REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

H.C.CRIMINAL APPEAL NO.124 OF 2013

PATRICK BARASA WAWIRE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No.19 of 2012 in the Chief Magistrate's Court at Kakamega (Kendagor Ag. SRM)

JUDGMENT

Patrick Barasa Wawire, (The appellant) has appealed to this court against conviction and sentence imposed on him by the resident magistrate, (Hon. C. Kendagor), in *Criminal Case No.19 of 2012* at the Chief Magistrate's Court at Kakamega. The appellant had been charged with one main count of defilement of an imbecile contrary to *section 146* of the Penal Code. Particulars of the offence were that on or about 28th December, 2011, at (withheld) village, (withheld) sub-location in (withheld) District within Western Province; the appellant unlawfully had carnal knowledge of (withheld) a girl aged 14 years knowing her to be an imbecile. He also faced an alternative count of indecent act with a child contrary to *section 11(1)* of the Sexual Offences Act, (No.3) of 2006, particulars being that on 28th and 29th December, 2011, at (withheld) village, (withheld) sub-location (withheld) District within Western Province, intentionally and unlawfully touched the vagina of (withheld), a girl aged 14 years, with his penis. The appellant pleaded not guilty to the main charge as well as the alternative and after a full trial in which the prosecution called 6 witnesses and one witness by the defence, the learned magistrate convicted the appellant on the main count and sentenced him to fourteen years imprisonment with hard labour.

Aggrieved with the conviction and sentence, the appellant lodged an appeal to this court and raised 10 grounds of appeal as follows:-

> *"1. That the learned trial magistrate erred in law and fact in convicting the appellant on a charge that was defective and/or on a non-existent provision and when the particulars of the charge contradicted and/or did not support the said charge.*
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> *2. That the learned magistrate erred in law and fact in convicting the appellant on a charge of defilement of an imbecile contrary to section 146 of the penal Code Cap 63 Laws of Kenya yet the ingredients of the offence under that section had not been proved and in the absence of evidence and when in fact no offence under that section had been established or at all.*
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> *3. That the learned magistrate erred in law in convicting the appellant on a charge of defilement of an imbecile in the absence of medical evidence that the complainant was an imbecile and when the*

age of the complainant has not been satisfactorily established as 14 years or below or at all and when the evidence of her medical condition and age were merely speculative, contradictory, inconclusive and unreliable.

4. That the learned trial magistrate erred in law and fact in convicting the appellant on a charge of defilement of an imbecile yet the prosecution's evidence and in particular the medical evidence tendered by PW2, the clinical officer was scanty, unsatisfactory, speculative and contradictory in material particulars and when PW2 is on record saying that he did not know who defiled the complainant and when the medical evidence tendered could not certainly conclude whether the complainant was actually defiled and if so when the alleged defilement took place and when medical evidence tendered did not link the appellant to the alleged offence or at all.

5. That the learned magistrate erred in convicting the appellant in the face of overwhelming exculpatory evidence and when PW2 admitted never having examined the appellant.

6. That the learned magistrate erred in law and fact by shifting the burden of proof and she failed to identify or address the correct issues or at all and her judgment neither contained the points or issues for determination nor reasons for no decision thereon.

7. That the learned trial magistrate erred by considering the evidence piece-meal and she failed to consider the entire evidence as a whole and she erred by failing to consider the appellant's defence and/or by dismissing out of hand the evidence tendered by the appellant and his witness.

8. That the learned magistrate erred in convicting the appellant yet the evidence tendered by the prosecution was contradictory, inconsistent, uncorroborated, insufficient and wanting in material particulars and the prosecution had not proved its case to the standard required in law or at all and the trial magistrate indulged in speculative conjectures and drew inferences and arrived at conclusions not warranted by evidence and her decision was pre-determined, arbitrary, indefensible, biased and has occasioned a serious miscarriage of justice.

9. That the learned trial magistrate failed to consider the evidence before her wholly and critically and she failed to consider the appellant's defence of alibi and such other defences raised by the appellant or at all and she failed to find that in view of the contradicting prosecution evidence but the appellant had not committed the offence in question and that it was highly probable that the offence in question had not been committed at all.

10. That the learned trial magistrate erred in ignoring the principles of sentencing and she ignored the appellant's mitigation and she was evenly deflected by extraneous factors and the sentence of 14 years imprisonment was manifestly harsh, vindictive, unreasonable and excessive in the circumstances."

During the hearing of the appeal, the appellant was unrepresented. He relied on his written submissions. The appellant in general denies having committed the alleged offence and points to the evidence of PW1 as a clear indication that he did not commit the offence. The appellant says that he was wrongly implicated and that the charge was defective. He says that there is clear evidence that the complainant was not found in his house but in the house of a person called Tom.

Regarding the evidence by PW2 (clinical officer) the appellant submitted that the evidence of that witness was that he attended one (withheld) and that the medical report did not show that his sperm specimen was found on the complainant (PW3) which means the witness could not say who had defiled the complainant. He also argued that the evidence of PW4 was full of fabrications intended to nail him. He further argued that according to witnesses, someone called "Ezekiel" (PW1) had gone to his home and reported back that the complainant was not there. Although PW6 said that the complainant was found in the appellant's home, the appellant argued that this is a contradiction which the court bellow should have considered. He took issue with the trial magistrate for not taking into account his defence of alibi and for not evaluating it. He therefore urged this court to allow his appeal saying that he did not commit the

offence, and was woken up from his house to help look for the complainant but he was surprised to be charged yet the boy who was with the complainant though known, was left out.

Mr Oroni, learned State prosecutor, opposed the appeal. He supported the decision of the trial court and submitted that the appellant was seen together with the complainant at the complainant's gate as the complainant walked towards him. He further submitted, that PW2, the clinical officer examined the complainant and confirmed that she had been defiled. He also referred to the testimony of the complainant who said she had been defiled by the appellant. According to the learned State Prosecution Counsel, the testimony of PW1 placed the appellant at the centre of the offence. He submitted that all evidence placed the appellant at the scene, hence his conviction was sound. Regarding sentence, the learned prosecution counsel submitted that the sentence ws merited due to the rampant and prevalence of these cases in the area. He pleaded with the court to uphold the conviction and affirm the sentence.

I have considered the appellant's appeal and submissions in support thereof. I have also considered the response to the appeal by the State. This being a first appeal, my duty is to reconsider, re-evaluate and re-analyse the evidence on record afresh and make my own independent conclusion whether or not to interfere with the findings of the trial court, while of-course, bearing in mind that this court neither heard the testimony nor saw the witnesses and give due allowance for that. (See *Ekeno vs Republic*) [1972] EA 32). As was held in the case of *Collins Akoyo Okwemba & 2 others vs Republic* [2014] eKLR.

> *"It is a duty to re-evaluate re-analyse and re-consider the whole evidence in a fresh and exhaustive way before arriving at its own independent decision."*

What then was the evidence before the trial court? The prosecution called six (6) witnesses. *PW1, Ezekiel Odalo* testified that on 28th December, 2011 at about 7 p.m. he came across the appellant's motorbike parked at the complainant's gate. When he entered the homestead he found the appellant standing outside the gate. He also saw the complainant coming from the toilet. He asked her where she was going but she did not answer and proceeded towards the gate. The witness went his way and when coming back the complainant's mother (PW4) asked him whether he had seen the complainant. He informed her that he had seen the complainant walking towards the appellant at the gate. PW1 and another man went to the appellant's home but they did not find the complainant there. They then reported the matter to the village elder. They once again went back to the appellant's home this time with the village elder and the appellant denied having seen the complainant. At that point, the village elder called the village chairman and the appellant took them to his brother's house where the complainant was found. The witness took the complainant home. She was later taken to hospital and a report made to police.

PW2, *Robert Wanyonyi*, a clinical officer at (withheld) sub-district hospital testified that he examined the complainant, a 14 year old girl on 29th December, 2011 and found her panty blood stained and torn. The complainant alleged to have been defiled by two people known to her on 28th December, 2011 in one of those people's house. The witness told the court that the complainant who was mentally retarded, had dried blood on her genitals *labia majora* and *labia minor*, which were lacerated and the heymen was freshly broken. He also found mucoid substance on her. He concluded that the complainant had been defiled. He treated her and put her on HIV preventive drugs. He produced the P3 form as an exhibit.

The complainant (PW3) testified through an intermediary, *R H A*, her teacher, that on a date she could not remember she met "Pato", (the appellant) who asked her to follow him. She went where the appellant was and he carried her on his motor cycle to a house where he slept with her. She told the court that the appellant undressed her, removed his clothes and then defiled her. After the appellant was through, he went out and someone brought her food. It was dark and for that reason she could not tell who that person was. She ate the food but later that night people found her and took her to her home. It was the complainant's evidence that it was the appellant who defiled her.

The next witness was PW4, the complainant's mother who testified that the complainant was 14½ years when she was defiled. She produced age assessment form PEx3. She also told the court that the complainant had a mental disorder and attended a special unit at (withheld) School, and produced an

assessment report by Ministry of Education official as PEx 4. The witness testified that on 28th December, 2011 her daughter disappeared from home but was later found in the complainant's house that night. When she interrogated her the following morning, the complainant told her that she had been taken by the appellant to a house where he defiled her. She examined the complainant and found sperms on her underwear. The girl could not walk properly. She took the complainant's cloths to a children's officer and later took her to hospital, and made a report to the police.

PW5, father to the complainant, testified that the appellant is his neighbour and works as a boda boda. He told the court that his daughter of 14 years of age has mental retardedness and a problem of speech and for that reason, she attends a special school. On 28th December 2011 at 9.00 PM, he came home and found the complainant missing. Shortly after, PW1 came and told him that he had earlier seen the girl with the appellant. PW5 went to report the matter to the village elder who accompanied them to look for the complainant. The appellant led them to a house and the complainant was found in that house. They later learnt that she had been defiled. She was taken to hospital and a report made to the police. *PW6 Sgt Augustine Movakwo* told the court that he received a report of defilement concerning the complainant who had been taken to hospital with difficulty in walking and the doctor had confirmed that she had been defiled. He issued a P3 form which was completed and returned. He took the girl for age assessment and she was assessed to be between 14 and 15 years of age.

At the close of the prosecution case, the appellant elected to give a sworn statement and also called one witness. The appellant testified that on the material night he was sleeping at about midnight when people came to his house. The village elder woke him up and asked him whether he had seen the complainant. He answered in the negative and the village elder asked him to help them look for her. He took them to Tom's house. The village elder knocked on the door and Tom opened. The village elder asked whether the complainant was in the house and Tom answered in the affirmative. The village elder entered the house and came out with the complainant. The village elder then woke up Tom's father and informed him what had happened. After three days, Tom and the appellant were arrested. While at the police station, Tom's father paid Kshs.25,000/- to the complainant's father and secured Tom's release leaving him to be arraigned in court. The appellant denied defiling the complainant. DW2, the village elder, testified that on 28th December, 2011, the complainant's father went to her home in the company of other people and told her that her mentally retarded daughter had gone missing. They wanted her to assist them look for the complainant. They went to the appellant's home and the appellant's wife opened for them. She asked for the appellant who was then woken up by his wife. The appellant denied having seen the complainant. The appellant took them to Tom's house. DW2 went inside and found the complainant sleeping in bed with Tom. Tom ran away into the sugar cane plantation. She woke up Tom's father and told him what had transpired and Tom's father promised to bring him once he returned. On the third day Tom's father went to her and told her that Tom had resurfaced but he wanted to sort out the matter with the complainant's father. She convened a meeting for the next day but the complainant's father did not turn up. Instead PW1 came with police officers who arrested Tom. Tom and the appellant were taken to the police station but Tom's parents paid Kshs.25,000/- to the complainant's parents and secured his released. She told the court that it was Tom who defiled the complainant and not the appellant.

I have re-evaluated and analysed the evidence afresh as is my duty as the first appellate court in order to draw my own conclusions. From the record, the appeal raises the following question for determination namely:-

1. Was the charge defective?

2. Is the complainant an imbecile or mentally retarted?

3. Was it the appellant who defiled the complainant that is to say, did the prosecution prove its case against the appellant beyond reasonable doubt?

In his first ground of appeal, the appellant has attacked the learned magistrate's judgment that she erred in convicting him on a defective charge based on a non-existent provision of law and that particulars contradicted or did not support the charge. The appellant was charged with the offence of defilement of

an imbecile contrary to *section 146* of the Penal Code, while the particulars are that on the 29th December, 2011 at (withheld) village, he unlawfully had carnal knowledge of the complainant, a girl aged 14 years knowing her to be an imbecile. First and foremost, the appellant was charged under *section 146* of the Penal Code for defiling an imbecile. The particulars say that he had carnal knowledge of the complainant while he knew her to be an imbecile. *Section 146* of the Penal Code Cap 63 of Laws of Kenya is in the following words:-

> *"Any person who, knowing a person to be an idiot or imbecile has or attempts to have unlawful carnal connection with him or her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the person was an idiot or imbecile, is guilty of a felony and is liable to imprisonment with hard labour for fourteen years."*

It is therefore not true that the appellant is charged under a non-existent provision of the law. I also do not agree that particulars of the offence do not support the charge. The charge against the appellant is based on *section 146* of the Penal Code and particulars of the charge are, in my view, proper and sound. The charge and particulars thereto articulate the ingredients of the offence, that the appellant had canal knowledge of the complainant, that the complainant was an idiot or imbecile and that the offender knew or ought to have known that his victim was such an idiot or imbecile. I find and hold that the charge is proper and the particulars well stated. This holding therefore disposes of the first point for determination.

The second point for determination is whether the complainant was an imbecile or idiot. The appellant was charged with having carnal knowledge of the complainant knowing her to be an imbecile. According to *Black's Law Dictionary* 7th Edition, by Bryant A. Garner (1999), the word "imbecile" means; *"A person afflicted with severe mental retardation."* The same Authors define *"idiot"* to mean *"a person afflicted with profound mental retardation."* The evidence on the mental condition of the complainant as tendered before the trial court was that she was an imbecile. PW1 in cross-examination told the court that when he asked the complainant where she was going, *"she did not reply being an imbecile." The* other bit of evidence is from PW2, a clinical officer who said *"I found that the complainant was mentally retarded"*. Next was R H A a special education teacher and the complainant's teacher who acted as her intermediary who assisted the complainant testify. This means the complainant could not communicate in the usual manner. PW3, mother to the complainant told the court that her daughter has a mental disorder and has a problem with speech. She produced what she said was an assessment report from the Ministry of Education dated 24th July 2009 as PEx4. While PW5, father to the complainant told the court that his daughter has a problem with her speech. That is the evidence on record.

An *imbecile* or *idiot* is one who has a *severe mental retardedness* as seen from the definition above. It is a medical condition and not a situation that can be presumed. It must be shown by clear medical evidence that such a condition is present and afflicts the complainant. With respect, PW2, the clinical officer simply said that the complainant had mental retardedness without saying how he came to that conclusion. The teacher who assisted the complainant to testify did not say what her problem was. The complainant's father was also clear that his daughter had a speech problem. Apart from what these witnesses told the court, there was no attempt to show through medical evidence what mental problem the complainant had.

I agree with *Ojwang J* (as he then was) when he held in *Justus Mwangangi Nzioka vs Republic* [2008] eKLR as follows:-

> *"Before the trial court, there was no evidence that the complainant was afflicted with any form of mental retardation. For that reason this court cannot hold that the complainant was an idiot; and it cannot be so held for the more important reason that this court takes Judicial Notice that many thousands of people in the world do have differing kinds of sense impairments or disabilities, yet they still live normal lives, and they merit recognition as normal persons enjoying common rights who deserve common courtesy and respect. It is an attribute of human dignity, which, in so far as the Constitution protects it, must be a principle guiding Judicial dispute settlement." (emphasis)*

On the basis of the evidence on record, I am unable to hold that the complainant was an imbecile or idiot, a matter of medical evidence which in this case was lacking and to which only an appropriate witness can

testify.. Having answered this question in the negative, the appellant's grounds of appeal 3 and 4 succeed.

The last and final question for determination is whether it was the appellant who defiled the complainant or simply put, whether the prosecution proved its case against the appellant beyond reasonable doubt.

Defilement is a fact which must, in criminal proceedings, be proved. In this case, there is sufficient evidence to show that indeed the complainant was defiled. But who defiled her? PW1 told the trial court that he saw the appellant with the complainant. Later he heard that the complainant was missing and was finally found in a house belonging to one Tom. PW2, the clinical officer, examined the complainant and established that there had been forceful penetration of her genitalia, a fact he established considering the presence of laceration on the *labia Majora* and *labia minor*. There were also dried blood stains on her panties, sexual organ and the hymen was freshly broken. He therefore concluded that the complainant had indeed been defiled. He signed and produced a P3 form confirming his findings. The complainant testified that she was taken by *PATO* (appellant) to a house where he defiled her. This is what she told the court:-

> *"I met PATO who carried me. PATO talked to me and he told me to follow him ... He took me to a cottage. I do not know the owner of the cottage. Then I slept with PATO on a bed. He removed my dress and underwear and I remained with my petty coat ... He then inserted his penis in my vagina. I felt pain. I do not remember how long it took and I did not cry. When PATO finished having sex with me he went out of the cottage. Then someone whom I could not identify brought me ugali and fish. I did not see the person because there was no lamp ..."*

PW4, mother to the complainant's evidence was that she found the complainant missing from home and was later informed by the village elder that the complainant was found in a house in the accused's compound. On interrogating the complainant, she told her that the appellant had taken her to a house and defiled her. She checked her cloths and found sperms on them.

PW5, *Sgt Agustine Mavokwio* told the court that he received a report concerning the complainant's defilement, and when she was taken to hospital the doctor confirmed that she had been defiled. The appellant was arrested and charged with the offence. Her age was assessed by a doctor to be between 14 and 15 years. And what was the appellant's evidence on the alleged defilement?

The appellant told the court that the village elder went to his house at around midnight and woke him up from sleep. She inquired whether the complainant was in his house which he answered in the negative. He was asked to help them look for the complainant and he took them to Tom's house where the complainant was found with Tom. The appellant and Tom were later arrested after 3 days. The village elder (DW2) testified on behalf of the appellant and confirmed that she found the complainant sleeping with Tom in Tom's house. Tom ran away but was later arrested and released.

After analysing evidence on this aspect, the learned trial magistrate concluded thus:-

> *"The complainant victim was seen heading towards the accused who was standing at her father's gate, only later at night for her to be found in the accused's brother's house. In my humble view, there are no other logical explanations other than that the accused took her there. Further the accused's action of taking the village elder and others to where the complainant victim was is inconsistent with his innocence. I am convinced and find that the complainant victim was defiled by the accused."*

From the entire record, the only evidence that supposedly links the appellant with the offence is that of the complainant. Other than that, there is no independent evidence linking the appellant to the offence and for the charge of defilement to succeed, given the circumstances of this case it was necessary to prove by other independent evidence that there was sexual contact between the complainant and the appellant. The law is clear that in criminal cases whatever the distinction, the burden is always on the prosecution to prove its case against an accused beyond reasonable doubt and there should be no room for conjecture.

That is what was held in *Mkendeshwo vs Republic* [2002 1 KR 46 when the Court of Appeal said:-

> *"In criminal cases the burden is always on the prosecution to establish the guilt of the accused beyond any reasonable doubt and generally, the accused assumes no legal burden of establishing his innocence. "*

This being a sexual offence, there was need for corroboration of the complainant's evidence with some independent evidence of some material particular. In the case of *Chila vs Republic* [1967] EA 722 at page 723, the Court of Appeal for East Africa said:-

> *"The law of East Africa on corroboration in sexual offences is as follows:-*
>
> *'The Judge should warn the assessors and himself of the danger of acting on the uncorroborated testimony of the complainant but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful.'"*

Under *section 124* of the evidence Act (Cap 80) Laws of Kenya, the court can convict on the basis of evidence by the complainant alone if satisfied that she was telling the truth. In the present case, the learned trial magistrate warned herself of the danger of convicting on the basis of the complainant's evidence and after doing so, proceeded to convict the appellant. She believed the complainant but disbelieved the testimony of the appellant and his witness. The learned trial magistrate also took into account circumstantial evidence surrounding this matter.

The trial court was indeed at liberty to convict on the basis of the complainant's evidence and the law allowed it to do so. The appellant may have known that the complainant was in Tom's house. He may also have had an inkling on the goings on. However that is not enough to base a conviction given the circumstances surrounding this case.

The trial court also took into account circumstantial evidence in arriving at its decision. The law on circumstantial evidence is abound. In the case by *R v Kipkering Arap Koskei & Another* (1949) 16 EACA 135 it was 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 prosecution and never shifts to the accused." (emphasis)*

I would have had no difficulty in upholding this conviction based on the evidence of the complainant and the existing circumstances had there been no other incompatible facts. The complainant says she was defiled by the appellant. At the same time, there is evidence that the complainant was found sleeping in bed at night with another man called Tom. Could this raise a reasonable hypothesis that Tom defiled the complainant? Tom was arrested but released under unclear circumstances and was not called to account what the complainant was doing in his house at night. Why was Tom not called to explain what the complainant was doing in his house that night? This does not resonate well with the position taken by the trial magistrate that only the appellant could have defiled the complainant. And as stated in the case of *Simon Musoke vs R Criminal Appeal No. 188 of 1956* when relying on circumstantial evidence, there must not be any co-existing facts or circumstances which may weaken or destroy that inference of the guilt of the accused person. In the circumstances of this case, I am doubtful that only the appellant could be presumed to have committed the offence. Where evidence creates a doubt that the accused like in this case, committed the offence the benefit of doubt should go to the accused. (see *Mwiruri vs Republic* [1983] KLR 205.)

On the above basis, the answer to the last question is that the prosecution did not prove its case against the appellant beyond reasonable doubt. This is a case where the prosecution bungled investigations when they had an opportunity to nail the culprit. There are allegations that money changed hands, a grave

matter, given the harrowing experience the complainant went through. The investigating officers could have easily found out through analysis and examination whether the blood samples on the complainant's cloths was that of the appellant, Tom or both. They had the opportunity to get conclusive evidence on who the defiler was, but wasted that opportunity. There is a possibility that someone else other than the appellant defiled the complainant and the circumstances of this case are such that the court could not draw inference of guilt on the part of the appellant given that there is another hypothesis. In the case of *Sawe vs Republic* [2003] KLR 364 the Court of Appeal reiterated the position in law on a circumstantial evidence when it held that:-

> *"Circumstantial evidence can be a basis for conviction only if there is no other existing circumstances weakening the chain of circumstances relied on ... The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution and never shifts to the accused."*

In the present case, according to the evidence on record, Tom is not excluded from being the person who might have defiled the complainant. Neither did the evidence before the trial court, in my considered view, irresistibly point to the appellant's guilt to the exclusion of all others within the meaning of the decisions cited above as the person who defined the complainant. This leads to the conclusion that it was unsafe for the trial court to convict the appellant on the basis of this evidence.

For the above reasons I find that this appeal has merit and is allowed. The conviction is hereby quashed and the sentence set aside. The appellant shall be set free forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at Kakamega this 26th day of January, 2016.

E.C. MWITA

JUDGE