment was done at Coast General Hospital and she was assessed at 10 years".**

36. There was evidence that the complainant's mother was upcountry but there was no evidence that she could not be availed or sent evidence to confirm the exact age of the complainant. There was also evidence that the complainant was a pupil at Visa primary school. The question becomes, were her records at the said school confirmed so as to testify on her age?

In the case f KAINGU ELIAS KAMOSO –VRS- REPUBLIC, CRIMINA APPEAL NO. 504 of 2020, MLD (vr) the court of appeal held that; **"Age, of the victim must be proved in the same way a penetration in the case of rape and defilement . It is therefore …… that the same to be proved by credible evidence for the sentence to be imposed upon the appellant as conviction always depends on the age of the victim".**

37. It is worth noting the variances with regard to the age of the complainant must have been evident in the course of investigations. This being the case, there was need for the investigating officer to go a step further and confirm the complainant's age by having the biological mother come to confirm this issue alone. It was not shown that it was impossible or impracticable to avail her to do this. So, while the age given in the particulars of the charge, the complainant and age assessment report shall place the complainant within the bracket of a minor, her exact age was not conclusively proved. In view of this, my finding is still that the victim is s minor and the sentence that was meted, if the court were to rely on the age assessment report, would still be that of life imprisonment.

38. On the 2nd issue, I will be discussing the issues raised in grounds 2 ,3 and 4 of the memorandum of appeal. Section 107 of the Evidence Act (Cap 80) of the Laws of Kenya provides as follows;

> **"Whoever desires a court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exists".**

Section 109 of the same Act provides as follows;

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall be on any particular person".

It is trite law that the burden of proof in a criminal trial lies upon the prosecution and does shift to the accused person unless a law expressly states so".

39. On the issue of whether the prosecution failed to comply with the provisions of section 36 of the sexual Offences Act, No 3 of 2006 which provides for evidence of medical or forensic nature, I find that the said provision sets out elaborate measures on how a trial court should treat such evidence . It is true that the provisions are not couched in mandatory terms, with the use of the word "may". Also, I agree with the prosecution in their submissions that the case did not present any special circumstances to warrant such discretion for the samples to be taken from the appellant to prove any fact since there was no evidence of an infection or pregnancy.

40. There is the allegations by the appellant in his submissions that there is a variance in the evidence of Pw3 and that in the P3 form (Exhibit P2). The P3 form indicated the date of reporting to the police as 17th March, 2012 while the incident is alleged to have occurred on 15.3.2012 at 1400 hours. The victim is said to have been sent to hospital on 13th April, 2012, Pw3, the medical officer has indicated that he received the P3 form (Exhibit P2) on 17th March 2012, and completed, signed and stamped the same on 13th April, 2012. In his evidence in court he claims to have signed the P3 form (Exhibit P2) on 17.4.2012 which is stamped with a stamp bearing the date of 13th April, 2013. Clearly, that evidence raises a lot of questions as to when the complainant was examined, when the P3 form was filled, signed and stamped, within which period the victim was examined and treated after the occurrence of the alleged offence. In fact one is bound to wonder what P3 form was Pw3 holding and reading as he testified in court and produced one as Exhibit P2.

41. Also, according to Pw1, guardian to the victim, it is on 15.3.2012 when she sent the victim to the shops and she returned to the house with a dress that was a wet dress at the back and a pant with water. It is the same day she established that the complainant had been defiled and she called her husband Pw4, to take her to hospital. Pw2, the complainant just told court that

"…the material day……" without mentioning the date.

42. Pw4, on the other hand confirms that he took the complainant to Mtwapa clinic where she was examined and referred to Coast General Hospital after report to the police station on 15.3.2012. The evidence of all these witnesses is inconsistent or at variance with the evidence of Pw3 and the P3 form (Exhibit P2) with regard to when the complainant was examined in hospital.

There was also the issue of the complainant dress and pant being wet, which was not corroborated even by Pw4 who saw and took her to hospital the same day.

43. Another evidence that leaves the court wondering and questioning the credibility of the evidence is how possible it is for a child of between 7 to 10 years old can be defiled for the first time and there is no bleeding.

44. I find that the evidence I have analyzed does not meet the standard of proof set by section 107 as read with section 109 of the Evidence Act.

There is then the 3rd issue of whether the appellant's defence of alibi is questionable. The principle that governs this has been developed by various courts and referred from time to time.

45. In the old case of **KIBALE VRS UGANDA (1999) E.A 148 (SCU),** the court stated the law as follows;

"It is indeed the law that there is no burden cast on an accused person to prove his alibi".

It went on to state I "The prosecution has the burden throughout of negating the alibi".

The court followed the old decision in **SAID VRS R (1963) E.A 6** where it restated the law on the general principals of proof. It is trite law that and accused person assumes no burden of proof in a criminal case whether his defence amounts to an alibi defence or not. It went on to state;

" 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 the alibi introduces into the mind of a court a doubt that is not unreasonable"

46. The appellant gave evidence that he was attending his aunt's funeral (burial) at Kaloleni having left the alleged place of incident on 15.3.2013 at 7.00am. This was confirmed by his witnesses, Dw2, Dw3 and Dw4, that indeed the appellant attended his aunt's funeral.

47. It therefore, was upon the prosecution to prove to this court that there was no funeral (burial) that the appellant attended or which took place and that he was at his place of work on the alleged date. The appellant's evidence was not challenged but there was a lot of efforts put in challenging the evidence of Dw3 and Dw4, which was not actually necessary.

48. The defence raised the defence of alibi, which raised reasonable doubt but the same was not challenged by credible evidence in rebuttal by the prosecution. The prosecution ought to have moved the court for an adjournment and called evidence to reply to the appellant's defence or pin him to the scene of crime but this was not done.

49. In conclusion, I find that the prosecution's evidence, was full of gaps which cast doubt as to whether or not the alleged offence occurred. The benefit of this doubts ought to have gone to the appellant.

The total effect of the above mentioned findings is that the prosecution failed to prove their case against the appellant to the required standard of "beyond reasonable doubt"

50. I therefore find and hold that the appeal has merit and therefore succeeds. The conviction against the appellant is hence quashed and sentence of life imprisonment imposed upon him set aside. The appellant, it is hereby ordered that, he be and is hereby set at liberty forthwith unless lawfully held.

51. It is so ordered.

Delivered, dated and signed this 31st day of October, 2018

LADY JUSTICE D.O CHEPKWONY

In the presence of :

Mr Masila counsel for the state

Appellant in person

C/clerk- Beja Nduke