REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

(CORAM: R. MWONGO, J)

CRIMINAL APPEAL NO. 160 0F 2015

SMK...APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Being an Appeal from the Original Conviction and Sentence

in Criminal Case No 1075 of 2014 in the Senior Resident

Magistrate's Court, Engineer, (G.N Opakasi – RM)

JUDGMENT

Background

1. The appellant was charged in the lower court with the offence of defilement contrary to **section 8(1)** as read with **section 8(3)** of the **Sexual Offences Act No. 3 of 2016.** The particulars of the offence were that the accused on the 24th day of November 2014 in Nyandarua County caused his penis to penetrate the vagina of TWN, a girl aged 13 years. In the alternative the accused was charged with the offence of indecent act contrary to **section 11(a)** of the **Sexual Offences Act**. The particulars of the offence were that SMK on the 24th day of November, 2014 in Nyandarua County willfully and unlawfully did an indecent act to TWN a girl aged 13 years by causing his penis to come into contact with the vagina of the said girl.

2. The accused pleaded not guilty to the charges. In her judgment, the trial magistrate however found the alternative charge defective on grounds that section 11 (a) related to commission of an indecent act with an adult. She proceeded only with the initial charge. The accused was convicted after being found guilty of the offence.

3. Dissatisfied with the judgment, the accused has appealed to the High Court. Prior to his appointing counsel, the appellant had filed his grounds of appeal and written submissions. His counsel filed amended grounds of appeal and fresh written submissions. He narrowed the issues for determination by the court to the following three:

> *"1. Whether the learned magistrate erred in law by holding that the prosecution had discharged its legal burden and proved their case beyond reasonable doubt. (Grounds 1, 2, 3,4,6,8 and 9 of the amended grounds of appeal} .*
>
> *2. Whether the trial court misapprehended facts, applied wrong legal principles and drew erroneous conclusions to the prejudice of the Appellant. (grounds 5 of the amended plaint)*
>
> *3. Whether the trial court erred in in law by failing to consider the plausible and alibi defense given by the appellant. (grounds 7 and 10 of the amended grounds of appeal)"*

4. As this is a first appeal from the lower court, the duty and role of this court on a first appeal is as well stated in the Court of Appeal case of **Issac Ng'ang'a Alias Peter Ng'ang'a Kahiga V Republic Criminal Appeal No. 272 Of 2005** as follows:-

> ***"…In the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze 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 court would give allowance of the same. There are now a myriad of case law on this but the well-known case of OKENO -VS- REPUBLIC (1972) EA 32 will suffice. In this case, the predecessor of this court stated:-

> ***The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and 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. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses (See Peters Vs. Sunday Post, (1958) EA 424)'***

Brief Facts

5. The prosecution called seven witnesses during the trial. The appellant gave unsworn testimony in his defence.

6. PW1, the complainant was taken through a voir dire examination, following which the trial magistrate was satisfied that she understood the meaning of telling the truth and could give a sworn statement.

7. She testified that on 24th November, 2014 she was at [Particulars Withheld] Home in Njabini with her sisters Z and N. The appellant, who she referred to as “uncle”, then came and entered her mother’s house. After she finished washing, she entered the house, and into her mother’s bedroom to get some clothes. The appellant followed her, found her seated on her mother’s the bed, and lay on the bed. He removed her trousers and panty, removed his and laid her on the bed. Then he defiled her when he:

> ***“removed his thing for urinating and put it into my part for urinating and I felt pain, and then I felt something like water then he got out of me”***

8. She also said that her sister Z came into the bedroom but did not know whether she saw them since there was a curtain separating the bedroom and sitting room. She told no one anything until the next day when she started bleeding and informed her Aunt AW who took her to hospital and then to the police station. She said she knew the appellant, and that this was not the first time he had done such an act:

> ***“He has done it many times. When school is closed he used to do it every day but when we are in school he used to call me on Friday. I informed this to Aunt A. “***

9. In cross examination, PW1 could not recall the time or date when the incident occurred. She also said she did not tell her mother anything when she came home because she was afraid to tell her. Instead, she reported the matter to her aunt A. She said she reported because the appellant, who was apparently a cook at her school, greets all the other children and not her. She could not remember the colour of the trousers he or she was wearing at the time of the incident. Further, she said the door was not locked whilst the incident occurred.

10. ZW PW2, also a minor aged six years, underwent a voir dire examination and satisfied the trial court that she understood the meaning of telling the truth, but directed that she give unsworn testimony. She, too, lived at [Particulars Withheld] Home, and was there on 24th of November 2014 washing clothes with PW1at around 1.00 pm, when Uncle S, the appellant arrived and greeted them. He sat briefly on a chair given by PW1, then went into the house.

11. After a while PW2 went into the house to look for clothes and uncle S told them to go out. He was left in the house with PW1, and as she and her little brother, K, went out, they left uncle S PW1 on the bed. Thereafter uncle S came out, said bye and left. She identified uncle S as the appellant, who was then seated in the dock.

12. In cross examination, PW2 said she was told to come and testify by her mother. She confirmed that she did not tell her mother that the accused went to bed with PW1, and that there were only four children at the home when the accused came. In answer to the courts question, she confirmed that she saw PW1 on the bed with the appellant. The court noted that this witness appeared to be scared of the accused as she did not maintain eye contact looked aside.

13. PW3, HNK, is the mother of PW1, and works at the Children’s home. When she got home on 24 November 2014 at around 5.00pm, she found PW1 and asked her what was wrong, to which she replied nothing. She also found out that PW1 had not eaten and asked her if she was unwell and needed to go to hospital. She said there was no problem.

14. On 3 December 2014, the accused called her and told her that her daughter, PW1 had taken her to the police station at Njabini. He said that PW1 had accused him of defiling her, and asked PW3 to talk to PW1 one so that the case could end. Thereafter, she and others recorded statements of the police station. Later she spoke to PW1 who told her she could not have reported anything because she was scared her mother would have beaten her.

15. In cross examination, PW3 denied that she had ever disagreed with the matrons at the home; that she had ever been given slippers or given anyone slippers; or that there was a plan to make him lose his job.

16. PW4, Alice Kimani was the manager of the Children’s Home. She was at work on 2 December 2014 when PW1 entered her office and told her that accused and gone to their place and defiled her. She confirmed whether anyone else had been there, and PW1 confirmed that PW2 had been there. She called PW24 confirmed the information by PW1. She thereafter took PW1 to the police station where the reported the incident, and were advised to go to hospital. They went to Njabini health centre which did have sufficient facilities, so they went on to

Engineer District Hospital. TW four also confirmed that uncle S had been a cook at the home for more than two years. Although buying gifts for the children is not allowed at the home, the appellant frequently bought the children gifts.

17. In cross examination PW4 for denied that PW1 was being used to cause him to be fired from his job.

18. PW5, Dr Maingi Muchiri, from Engineer hospital, gave evidence in respect of the P3 form which had been filed by an officer who had been seconded to West Africa. PW5 said he was familiar with that officer's handwriting and he explained the difference between a clinical examination lab test, noting that this being a referral the Post Rape Care Form indicated that the child had torn which was not proof for the accused's guilt. He also indicated that victims respond differently; some being calm, while others are disturbed. He also pointed out that a torn hymen can be caused by consensual sex, vigorous exercise or forceful penetration.

19. PW6 was Inspector Benjamin Muthiani, who was the investigating officer. Of significance, he explained how he carried out the investigations after the complaint had been reported by the complainant on 3 December 2014. He also produced the birth certificate PW1 showing that she was 13 years old, confirmed that he issued the P3 form and how the help of the school management the accused was summoned the police station where he arrested and charged him. In cross examination, he complainant's name in a statement, and reaffirmed that he got most of his information from the investigations carried out.

20. I now turn to an analysis of the evidence vis-à-vis the grounds of appeal as summarised in the issues for determination.

Discharge of legal burden of proof

21. On this ground the appellant argued that the prosecution did not prove its case beyond reasonable doubt and that there were inconsistencies and discrepancies in the prosecution case that the trial failed to consider. Counsel further questioned why PW1 while being defiled, did not attempt to raise alarm or free herself even after PW2 came in and found her being defiled. This was particularly surprising, urged counsel, given that PW2 did not speak a word to anyone, and that there was no mention of any threat directed towards PW1 or any other sibling in the house.

22. In my view, it is not surprising that PW1 did not raise an alarm or attempt to free herself from the appellant during the incident. This appears to be wholly consistent with PW1s evidence that she had been sexually defiled by the appellant on many proud occasions. Her evidence was that:

> ***"That was not the first time he had done that to me…. He has done it to me many times. When school is closed used to do it every day but when we are in school used to call me on Friday."***

On this basis, it is reasonable to deduce that PW1 had become used to this activity, hence our rather unperturbed reactions, even in the absence of any threats. In further support of this conclusion, PW5, the doctor, explained as follows in cross examination:

> ***"different victims respond differently to trauma. Some will become while some will be disturbed.***

He also explained that the hymen can be broken by reason of vigourous exercise, consensual sexual intercourse or by forceful penetration.

23. The appellant also argued that there were discrepancies on the dates i.e. PW1 stated that she told her aunt what had transpired the following day after she started bleeding and that there were contradictions on the dates on the treatment cards, P3 form and PRC form and the testimony of PW3 and PW4. Further the accused stated that the Magistrate mentioned that the accused failed to bring out the inconsistencies yet the documents bearing the dates that establish the inconsistencies formed part of the evidence on record.

24. I have perused the P3 Form (Exhb 1) and Post Rape Care Form (Exhb 2) but have not seen treatment cards. Both forms are dated 2nd December, 2014 which is nine days after the incident. The Post Rape Care Form is sketchy and indicates that the PW1s hymen was torn. It does not indicate whether the tear was recent. The P3 form is more detailed. It indicates that the hymen was torn without stating the age of the tear. An examination of the other genitalia showed they were normal.

25. PW4 testified that they went to Engineer Health centre and then to Engineer District Hospital where PW1 was examined, and that the next morning the appellant was arrested. Neither PW1, PW2 or PW3 stated the date on which they went to hospital. PW5, the doctor from engineer hospital, stated that the P3 form was filled on 2 December 2014 he explained that it is completed by the clinical officer, Anthony, who had gone to work in West Africa. Thus, although there is a nine day delay before the examination of the child, I see no contradictions in the information in the exhibits, and there was no evidence that PWA one was taken to hospital immediately after the alleged incident.

26. The failure of the forms to indicate the age of the tear of the hymen is consistent with the evidence of PW1 where she stated that she had had several encounters of sexual intercourse with the appellant in the past.

27. In addition, the appellant stated that the evidence of PW1 should have been corroborated, and that the medical evidence does not corroborate PW1's evidence thus raising doubt whether she was defiled or not.

28. I note that PW2 corroborated the eyewitness evidence of PW1 to the extent that the appellant and PW1 were on the bed together. As to corroboration of the actual defilement, the proviso to **section 124** of the **Evidence Act** allows the court to convict on the evidence of a victim in sexual offences where the court is satisfied that the victim is telling the truth. In this case, the trial magistrate invoked the aforesaid provision and also cited the case of **Makungu v Republic (2002) EA 482** on the unconstitutionality of the requirement for corroboration in sexual offences. The trial magistrate stated, correctly in my view, that:

"I attribute this to the fact that most sexual offences are committed in secret. I therefore find that much is PWA ones testimony was not adequately corroborated by the testimony of any other witness I believe she was telling the truth. The complainant (PW1) was courageous in court though sometimes breaking down in tears. She did not seem to be lying neither did she seem as though she was being used by someone to frame the accused.Tthe accused was a person very well known to the complainant (PW1). He was there at the children's hence if indeed the accused defiled her then surely she must know that it is him"

29. The trial magistrate assessed the evidence of PW2, did not find any inconsistencies in her testimony and concluded that she had not been coached. In her judgment the trial magistrate said:

"My view is that it would be very easy to tell if a child of such tender years as coached the court did not however find any inconsistencies in PW2's testimony an indication that she was not coached."

By stating that there were no inconsistencies in PW 2s evidence, the learned magistrate found her testimony credible or truthful. This fulfilled the **section 124** Evidence Act test.

30. The appellant also complained that the court purported to make an enquiry of PW2 under **Section 150** of the **CPC** but he was not given an opportunity to cross examine that witness while it was evident that the evidence introduced would jeopardize the accused. The appellant also states that the trial magistrate made a note that PW1 was scared of the accused but did not point out at what specific instances of demeanor which she noted and which she relied upon.

31. On the point concerning **section 150**, it is true that under section **150 CPC** the appellant was entitled to an opportunity to cross examine PW2 on the evidence elicited by the court. I note from the record, however, that the evidence elicited by the court as to whether appellant visited and whether PW2 saw the appellant with PW1 on the bed, this was evidence which PW2 had already given in her evidence-in-chief and the appellant cross-examined PW2 but did not raise any issue on that evidence. PW2 stated in evidence in chief:

"We were washing clothes together with Tabitha (PW1) then Uncle S came …… Then W (PW1) give the accused chair sat then he went to the house…..

Then I went to look for K's clothes then uncle S told us to go out. He was with W PW1 one on the bed. We went out and left Uncle S and W (PW1) on the bed"

On that evidence, the appellant then had a chance to cross examine PW2, which he did as follows:

"Accused: Did you tell your mother that I went to bed with W?

PW2: No"

32. In essence, the issue which the court raised under **section 150** had already been elicited and dealt with, and was therefore not a new issue. I do not find that any prejudice as suffered by the appellant on account of not being asked to cross examine on what the court had raised because it was not a new issue at all as the appellant had dealt with it earlier in cross examination.

33. In concluding on the question of proof and the probative value of the evidence, the trial magistrate in her judgment relied on the case of **Stephen Nguhi Mulili v Republic (2014) eKLR.** In that case, the court cited the case of **Miller v Ministry of Pensions (1974)** where it was held that:

"The degree is settled. It need not reach, but it must carry high degree of probability. Proof beyond reasonable doubt does not mean proof beyond shadow of doubt, the law would fail to protect the community if it admitted fruitful possibilities to defeat the cause of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favor 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. I am satisfied that on this issue the trial court acquitted itself well and that the standard of proof beyond reasonable doubt was achieved.

Misapprehended Facts, Wrong Legal Principles and Erroneous conclusions

35. On the second issue, some of the matters raised have also been dealt with in the question on the burden of proof, and need not be repeated here.

36. The appellant submitted that PW1 had a vendetta against him because the magistrate during PW1's evidence noted as below :

"***Of importance in her testimony is that during cross-examination when she was asked why did you report, she said, "because you used to go to all rooms and say hello to all the other children and not me. You used to go to all rooms and greet them apart from me."***

She further stated, "Yes, you bought me oversize slippers and clothes and the rest you bought them the right size."

37. The appellant stated that trial magistrate did not attempt to evaluate the theory that PW1 had ill motive and that her evidence was not credible. However, the trial magistrate did in fact deal with the issue when she stated:

> ***"I have carefully considered the accused's submission and especially the defence that this case was a frame up by his colleagues and my view is that from the evidence adduced in court I do not see malice being the reasons the accused was brought court. While there may be disagreements between the accused and his colleagues at*** [Particulars Withheld]***Home as the accused alleges, I am not satisfied that the complainant hearing was being used by the colleagues of the accused especially the resident manager and the farm manager to falsely accuse the accused person herein".***

38. On the basis of the evidence available, I am satisfied that the learned magistrate properly considered and applied the law to reach her conclusion which I have not found any reason to disturb.

Alibi

39. The appellant in his defence said he was essentially not at the scene of the crime; that he had gone to Nakuru on 24th November, 2014; that the trial court rubbished this evidence instead of interrogating it; that the court instead relied on the hearsay evidence of PW4 who is said to have testified that the appellant admitted to have gone to the home of PW1.

40. The appellant cited the case of **George Opondo Olunga v R [2016]eKLR** where Makau J stated that the defence does not assume any burden of proving the truth of its answer and that:

> ***"…. The defence of alibi can suffice if it is sufficient to introduce into the mind of the court in doubt that is not unreasonable."***

Accordingly the appellant submitted that an accused person should only be convicted on the strength of the prosecution's case and not the weakness of his case.

41. How did the trial court deal with the evidence of alibi? This is what the trial magistrate said in her judgment:

> ***"… From the evidence of the three prosecution witnesses, PW1, PW2 and PW4, it is clear to this court that indeed the accused went to the home of PW3 where PW1 and PW2 together with their other siblings were. The accused did not raise his defence of alibi earlier in the case. He did not even mention it in his submissions. It is my view that indeed if the accused did not go to PW3'S home on the 24th of November, 2014, and if indeed he went to Nakuru and Nairobi on the alleged day then he would have raised the defence earlier in the case. He would have endeavored to prove throughout the trial that he was not at the alleged scene of crime but instead he was at Nakuru from Nairobi and at 11.00 p.m. back to Njambini. Therefore, I have carefully considered the accused persons defence of alibi as against the prosecution's case and I find that the same is an afterthought. To mean that it is not true that the accused was not at the scene of crime on the alleged date. He was in fact at the scene of crime."***

42. I have also perused the appellant submissions filed on 13 August 2015 in the lower court. Nowhere in those submissions did the appellant mention is not being at the scene of the incident on 24 November 2014. Instead his submission states that PW2 admitted being coached by PW4 on what to say in court, and that PW3:

> ***"…testified that I have never been to their home any time and that I did not visit them on 24th of November 2014*** "

I have not seen anywhere in the evidence of PW2 where she admits that she was coached, nor do I see anywhere in the evidence of PW3 anything suggesting that the appellant did not visit the home on 24 November 2014. Indeed the evidence of PW2 was that the appellant visited and she saw him on the bed with PW1. In cross examination, although she admitted that her mother is the one who told her to come and testify, she denied that her mother told her that the appellant went to bed with PW1.

43. Admittedly, on whether the accused had ever visited the home, there is cross examination evidence of PW2 where she answered *"No"* to the accused's question whether he had *ever come to her home*. This must be understood as implying that the accused had not visited them in the past or up to that point, when viewed in the context of the other questions appellant asked such as:

> ***"Accused: How many were you at home when I came to your home?***
>
> ***PW2: W, K, N and me"***

So that from the latter question, PW2 was asserting that the appellant visited on that day, and she (PW2) was in the house with the other three children.

44. In my view the magistrate evaluated and analysed the evidence exhaustively, and on the question of alibi, I do not see anything that would sufficiently introduce any doubt into the mind of the court concerning the whereabouts of the appellant on the material day. As such, I agree with the trial court that the alibi was introduced as an afterthought, and in any event was insufficient to cast doubt on the prosecution's evidence.

Disposition

45. For all the above reasons and having considered all the appellant's grounds of appeal, and also having carefully reviewed the evidence on record, I find that on the basis of the available evidence, the learned magistrate carefully and effectively analysed the evidence in a detailed judgment, and correctly convicted the appellant.

46. Accordingly, the appeal is dismissed.

Orders accordingly.

Dated and Delivered at Naivasha this 20th Day of December, 2018

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RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mr. Wairegi for the Appellant

2. Mr. Koima for the State

3. Court Clerk - Quinter Ogutu