REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 3 OF 2017

CELESTINE ESEME NYONGESA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal from the original conviction and sentence in criminal case number 2467 of 2013 in the Chief Magistrate's Court at Bungoma – C. L. Yalwala (SRM) on 11/2/2016*)

JUDGMENT

1. The Appellant **Celestine Eseme Nyongesa**, was charged with defilement of a child contrary to **section 8(1)** as read with **section 8(3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the charge were that on the 3rd of day of November 2013, at around 1600 hours in Teso North district within Busia County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of LN a child aged 12 years. (initials substituted to protect the identity of the minor).

2. In the alternative, the Appellant was charged with indecent act contrary to **section 11(1)** of the **Sexual Offences Act**. It was alleged that on the same date, time and place, the Appellant committed an indecent act to the said LN by touching her private parts namely breasts, buttocks and vagina.

3. In a nutshell, the Prosecution case was that on the material date, at about 4.00 p.m. the Complainant went to the Appellant's home to fetch tap water. The Appellant, who has a tap at his home, was alone at the time. The Appellant pulled the Complainant into his house, and led her to his bedroom. Once in the bedroom, the Appellant removed her pant and made her lie on her back on the bed. The Appellant removed his trouser and inner pant and lay on top of the Complainant between her legs. He inserted his penis into the Complainant's vagina. The Complainant testified that this was the first time such an act had been done to her, and that she felt pain.

4. The Appellant gave her Kshs. 40/- to convince her not to report the incident to her parents but when she returned home, She reported the incident to her mother that evening. The next day, they reported the incident to Malaba Police Station. The Complainant was taken to Kocholia District Hospital for examination and treatment and a P3 form was filled in this regard.

5. Following a full trial, the Appellant was convicted on the main charge and sentenced to twenty years imprisonment. Aggrieved by the decision of the trial court, the Appellant appealed against both the sentence and conviction on four grounds. He claimed that the trial court convicted him on evidence that fell short of probative value; that the evidence of the single visual minor witness was uncorroborated; that the conviction was based on mere speculations and farfetched inferences; and that the prosecution evidence was marred with material contradictions, discrepancies and inconsistencies.

6. The state opposed the appeal through learned state counsel Mr. Oimbo and stated that the prosecution had proved its case to the required standard. Counsel urged the court to dismiss the appeal and uphold the conviction and sentence.

7. This being the first appeal, I am mandated to look at the evidence adduced before the trial court afresh, re-evaluate and reassess it and reach my own independent conclusion. I must however warn myself that I did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot comment on their demeanor. – **See Odhiambo vs. Republic Criminal Appeal No. 280 of 2004 [2005] 1 KLR**.

8. The first ground essentially attacked the weight of evidence adduced by the prosecution to prove the offence of defilement. The Appellant argued that the evidence tendered by the prosecution did not fulfill the requirements set out in criminal liability, and therefore lacked probative value. That the Complainant could not recall the date of the incident or the day of the week on which the alleged offence took place. Further that the prosecution failed to prove the element of penetration and that there was a water tap or borehole at the accused's home. Learned state counsel Mr. Oimbo submitted that the prosecution had proved all the ingredients of defilement to sustain the conviction.

9. The essential ingredients that need to be proved for a successful conviction on a defilement charge are the age of the complainant, proof of

penetration and positive identification of the assailant as highlighted in the case of **Dominic Kibet Mwareng vs. Republic Criminal Appeal 155 of 2011 [2013] eKLR**.

10. In the present case, the age of the Complainant was conclusively proved. PW1 the Complainant herein testified that she was 12 years old at the time of the offence and she was then a class 4 pupil. This was corroborated by the evidence of PW2 the Complainant's mother who stated that the Complainant was born on 11th September, 2001 and produced a copy of her birth certificate. An age assessment report filled by PW3 further indicated that the Complainant was approximately aged 12 years at the time. Further, the record indicates that the trial court conducted a voir dire examination and noted the minor's apparent age as 12 years. The premise therefore is that the requirement of age was conclusively proved before the trial court.

11. On proof of penetration, the Complainant gave a detailed account of the defilement. She explained how the Appellant removed her pant and made her lie on her back on the bed, after which he removed his trouser and inner pant and lay atop her between her legs. She further explained how the Apellant inserted his penis into her vagina.

12. From the medical evidence tendered before the trial court, and corroborated with the evidence of the Complainant and that of PW4, the Clinical officer who examined the Complainant, conclusively proved the issue of penetration. The P3 form indicated that the Complainant's hymen was not intact and further lab tests revealed the presence of epithelial cells. PW4 concluded that the Complainant had been defiled, and administered Post-exposure Prophylaxis (PEP), analgesics and antibiotics to the Complainant.

13. On the issue of identification, the record indicates that the Complainant and the Appellant are neighbors. The Appellant was no stranger to the Complainant and it was therefore a matter of recognition as opposed to identification. Recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. - **See the Court of Appeal case of Reuben Taabu Anjononi & 2 others vs. Republic [1980] eKLR.**

14. The upshot of the above is that all the three critical ingredients required to sustain a charge of defilement were proved by the prosecution to the required standard.

15. The Appellant also complained that the learned trial magistrate relied on the uncorroborated evidence of a single eye witness who was a minor. He stated that this was in contravention to **section 124** of the **Evidence Act**. Learned state counsel Mr. Oimbo submitted that **section 124** allows the court to rely on the evidence of a single witness to convict. Counsel urged that the trial court had in its judgment warned itself on the dangers of relying on the evidence of a single identifying witness.

16. Section 124 of the **Evidence Act** provides thus:

> **"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.**
>
> **Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."**

17. In **Nyamai Mutia & Musee Katee vs. Republic Criminal Appeal 623 of 2010 [2017] eKLR**, the Court of Appeal (Makhandia, Ouko & M'inoti JJ.A) observed thus:

> **"The proviso to section 124 of the Evidence Act was introduced by the Statute Law (Miscellaneous Amendments) Act No. 5 and further modified by the Statute Law (Miscellaneous Amendments) Act No. 3 of 2006. The effect of those amendments is that in a prosecution involving a sexual offence, the trial court can convict the accused person on the evidence of the victim alone if it believes the victim was truthful and recorded the reasons for that belief."**

The Appellate court went on to cite and apply the case of **George Kioji vs. Republic Criminal Appeal No. 270 of 2012 (unreported)** in which the Court of Appeal differently constituted held thus:

> **"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."**

18. From the record, it is clear that the learned trial magistrate warned himself of the danger of convicting the Appellant herein on the uncorroborated evidence of a single eye witness. He proceeded to state that he was persuaded to believe it and found no reason why the Complainant would lie that the accused had defiled her. He stated as follows:

> "*I have warned myself that the Complainant's evidence is the only evidence of identification of the accused as the person who defiled her. The same is not corroborated. However, I am persuaded to believe it. As I have stated, I find no reason on the Court record why she could merely lie against the accused person yet she was indeed defiled. In my observation she was telling the truth*

and I accept her evidence against the accused person and find that he is the one who defiled her."

19. Sexual offences are by nature secretive and will rarely be committed in the presence of witnesses. There is however no legal requirement for independent evidence to corroborate the evidence of a victim. **Section 124** of the **Evidence Act** is clear that the court may proceed to convict an accused person on the sole evidence of a Complainant in a criminal case involving a sexual offence, if it is satisfied that the Complainant is telling the truth. The law only requires that the reason for believing that the Complainant is telling the truth be recorded in the proceedings, and this the trial court did.

20. I note that the narration of the Complainant of the events surrounding the defilement was so detailed and vivid as to be convincing. I find no reason to believe that the Complainant would fabricate evidence of her defilement. The Complainant, PW1 stated that she did not initially report the incident to her mother since the Appellant had warned her not to, even bribing her with Kshs. 40/- to convince her.

21. On the third ground, the Appellant complained that his conviction was based on mere speculations and farfetched inferences. That the prosecution witnesses could not recall the day or date on which the alleged defilement occurred. He urged that the Complainant was coached in her testimony in a bid to fix him. He seemed to suggest that he had been framed because of the business rivalry between him and the Complainant's mother. Learned state counsel Mr. Oimbo opposed this argument and submitted that not recalling the day of the week when the offence occurred did not go to the root of the case and was not fatal to the case.

22. I am alive to the fact that not every inconsistency is fatal to the prosecution's case. In the present case, the Complainant testified that she was defiled on 3rd November 2013 and that she had left school that evening and changed out of her school uniform, in spite of the fact they did not usually attend school on Sundays. This was echoed by the Complainant's mother, PW2 in her testimony. PW2 stated that the Complainant informed her that she had been defiled on 3rd November 2013 and that the Appellant called her a second time on 7th November, 2013 prompting her to disclose what had transpired between her and the accused on the former date. In PW2's testimony, she clearly pointed out that 3rd November, 2013 was a Sunday. The premise therefore is that there were no grave inconsistencies to suggest that the prosecution witnesses were untruthful or to affect the substance of the charge.

23. All in all however, the Complainant's evidence places the Appellant at the scene of crime and debunks his defence that the case arose out of a grudge. I find no reason to believe that the Complainant implicated him because of their business rivalry. The record demonstrates that the Complainant withstood cross-examination beautifully, a fit she would not have achieved had she been coached as alleged by the Appellant.

24. Lastly, the Appellant contended that the trial court failed to consider his defence. Learned state counsel Mr. Oimbo stated that the record demonstrated that the Appellant's defence was extremely analyzed before it was dismissed.

25. I note that the Appellant raised an *alibi* defence stating that he was not in his homestead at the time of the alleged offence, but rather 500 metres away, in his poshomill at Kocholia market. An *alibi* raises a specific defence and an accused person who puts forward an *alibi* as an answer to a charge does not in law thereby assume any burden of proving that answer. It is sufficient if an *alibi* introduces into the mind of a court a doubt that is not unreasonable. In the instant case, however, the *alibi* defence advanced by the Appellant was not sufficient as to displace the prosecution's evidence.

26. The record indicates that the trial court considered the Appellant's *alibi* defence and found it unconvincing. In his judgment, the learned trial magistrate observed thus:

> *"The accused person's defence that he could not have done the act because he was at his poshomill, in itself, cannot suffice. The evidence herein is that the offence occurred at Kocholia village. The accused person's said poshomill is situated at Kocholia market. Therefore his being seen at the poshomill sometime on the material date did not remove him from the scene of crime that day, being Kocholia village."*

27. Once an accused person raises an *alibi* as a defence, the trial court has an obligation to weigh the alibi defence against the prosecution's evidence as observed by the Court of Appeal sitting in Mombasa in **Juma Mohammed Ganzi & 2 others vs. Republic Criminal Appeal 275 of 2002 [2005] eKLR**. From the record, it is not in doubt that the trial court considered the *alibi* defence and dismissed it after weighing it against the prosecution's case.

28. In the opinion of the trial court, the evidence tendered by the prosecution placed the Appellant at the scene of the defilement and positively identified him as the perpetrator of the offence. Taking into account the facts of the present case, it is clear that the prosecution advanced a water tight case against the Appellant which was not at all shaken by the *alibi* defence. I therefore entirely agree with the decision of the trial court to dismiss the Appellant's *alibi* defence.

29. I have scrutinized and reassessed the evidence on record, bearing in mind that this being a criminal case, there was no burden whatsoever on the Appellant to prove his innocence. I find that the evidence tendered by the prosecution witnesses was cogent and proved the case against the Appellant to the required standard.

For the foregoing reasons, I uphold the decision arrived at by the trial court against the Appellant. I find that the appeal against the conviction and sentence is wanting in merit. This appeal is accordingly dismissed.

It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF OCTOBER 2018.

L. A. ACHODE

HIGH COURT JUDGE

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUNGOMA THIS 22ND DAY OF NOVEMBER 2018.

S. N. RIECHI

HIGH COURT JUDGE