REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 198 OF 2015 & 52 OF 2016

JAMES AGALOMBA KIGIKA……..……..APPELLANT

VERSUS

REPUBLIC …….…….…….…….RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's court at Kibera

Sexual Offence Case No. 51 of 2013 delivered by Hon. E. Juma, SPM 30th September, 2015).

JUDGMENT

Background

James Agalomba Kigika, the Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. The particulars of the offence were that on 7th October, 2013 at N.I.T.D Market in Nairobi within Nairobi County, unlawfully and intentionally committed an act by inserting his genital organ (penis) into the female genital organ (vagina) of B.N.W., which caused penetration into the said child aged 7 years

In the alternative he was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of the charge were that on 7th October, 2013 at N.I.T.D market in Nairobi within Nairobi County, the Appellant, unlawfully and intentionally committed an act by touching the female genital organ (vagina) of BNW a child aged 7 years.

At the end of the trial, the Appellant was found guilty in the main count and convicted accordingly. He was sentenced to life imprisonment. Being dissatisfied by both the conviction and sentence he preferred this appeal.

This court has consolidated both Appeal No. 198 of 2015 and 52 of 2016 which relate to the Appellant herein. The Appellant first filed appeal No. 198 of 2015 together with a Memorandum of Appeal in person. For reasons best known to himself, he thereafter filed appeal No. 52 of 2016 which was commenced by a Petition of Appeal filed by his lawyer S. Musalia Mwenesi Advocates. Therefore, this judgment will close both files in High Court Criminal Appeal No. 198 of 2015 and 52 of 2016.

Grounds of Appeal

The Appellant was represented by the law firm of S. Musalia Mwenesi Advocates, who filed a Petition of

Appeal dated 29th March, 2016. It contains 12 grounds of appeal which I have summarized into eight. The Appellant was dissatisfied that the investigations were poorly carried out and their results could not have founded sufficient ground for conviction, that the prosecution evidence was uncorroborated, inconsistent and unreliable, that the trial court failed to summon crucial witnesses pursuant to Section 150 of the Criminal Procedure Code, that there was no positive identification of the Appellant, that the sentence was excessive and that no forensic examination was conducted on the complainants' underpants which were allegedly stained with semen so as to establish that the semen belonged to the Appellant. Finally, the Appellant was dissatisfied that he was convicted on insufficient medical evidence.

Submissions

The Appellant's counsel filed written submissions on 18th November, 2016 and orally highlighted them on 8th December, 2016. In summary, learned counsel Ms. Mwenesi submitted that identification of the Appellant was not established. She emphasized that the defilement allegedly took place at night when the conditions for identification were difficult. According to the complainant, she and her other children friends were carried by the Appellant in his vehicle to an open field where he defiled them. Unfortunately, the complainant who testified as PW2 did not state whether the defilement took place in the open field or inside the car itself. Furthermore, PW2 testified that she was defiled by a person she could identify but not known to her. She later learnt that her defiler was known by the name 'Toto' which to the contrary was not a nickname of the Appellant. In that regard, counsel submitted that the court could not make an inference without sufficient evidence that the Appellant was known by the name 'Toto'. Further, that if such a conclusion were to be arrived at without evidence the same would amount to an assumption of the existence of a fact. The court was referred to the case of **J.O.O v Republic [2015]** where it was held that:

> ***"whereas a court of law is always called upon to make decisions or inferences on some set of circumstances, such a court should endeavor to make such decisions or inferences on the basis of the available evidence as adduced before it and it ought to be slow in making assumptions not supported by facts as tendered before court".***

Further on identification, the Appellant questioned why the mother to PW2 (PW1) did not cause the arrest of the Appellant the first time PW2 identified him to her. PW1's evidence was that the Appellant used to visit the market where she ran her business. It therefore beat logic why at the same time she testified that she had never seen him. The Appellant also challenged PW2's assertion that she identified the Appellant from a church as he drove on the road. The distance between the church and the road was not given so as to ascertain that PW2 truly saw the Appellant. Given that the defilement took place at night, there was a possibility of a mistaken identity.

On medical evidence, counsel submitted that the same was insufficient to found a conviction against the Appellant. She submitted that when PW2 was first examined at Nairobi Women's Hospital, a Post Rape Form was filled which indicated that she had not suffered any significant injuries. Further, the evidence of PW4 who produced the form on behalf of the doctor who examined PW2 was that PW2's anus was widened. However, this was not reflected in the form. Besides, PW2 did not testify that she was defiled through the anus. His evidence in the circumstances could not be relied upon, more so because he is not the one who examined PW2. Again, the mere fact of a missing hymen was not indicative of defilement as it was not shown when it was broken. In any case, a hymen can be broken through different ways. It was also not clear why PW2 was not taken to hospital on the day of defilement but on the following day yet the offence was grave. He also faulted the trial court for relying on the evidence of PW5, the Police surgeon who examined the complainant 23 days after the incident. On the whole, he was of the view that penetration was not proved.

On forensic examination, the Appellant's counsel questioned why PW2's underpants were not examined yet it was said that they were stained with semen. The Appellant would only have been linked to the defilement if it was established that the semen on the underpants belonged to him.

With regard to contradicting evidence, counsel submitted that PW2 was not consistent with regard to how

the defilement was perpetrated. It was said that she initially testified that she was defiled in the presence of one J and A but later testified that there was a third child. Further, she testified that all the children that were in her company were defiled by the Appellant, but J denied any sexual assault on him. In this regard it was the Appellant's view that the prosecution ought to have called the children who were with PW2 so as to ascertain that indeed PW2 was defiled by the Appellant. The failure to call the children as witnesses gave the inference that their evidence would have been unfavorable to their case. The case of **Juma Ngondia vs Republic [1982] KLR 454** and **Jackson Mutembei Mbae vs Republic [2015] eKLR** were cited in support of this submission.

Finally, counsel submitted that the learned trial magistrate summarily dismissed the Appellant's alibi defence without giving reasons. This shifted the burden of proof upon the Appellant, whereas it is trite that the same lies with the prosecution to prove their case beyond a reasonable doubt.

The Respondent was represented by learned State Counsel Ms. Sigei who opposed the appeal. She submitted that the Appellant was positively identified, that the prosecution evidence was corroborative, consistent and reliable and that penetration was proved. On identification, counsel submitted that PW2 pointed the Appellant to her mother twice, once, when he was walking on the road and a second time when he went to purchase vegetables from the market. This was indicative that she was certain about the person who defiled her. She submitted that evidence was sufficient that the Appellant carried PW2 together with J and A in his car after which he took them to a field where he defiled them. PW2 had also described the Appellant's car as white in colour and the Appellant confirmed that he had a white Nissan car. Regarding the Appellant's nickname, learned counsel submitted that it was PW2 who called him by that name, 'Tito', although the prosecution failed to cross-examine her more about it. On the Appellant's defence, Ms. Sigei submitted that it was the duty of the Appellant to corroborate his alibi defence to demonstrate that he was not at the scene of the crime at the time it occurred. He urged that the court dismisses the appeal.

Evidence

The prosecution called a total of 5 witnesses. Their case is founded on the evidence of both PW1, the mother to the complainant and PW2, the complainant herself. The case was that on the material date, PW2 after leaving school at 2.00 p.m., went to stay with her mother where she sold vegetables within Kabete area. At about 6.00 p.m., PW2 went to play with other children. PW1 closed her business at about 7.00 p.m. That is when she looked around for PW2 so that they could go home to no avail. She searched the entire market area but could not find her. She reappeared about 8.00 p.m. and on enquiry, she informed her that somebody had done bad manners (*"tabia mbaya")* to her. She rushed to Kabete Police Station where she reported the matter. On examining PW2's underpants, she noticed that they were stained with semen and that is when she was advised to take her to Nairobi Women's Hospital for further examination and treatment. She took her to the hospital on the following day. According to PW1, the complainant later pointed out the Appellant to her while he was driving his blue Mini Truck along the road. She did not take action at that point until on another day when the Appellant went to the market to purchase some vegetables. On this day, PW2 pointed him out to her again. She approached him and enquired whether he is the one who had defiled his daughter. When the Appellant got disinterested in what PW1 was enquiring about, she got offended and arrested him. He escorted him to Kabete Police Station after which he was charged accordingly.

PW2 gave a sworn statement of evidence. She recalled that she was playing with J and A amongst other children. They were about ten in number. It was late in the night and it was dark when the Appellant approached them and requested them to board his car. She referred to him as 'Toto'. She described his car as white in colour and that he was with another man in the car. He specifically called her, J and A into the car and promised to take them to a better playing field. It was when in this field that the Appellant undressed the three of them and defiled them. Although they cried, the Appellant warned that if they disclosed what had happened he would kill them. He left them to walk home on their own. Upon meeting her mother, PW2 disclosed what had happened to them. The latter reported the matter to Kabete Police Station and on the following day she was taken to Nairobi Women's Hospital where she was treated. According to PW2, she did not know the Appellant before. She next saw him when she was in a church.

At the time, the Appellant was in the market. She informed PW1 that she had spotted the Appellant but PW1 took no action. On a second incident, she spotted him in the market and informed PW1. PW1 personally effected the arrest and in her company (PW2) escorted him to the Kabete Police Station.

PW3, PC Peris Indeche of Kabete Police Station investigated the case. She recorded the witness statements as well as that of the Appellant. The latter statement was recorded on 10th November, 2013 after she found him in the police cells. She preferred the charges against him.

PW4, Dr. Daniel Wanjuki of Nairobi Women's Hospital produced the PW2's Post Rape Form after her examination on 8th October, 2013 by Dr. Mujadal Shuka. His evidence was that PW2's hymen was missing and her anus was widened. He indicated PW2's year of birth as 2006. **PW6, Dr. Joseph Maundu** of Nairobi Police Surgery on the other hand filled PW2's P3 form upon her examination on 30th October, 2013. She had no abnormalities or bruises on her genitalia but her hymen was broken.

After the close of the prosecution's case, the learned trial magistrate ruled that a prima facie case had been made out warranting the Appellant to give a defence. He gave a sworn statement of defence but called no witnesses. *He testified that he lived near Kabete Technical and was a driver cum technician in Industrial Area with ARM Engineering. He denied he committed the offence adding that he was framed up. He testified that on 7th October, 2013 he was in Sondu in South Nyanza working. He exhibited a register from the office which did not bear his signature as evidence that he was away from the office. He testified that he was arrested on 10th October, 2013 when he was at the market purchasing food. He stated that a lady came toward him shouting that it was him who had defiled her daughter. A crowd formed which escorted him to the police station. He stated that he did not know the complainant and that she was not there during his arrest. He acknowledged he knew the mother who was formerly a fruit and vegetable vendor at Kangemi, who he occasionally bought things from before she relocated her business.*

In cross examination, he stated that he had no evidence to demonstrate that he was in Sondu on the date of the incident. His explanation was that he had since left ARM Engineering and could therefore not get access to official documents.

Determination

I have accordingly considered the evidence on record and the respective rival submissions and arrived at the issues for determination as follows:

a. Whether the Appellant was positively identified.

b. Whether the prosecution proved penetration.

c. Whether the prosecution case was corroborated and proved beyond a reasonable doubt.

d. Whether the Appellant's alibi defence was considered, and

e. Whether the sentence imposed was harsh and excessive in the circumstances.

The issue of identification in my view is paramount in determining the success or failure of this appeal. I say so because this is a case where although the evidence of a minor victim in a sexual offence can sorely be relied upon to found a conviction, the circumstances of this case are unique by themselves. The court must carefully examine the circumstances under which the alleged defilement took place against the consistency or otherwise of the evidence of the complainant. The court would then crystalize that evidence against a back drop of corroboration by any other evidence.

Suffice it to say, the incident took place at night. The evidence of the victim, PW2, was that she was not alone at the time. She was in the company of two other children namely J and A. Her further testimony was that apart from herself, J and A too were defiled; specifically, sodomized. This fact according to PW2

was relayed both to her mother, PW1 and the police. The evidence of PW1 to whom PW2 first reported the incident was that PW2 did not mention that she was defiled alongside other children. PW1 testified that it is PW2 who first informed the police that she was defiled together with other children and that she only mentioned much later to her that she was playing with other children. If the evidence of PW1 were anything to go by, and truly the police were informed that other children namely A and J were also defiled, the police would have investigated this line of complaint. In lieu thereof, and for purposes of this case, both J and A or at least one of them would have been called as crucial prosecution witnesses in corroborating the testimony of PW2. Interestingly, this did not happen. To completely shutter the evidence of PW2, PW3 the investigating officer in cross-examination stated that he was not told that any other child was sexually assaulted. Her testimony was in the following words:

> ***"I was not told of any sexual offence on J, I was not told that the accused defiled J. When I informed the accused he told me that he goes to his home with his company pick up vehicle. The accused denied being at the scene. He said that he was at work until 6.00 pm".***

It defeats logic how and why PW1 would state that PW2 informed the police about the defilement of other children whereas the investigating officer denied that such a report was made. PW1 herself being the mother of the complainant was categorical that no such report was made to her until much later at an unspecified time. Respectively, I cast doubt in my mind the truthfulness of PW2's evidence. As correctly submitted by the Appellants counsel, the failure to call the two crucial witnesses who would have otherwise strengthened the prosecution case gave the inference that had the witnesses been called, their evidence would have been adverse to the prosecution case. I therefore wholly associate myself with the holding in the case of **Paul Kanja Gitari vs Republic (2016)e KLR** where it was held that :

> *"**the state of the evidence tendered with all of its inconsistencies means that the Appellants complaint that some vital witnesses were not called is also not idle. It is of course trite that there is no number of witnesses required for the proof of the fact. However it has long been the law that when the prosecution calls evidence that is barely adequate, then the failure to call vital witnesses may entitle the court to draw an inference that had such witness been called, their evidence would have been adverse to the prosecution case".***

In the same respect, PW2 in her evidence in chief testified that she had never seen or met the Appellant before the date of the incident. In cross-examination, she contradicted herself by stating that since she lived upcountry, she never used to see the Appellant quite often. In her own words she stated as follows:

> *'**I usually stay up-country, I do not see the accused much'***

*T*hese words ultimately imply that the Appellant was previously known to PW2 and therefore the identification of the Appellant was by recognition. This is further emphasized by the fact that PW2 referred to the Appellant as 'Tito'. In my view, she would not have called him by name if she did not know him before the incident. Even if she only heard him being referred to by that name from other source, the prosecution ought to have made a clarification in cross examination how PW2 knew that the Appellant was known by the name 'Tito'. In the alternative, the prosecution would have led evidence of any other witness so as to clarify this mystery. It follows then that if PW2 knew the Appellant before the incident, she would have informed her mother or police that she had previously seen the person who defiled her.

Further, if the prosecution wished that the court takes the position that the Appellant was not known to PW2 before the incident, it would be expected that she maintained that position throughout her evidence. But the contradictions in her testimony rules out the truthfulness of her evidence. I am minded that in the voire dire examination, the trial court deduced that she was intelligent enough to tell the truth. Therefore, repetitive contradictions of evidence may not be wished away.

Still on identification, PW2 was candid that the Appellant picked her and other children in a white car. In contrast, her mother stated that:

"the accused drive a blue Mini Track and he complainant pointed him out as he drove by his vehicle"

*T*his testimony again casts a shadow of doubt why the key prosecution witnesses were not consistent on very crucial matters touching on the case.

It is also interesting to note how and why PW1 did not act swiftly on the first date PW2 pointed to her the Appellant as the culprit. The offence of defilement is by no means a heinous act which I believe aroused a lot of anger in PW1. It would then be expected that immediately PW2 pointed out the Appellant as the defiler for the first time was the best opportunity to cause his arrest. Unfortunately, this did not happen until on a second date when PW1 insisted that the Appellant was the defiler. Once again, it is doubtful why PW1 was reluctant initially to take action. I accordingly hold that the Appellant was not positively identified to the exclusion of any other persons that he is the person who defiled PW2.

It is trite from the medical record that there was evidence of defilement on PW2. However, for want of positive identification, I am hesitant to deduce that the person who perpetrated the heinous offence was the Appellant. In any case, it is not clear why the police did not call for PW2's underpants which PW1 claimed were stained with semen for purposes of conducting a DNA forensic examination to rule out that the semen came from the Appellant. Had this been done, even in the absence of a positive physical identification, the Appellant would have been directly linked to the offence. I then agree with the Appellant that this is a case that was poorly investigated. The evidence of the prosecution as adduced was insufficient and unreliable.

I however disagree with the Appellant that he was charged with an unspecified offence as the charge sheet is clear that the offence with which he was charged was defilement. It is also the offence to which he pleaded and for which he defended himself. I note that the Appellant did not corroborate his alibi defence. But the onus remains with the prosecution not only to prove their case beyond a reasonable doubt but to also dislodge the accused's alibi defence. From the foregoing, it is clear that the prosecution's case did not meet the threshold sufficient to dislodge the Appellant's defence. This is an appeal, in the circumstances, that must succeed.

In the end, I quash the conviction, set aside the sentence and order that the Appellant be and is hereby forthwith set free. It is so ordered.

DATED AND DELIVERED THIS 22nd DAY OF MARCH, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. M/s Mwenesi for the Appellant

2. M/s Nyauncho for the Respondent.