REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO 48 OF 2014

EVANS KILUGHA MWANGAGE......................................APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(From original conviction and sentence in Criminal Case Number 120 of 2012

in the Senior Resident Magistrate's Court at Wundanyi delivered

by Hon M. Chesang (RM) on 14th June 2012)

JUDGMENT

1. The Appellant herein, Evans KilughaMwangage, was tried and convicted by Hon M. Chesang, Resident Magistrate for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No 3 of 2006. He was sentenced to serve twenty (20) years imprisonment. He had also been charged with the alternative offence of committing indecent act with a child contrary to Section 11(1) of the said Act.

2. The particulars of the main charge were as follows:-

> **"On diverse Dates between 25th December 2010 and 10th March 2012 at [particulars withheld]within Taita Taveta County, intentionally and unlawfully caused his penis to penetrate the vagina of J W a child aged 12 years."**

ALTERNATIVE CHARGE

> **"On diverse Dates between 25th December 2010 and 10th March 2012 at [particulars withheld] within Taita Taveta County, intentionally and unlawfully touched the vagina of J W a child aged 12 years with his penis."**

3. Being dissatisfied with the said judgment, the Appellant filed a Notice of Motion application on 5th November 2012 seeking leave to file his appeal out of time. The said application was allowedand the Petition of Appeal deemed to have been duly filed and served. His Grounds of Appeal were as follows:-

> 1. **THAT the learned trial magistrate erred in both law and facts be convicting him on hereby** (sic) **evidence.**

2. **THAT the learned trial magistrate erred by not considering that the evidence of the doctor where for PW 1 was affected by vernerles disease of which he was examined by the doctor and was not found being affected** (sic)**.**

3. **THAT the learned trial magistrate erred both law and facts by not considering that no evidence supporting the allegation apart to her mother wherefore it is planet evidence**(sic)**.**

4. **THAT the learned trial magistrate erred by not considering that PW 1 and PW 2 made contradiction according to alleged crime in within court trial** (sic)**.**

5. **THAT the learned trial magistrate erred by not considering that he was held in police custody for 36 hours, then illegal 24 hours, under new constitution**(sic).

6. **THAT the trial magistrate failed to consider his defence case, thus his rights were breached.**

4. On 13th July 2016, this court directed the Appellant to file his Written Submissions. Instead of doing so, on 27th July 2016, he filed the said Written Submissions along with Amended Grounds of Appeal. The Amended Grounds of Appeal were as follows:-

1. **THAT the learned trial magistrate erred in law and fact by failing to appreciate the evidence of PW 4 which contradict** (sic) **the results of his examination.**

2. **THAT the learned trial magistrate erred in law and fact by not considering his defence which was the truth of the case.**

3. THAT the learned trial magistrate erred in law and fact by finding that PW 1's evidence was corroborated by that of her mother, PW 2.

4. **THAT the learned trial magistrate erred in law and fact by not appreciating the importance of arresting and thorough investigation**(sic).

5. **THAT the learned trial magistrate erred in law and fact by misleading herself in judgment without seeing that the case was unfatal** (sic) **as per the sentence.**

5. The State was to file its Written Submissions by 8th September 2016. However, when the matter came up in court on the same date, counsel for the State indicated that it filed a Notice of Motion application dated 23rd August 2016 on 24th August 2016 pursuant to the provisions of Section 358 of the Criminal Procedure Code Cap 75 (Laws of Kenya) seeking additional evidence to be adduced by a doctor regarding the issue of the sexually transmitted disease that PW 1 was found to suffer from and not the Accused person.

6. This court directed that the said application be heard first and gave directions on the disposal of the same. After hearing and determining the same, this court dismissed the sameon 13th December 2016 as it found the same to have had the potential of giving the Prosecution a second bite of the cherry by presenting evidence that ought to have emerged during the evidence of W M (hereinafter referred to as "PW 4") during the trial.

7. On 8thFebruary 2017, the State filed its Written Submissions dated 7thFebruary 2017 in respect of the Appellant's Appeal herein. The Appellant filed his response to the State's Written Submissions on 23rd February 2017.

8. When the matter came up on the same date 23rd February 2017, both the Appellant and the State asked the court to rely on their respective Written Submissions in their entirety as they did not wish to highlight the same. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

9. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

> "**On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

10. Having looked at the Written Submissions by the Appellant and the State, it appeared to this court that the only issue that had been placed before it for determination was whether or not the Prosecution had proved its case beyond reasonable doubt. It therefore dealt with all the Amended Grounds of Appeal together as they were related.

12. The Appellant contended the Complainant, J W (hereinafter referred to as "PW 1") adduced evidence on oath yet she did not inform the Learned Trial Magistrate if she understood the meaning of taking an oath. He added that in any event, her age was not proven because according to the Birth Certificate, she was shown to have been thirteen (13) years and not twelve (12) years as she had told the Trial Court.

12. He argued that a female could suffer from gonorrhoea for a long time without the same having been detected.He averred that the medical examination that was conducted exonerated him as it showed that unlike PW 1, he was not suffering from a sexually transmitted disease. It was his averment that if he had been infected with the sexually transmitted disease, then it could have been detected in as little as two (2) hours.

13. It was his further averment that PW 4 did not indicate how long PW 1's hymen had been torn or how many times she had engaged in sexual intercourse. He submitted that there was a possibility that persons other than him could have been responsible for the breaking of the said hymen because at the time of her examination, there was no evidence of spermatozoa.

14. He said that it had been mutually agreed that PW 1 and her sister would fetch water for him and he would pay them once they did so. He was emphatic that it was then not possible that he could have pulled PW 1 into his house as she would normally take water inside his house. He said that he was therefore surprised when he was arrested and charged with the present offence and was categorical that PW 1 had been forced to implicate him by her mother, D M (hereinafter referred to as "PW 2") with whom he had bad blood.

15. He further stated that PW 1 had exaggerated her evidence when she said that PW 2 saw her naked through the window of his house and that she told her to dress up. It was his averment that if his house was close to PW 1's house and she had been locked in his house from 12noon to 5.00pm as had been contended by PW 2, then PW 1 ought to have testified as much but she did not do so.

16. He pointed out that PW 1's father and village elder were not called as witnesses to corroborate PW 1's evidence yet they were there when the incident was reported at different times. He stated that No 92293 Stella Wanjiru (hereinafter referred to as "PW 3") ought not to have relied on the evidence of PW 1 and PW 2 but rather she ought to have conducted thorough and independent investigations to establish exactly what had transpired herein.

17. He submitted that the Prosecution had not proved its case beyond reasonable doubt and thus urged this court to allow his Appeal.

18. On its part, the State submitted that although PW 1 adduced evidence on oath without having informed the Trial Court that she understood the meaning of an oath, the Appellant did not suffer any prejudice as he Cross-examined her and that in any event her evidence was corroborated by PW 2

notwithstanding that she did not see him defile PW 1. In this regard, it placed reliance on the case of **Criminal Appeal 111 of 2011 Julius Kiunga M'biritha vs Republic** (full citation not provided).

19. It further stated that the incident occurred during the day and the Appellant, being known to PW 1, she was able to positively identify the perpetrator of the offence he was alleged to have committed. It was its contention that the fact that there were no spermatozoa did not mean that the Appellant did not defile PW 1 because the act of penetration does not necessarily result in discharging of semen in the victim.

20. It pointed out that PW 1 had testified that it was not the first time that the Appellant had defiled her which could explain the tearing of the hymen but no bruises, a fact it said was confirmed by PW 4. It was its contention that the fact that the Appellant was found not to have suffered from gonorrhoea did not affect the credibility of the Prosecution's case because medical evidence was not the only evidence that could be used to support the offence of defilement but that it could only assist. It referred the court to the case of **Cr Appeal No 5 of 2013 Robert Mutungi Muumbi vs Republic** (full citation not provided) in this regard.

21. It was its further submission that the Appellant failed to provide an alibi and failed to establish any ill motive on the part of PW 1 and PW 2. It said that he had the opportunity to Cross-examine PW 1 and PW 2 on the issue of payment of monies for fetching of water and consequently, his unsworn evidence did not convince the court of his innocence or shake the Prosecution's case.

22. It urged this court to dismiss the Appeal herein by upholding the sentence of twenty (20) years as Section 8(3) of the Sexual Offences Act provides as follows:-

> **"A person who commits an act of defilement with a child between the age of twelve and fifteen is liable upon conviction to imprisonment for a term of not less than twenty years."**

23. This court perused the proceedings in the Trial Court and noted that this was matter that came within the ambit of Section 124 of the Evidence Act Cap 80 (Laws of Kenya). The same stipulates as follows:-

> **"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is 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.**

24. Evidently, the proviso to Section 124 of the Evidence Act is clear that where there are no eye witnesses other than a person who has been defiled, the trial court shall receive evidence of such alleged victim, if it is satisfied that such alleged victim is telling the truth. Such a trial court must record the reasons for believing that witness and not the alleged perpetrator.

25. As the circumstances of the case herein were PW 1's word against that of the Appellant because there were no actual eye witnesses to the alleged incident, there was need to critically analyse her evidence to establish if the same could sustain a conviction against him. This court noted her evidence that she had sex with the Appellant herein several times between 25th December 2010 and 10th March 2012 and that PW 2 saw her through his window whereafter she told her to dress and caned her.

26. On her part, PW 2 said she saw the Appellant's window open and when she went to his house, she found him sitting outside his house. She stated that she looked into his house and saw PW 1 and when she asked him why she was keeping a child in his house, he did not response. It was then that PW 1 left his house and ran away. Although PW 1 had stated that PW 2 caned her after leaving the Appellant's house,

PW 2 only said that she threatened to take her to the Village headman but PW 1 never said anything.

27. It was not clear from both PW 1's and PW 2's evidence why PW 2 went directly to the Appellant's house to enquire whether PW 1 was in his house or if there were other houses nearby that she could also have looked for PW 1. It was also not clear what PW 1 was doing in the Appellant's house till 5.00 pm when PW 2 said she went to his house.

28. In addition, PW 2 stated that PW 1 informed her that she had had sex with the Appellant twice while PW 1 testified that the sexual contact happened several times. PW 1's assertions were corroborated by PW 3 who testified that the Appellant forcefully had sex with PW 1 very often.

29. Notably, inconsistencies and/or contradictions in testimonies in a trial are expected because each witness will normally testify as to what he perceived and/or observed at any given time. However, these inconsistencies and/or contradictions must not be so glaring as to lead a trial court to entertain doubt as to what really transpired at any given time. The version of unfolding events must more or else be similar so as to render the inconsistencies and/or contradictions immaterial and irrelevant.

30. Having analysed the evidence of PW 1 and PW 2, this court came to the firm conclusion that the discrepancy in their evidence was not one this court ignore for the reason that PW 1 was the sole witness of the sexual offence the Appellant was alleged to have committed. The fact that the Appellant was seated outside his house and PW 1 was inside his house, as PW 2 stated and reiterated by him in his unsworn evidence was not proof that he had defiled PW 1.

31. This court was, however, not able to confirm the circumstances under which PW 1 found herself in his house. This is because PW 2 went directly to the Appellant's house which conduct seemed to suggest that she knew where PW 1 was all along from 12 noon to 5.00pm. Her evidence that it was the first time to go to his house baffled the court because it was not shown that the Appellant's house was the only house in that area necessitating PW 2 to go to his house only and not look for her in any other place.

32. Going further, this court noted the Learned Trial Magistrate's observations that although the Appellant was not found with a sexually transmitted disease, it did not mean that he had defiled PW 1, an assertion that the State reiterated in its Written Submissions. However, it found and held that if it was to accept PW 1's evidence that she had sex with the Appellant several times, the last time being three (3) days before his arrest, there was no logical scientific explanation that was adduced by the Prosecution to show how PW 1 would have had had gonorrhoea without the Appellant having found to have been infected with the same disease after he was examined unless of course he had used protection which was not alluded to in the case herein.

33. This court was not persuaded by the State's submissions that medical evidence is only intended to assist the court in determining an act of defilement. To the contrary, medical evidence can exonerate a person who is charged with a criminal offence and more so a sexual offence where the victim has a sexually transmitted disease and the perpetrator is found not to be infected. The cases of **Julius Kiunga M'biritha vs Republic[2013]eKLR** and **Robert Mutungi Muumbi vs Republic [2015] eKLR** were thus distinguishable from the facts of the case herein as in addition to the absence of the sexually transmitted evidence, PW 1's and PW 2's contradicted each other.

34. This court came to the conclusion that although PW 4 had confirmed that penetration had occurred, there was nothing that linked the Appellant to the breaking of PW 1's hymen. The Appellant was under no obligation to have assisted the Prosecution prove its case as he had a constitutional right to remain silent and let it prove its case. Ill- motive or grudge must not be proven to exist in a case whenever a charge is preferred by a party against another. What waskeywas whether or not the Prosecution had adduced sufficient evidence to sustain a case against an accused person.

35. Accordingly, having considered the Appellant's Petition of Appeal, his Written Submissions and those of the State and the case law that it relied upon, this court found that PW 1's evidence was uncorroborated by medical evidence, by PW 2 or any other witness. The fact that PW 2 and the Appellant

both stated that she was in the Appellant's house, albeit under circumstances that were not clear to this court, made this court to form the opinion that she may not have been fully truthful regarding how she found herself in the Appellant's house.

36. If as she stated he used to pull her into her house by force, she did adduce evidence that would have assisted this court in concluding that she was unable to escape from his house and thus tilt the weight of her evidence against the Appellant in her favour more so because it was her word against his.

37. This court thus came to the firm conclusion that the Prosecution did not prove its case to the required standard which is proof beyond reasonable doubt and that the Learned Trial Magistrate misdirected herself when she convicted the Appellant based on the evidence that was placed before her. In that regard, it found that the Appellant's Grounds of Appeal Nos (1), (2), (3), (4) and (5) were merited.

DISPOSITION

38. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 5th November 2012was successful and the same is hereby allowed.

39. In view of the doubt that was raised in the mind of this court leading it to give the Appellant benefit of doubt, it hereby quashes the conviction and sets aside the sentence that was meted upon the Appellant by the Trial Court as it would be clearly unsafe to confirm the same. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

40. It is so ordered.

DATED and **DELIVERED** at **VOI** this **27th** day of **April** 2017

J. KAMAU

JUDGE

In the presence of:-

Evans KilughaMwangage - Appellant

Miss Anyumba-for State

Josephat Mavu– Court Clerk