REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 140 OF 2015

KEFA OMINA ALELA…….……..…….....APPELLANT

VERSUS

REPUBLIC…….…….RESPONDENT

(Appeal against Judgment, Conviction and Sentence imposed in Criminal Case Number 171 of 2013 in the Senior Principal Magistrate's court at Winam delivered on 17.4.14) by Hon. M.C. Nyingei on behalf of A.R. Kithinji SRM

JUDGMENT

The trial

The Appellant herein **Kefa Omina Alela** has filed this appeal against his conviction and sentence on a charge of is charged of defilement of a girl 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 are that

On 28.2.13 Particulars withheld West Bunyore Location within Vihiga County intentionally and unlawfully caused your genital organ namely penis to penetrate the genital organ namely vagina of RLA a girl aged 4 years

The prosecution's case

The prosecution called 5 witnesses in support of the charge. PW1 M N testified that the complainant **RLA** was her 4 year old daughter. She recalled that on 28th February 2013, the child was playing with other children when at about noon, she called the child who came from appellant's house and she noticed that the child was walking with difficulty. That upon inquiry, the child informed her that she had been playing with Baba Konda while naked. That she checked the child's private part and suspected that she had been defiled and therefore escorted her to Ipali Health Centre. That appellant was later arrested and charged.

PW2 S A O, appellant's father recalled that on 28th February 2013; he was sitted outside his house and that appellant whose house is about 10 metres away was in his house. He said that he saw the complainant walk out of appellant's house carrying potatoes. That later, PW1 went to him with complainant and reported that complainant had been defiled and he adviced PW1 to take her to hospital.

PW3 Victor Bahati Omugo a member of community policing recalled that he arrested the appellant on 28th February 2013 after it was reported that he had defiled PW1's daughter.

PW4 Lydia Nandikobe a clinical officer stated when she examined complainant on 18th March 2013, she

had laceration on labia minora and lab tests showed presence of spermatozoa as a result of which she concluded that the child had been defiled.

PW5 CPL Lydia Mugui said she investigated the case after which the appellant was charged. She tendered the complainant's clinic book as PEXH. 1 and P3 form as PEXH. 2.

The Defence Case

When put on his defence, the appellant gave sworn testimony in which he raised an alibi defence that he was away, making bricks throughout the material day. The learned trial magistrate considered the evidence and finding the charge proved against the accused sentenced appellant to life imprisonment.

The Appeal

Being dissatisfied with the conviction and sentence, the appellant lodged the instant appeal. In his Petition of Appeal filed on 12th October 2015, the appellant set out 7 grounds of appeal to wit:-

> ***1. The trial magistrate erred in law and fact by convicting him on insufficient, inadequate, inordinate and distorted evidence leading to miscarriage of justice***
>
> ***2. The trial magistrate erred in law and fact by failing to observe that there was no age assessment carried out to confirm the exact age of the complainant***
>
> ***3. The trial magistrate erred in law and fact by failing to observe that the appellant was not given statements of the prosecution witnesses***
>
> ***4. The trial magistrate made a misdirection by failing to observe that there was no DNA test carried out to establish the appellant's complicity in the commission of the alleged offence***
>
> ***5. The trial magistrate made a misdirection by failing to observe that he was not informed of the reason for his arrest in a language that he could understand***
>
> ***6. The trial magistrate faulted by failing to observe that no exhibits were produced in court***
>
> ***7. The trial magistrate erred in law and fact by failing to evaluate and examine the appellant's sworn alibi defence***

During the hearing of the appeal, the appellant relied on his filed written submissions which he orally highlighted while, Ms. Wafula, Counsel for the state made oral submissions in response thereto.

THE ISSUE FOR DETERMINATION BEFORE THE COURT

The issue for determination before the court is whether on the evidence presented before the court, the charge of defilement of a girl contrary to section 8(1) as read with 8(3) of the Sexual Offences act 2006 No. 3 of 2006 had been proved.

Analysis and Determination

This being a court of first appeal, I am guided by the ruling of the Court of Appeal in the case of ***OKENO VS. REPUBLIC [1972] E.A.32***, where it held that:-

> ***"It is the duty of a first appellant court to consider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld"***

The trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and this court is in dealing with this appeal obligated to give allowance for that.

In dealing with this appeal, I will separately consider the grounds of appeal as follows:-

a. Was appellant informed of the reason for his arrest?

Article 49 (1) provides that an arrested person has the right;

"(a) To be informed promptly, in a language that the person understands, of; the reason for the arrest, the right to remain silent and the consequences of not remaining silent.

Whereas there is no evidence before me that the appellant was or was not read the above right, the issue would have properly been raised at the trial Court and the arresting officer would have been questioned on the issue. To raise it as the basis for this appeal cannot be in the best interests of justice. I also recall that in the 1966 U.S. Supreme Court Case of ***Miranda vs Arizona***, the reason Miranda's conviction was quashed was because of the statements that he had made to the police without him being advised of his rights and not the non-advise of the rights *per se*. In the instant case, no complaint has been made that the non-reading of the **Article 49(1)(a)** right if at all, has prejudiced the appellant in any way and I am not convinced that this is a sufficient reason to overturn the trial.

b. Was appellant provided with witness statements?

Article 50 of the Constitution provides that: -

(2) every accused person has the right to a fair trial, which includes the right—

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

I have considered ***Byrne v Kinematograph Renters Society Ltd, {1958} 2 All ER 579*** cited by the appellant and I find that it is not relevant to this case for the reason that the Constitution is explicit on the rights of an arrested person. ***Jon Cardon Wagner v Republic & 2 Others [2011] eKLR*** also cited by the appellant is irrelevant to this appeal since it dealt with the issue of contradictory statements by the complainants.

In ***Thuita Mwangi & 2 others v Ethics & Anti-Corruption Commission & 3 others [2013] eKLR*** where the court held as follows:

The right to be provided with" material the prosecution wishes to rely on is not a one-off event but is a process that continues throughout the trial period from the time the trial starts when the plea is taken. The reality is that there will be instances where all the information relating to investigation may not all be available at the time of charging the suspect or taking the plea. The disclosure of evidence, both inculpatory and exculpatory, is easily dealt with during the trial as the duty to provide the material is a continuing one and the magistrate is entitled to give such orders and directions as are necessary to effect this right. When the fresh material is provided, the accused is entitled to have the time and opportunity to prepare their defence.

I have perused the record of the trial court and the appellant did not raise the issue of non-availability of statements during the trial. Had he raised it; I have no doubt that the learned trial magistrate would have given such orders and directions as are necessary to give effect to appellant's right under Article 50 (2) of the Constitution. I therefore find no merit in this ground of appeal.

c Was there an age assessment of the victim?

As regards lack of a birth certificate or an age assessment report to establish the exact age of the complaint for purposes of computing the applicable penal provision under the Sexual Offences Act, the Court of Appeal in ***J.W.A. v. Republic (2014) eKLR*** held that age of the victim is a matter of fact which could be proved by evidence other than birth certificate and age assessment report, and said as follows:

"The gist of the appellant's appeal is that there is material contradiction in the age of the complainant and it is unclear whether she was 10 or 16 years old; that the prosecution did not produce a birth certificate or adduce medical or other cogent evidence to prove the age of the complainant; that the penalty for various offences under the Sexual Offences Act, 2006, is determined by the age of the complainant. It is our considered view that the age of an individual is a fact and the two courts below established the fact that the complainant was 10 years of age. The complainant testified that she was 10 years old; the medical report produced as Exhibit 1 signed by Dr. K. Malumbe who examined the complainant indicates she was born in 1989 and was thus 10 years old in 2009, when the offence was committed; the P3 Form tendered in evidence as Exhibit 2 shows that the complainant was 10 years old at the time of the offence. On our part, we see no reason to disturb the finding of fact made by the trial courts below and we are satisfied that the evidence on record shows that the age of the complainant was proved to be 10 years

The complainant did not testify but her mother testified that the child was about 4 years old. A clinic card produced as PEXH. 1 shows that the victim was born in 2008. The P3 form produced as PEXH. 2 shows that the child's age as 4 1/2 years. From the foregoing; I find that the age of the child was proved by the mother and medical evidence contained in the P3 form to be between 4 years and 4 1/2 years.

d. Were exhibits produced?

Contrary to the appellant's contention, a clinic card was produced as PEXH. 1 while the P3 form was produced as PEXH. 2.

e. DNA

The Appellant argued that the trial magistrate made misdirection by failing to observe that there was no DNA test carried out to establish the appellant's complicity in the commission of the alleged offence.

In **AML v Republic 2012 eKLR**, the Court of Appeal upheld the view that:

"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."

This was further affirmed in ***Kassim Ali v Republic Cr Appeal No. 84 of 2005*** where this Court stated that:

"The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

Moreover, section 36 of the Sexual Offences Act that gives the trial court powers to order an accused person to undergo DNA testing uses the word "**may**". I therefore find that the power to order an accused person to undergo DNA testing is discretionary and it was not a mandatory obligation on the trial court.

f. Adduced evidence versus appellant's alibi

The Appellant argued that the trial magistrate erred in law and fact by convicting him on insufficient, inadequate, inordinate and distorted evidence leading to miscarriage of justice. He submitted that the child did not testify and that PW1 and PW2 did not witness the commission of the offence.

There's no doubt that the evidence against appellant was circumstantial. The principles that guide the court when considering circumstantial evidence are now well settled. The decision of the predecessor of the Court of Appeal in the well-known case of ***Republic v Kipkering arap Koskei & Another (1949) 16 EACA 135*** settled it all when it held:

"That in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any

other reasonable hypothesis than that of his guilt, and the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is always on the prosecutions and never shifts to the accused."

The principle was elaborated upon in a later case of ***Simon Musoke v R Criminal Appeal No. 188 of 1956*** when the court added that at the same time, there must not be any co-existing facts in, or circumstances which may weaken or destroy that inference of the guilt of the accused person.

PW1 M N recalled that on 28th February 2013, the child was playing with other children when at about noon, she called the child who was out playing and when the child came out of appellant's house, she noticed that she was walking with difficulty. That upon inquiry, the child informed her that she had been playing with Baba Konda while naked. That she checked the child's private part and suspected that she had been defiled. PW2 S A O, appellant's father recalled that on 28th February 2013; he was sitted outside his house when he saw the complainant walk out of appellant's house carrying potatoes. That later, PW1 went to him with complainant and reported that complainant had been defiled.

When put on his defence, the appellant raised an alibi defence that he was away, making bricks, throughout the material day. The appellant argued that the trial magistrate erred in law and fact by failing to evaluate and examine his sworn alibi defence.

On alibi evidence, the Court of Appeal in the case of ***Victor Mwendwa Mulinge Vs Republic [2014] eKLR*** held that even if the appellant raised the defence of alibi for the first time during the trial, the prosecution ought to have applied to adduce further evidence in accordance with Section 309 of the Criminal Procedure Code to rebut the appellant's defence.

Section 309 of the Criminal Procedure Code provides:-

"If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it."

In the case of ***Kiarie v Republic [1984] KLR*** the Court of Appeal held:-

"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 and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons".

The prosecution in the case before me did not apply to the court to obtain evidence for the purpose of rebutting the alibi of the appellant. This puts the case of the prosecution in doubt considering that circumstantial evidence tendered by PW1 and PW2 cannot be said to be overwhelming since it did not place the appellant in his house on 28th February 2013, at about noon when the offence was allegedly committed. Both PW1 and PW2 did not state that they had seen the appellant in his house at about noon on the material date.

Further to the foregoing, PW4 Lydia Nandikobe the clinical officer that examined complainant and filled the P3 form, stated that lab tests showed the presence of spermatozoa as a result of which she concluded that the child had been defiled. Of interest to note is that the prosecution did not take samples to determine the nexus between the spermatozoa and the appellant.

I have considered the judgment of the trial court and I find that the appellant's defence of alibi was not considered. In view of the foregoing analysis of the prosecution and defence case, I am of the considered opinion that the learned trial magistrate ought to have given the appellant the benefit of the doubt in the prosecution's case. I reach a conclusion that the case against the appellant was not proved beyond any reasonable doubt rendering the conviction unsafe.

g. Sentence

As stated earlier, the appellant was charged under section 8(1) as read with section 8(3). Section 8 states:

> ***(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years***.

The essential ingredients in a charge under section 8 are that the age of the child is of paramount and fundamental importance. The importance is created because the section gives a specific and mandatory sentence for each category of defilement committed against a child.

The appellant was sentenced to life imprisonment. The question is whether the conviction occasioned a miscarriage of justice in respect of the rights of the appellant or whether the appellant lost a legitimate right or expectation.

As stated, section 8 of the Sexual offences Act makes a conscious and specific penalty, according to the age of the child. An accurate assessment of the age of the child is a material factor in charging, convicting and sentencing. The trial court convicted the appellant as charged but sentenced him under section 8(2). After analyzing the evidence in detail, I find that the trial court must at the time of sentencing have been confronted with the issue concerning whether the appellant was charged under the correct provisions of the law but proceeded to sentence under a section other than the one appellant was charged with. In this regard, Warsame J in ***Jon Cardon Wagner v Republic & 2 Others (SUPRA)***, held:-

> ***"The matter which to my mind is relevant in this case is that where the power to be exercised by a judicial officer involves a charge against a person who is eventually convicted the person can be said to be prejudiced if he had no knowledge or reasonable expectation that he would be convicted under a different section than the one in which he gave his defence. One may argue that a person who was exposed to a situation where he is convicted for a charge in which he did not give his defence may have lost a legitimate expectation or right. The point I am making is that it is a common principle in every case which has in itself the character of judicial proceedings that the party against whom a judgment is to operate should have an opportunity of being heard.***

From the foregoing; I find that the conviction on other charges other than the ones that appellant was tried upon and on charges to which he did not have the opportunity to respond, no doubt gravely prejudiced him.

For the reasons I have stated, I am afraid the case presented by the prosecution was not proved beyond reasonable doubt. The appeal is thus hereby allowed. The conviction is hereby quashed and the sentence is set aside. The appellant is set at liberty unless otherwise lawfully held.

It is hereby so ordered.

DATED, SIGNED AND DELIVERED THIS 20TH DAY OF APRIL 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Clerk Winnie

Appellant Present in person

For the State Ms Wafula