



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NANYUKI

HCCRA. NO. 47 OF 2015

MORRIS MUTWIRI.....APPELLANT

-VERSUS—

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence by **Hon. E BETT SENIOR RESIDENT MAGISTRATE** dated 17th December, 2014 in Nanyuki Chief Magistrate’s **Court Criminal Case No. 1070 of 2012**)

JUDGMENT

1. **MORRIS MUTWIRI** was charged before the Chief Magistrate’s Court Nanyuki with the **offence of defilement Contrary to Section 8(1)(3) of the Sexual offences Act No. 3 of 2006**. There was also an **alternative count of indecent act with a child contrary to section 4 (1) of the Sexual Offences Act**. He was convicted on the main count and sentenced to life imprisonment. Being aggrieved by that conviction and sentence has filed this appeal.

2. This is the first appellat court and the duty of this court was the subject of the case, **OKENO VERSUS REPUBLIC (1972) EA 32** where the court remarked that:

“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. The first appellant court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates’ findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

3. The prosecution’s case is that **WK** a female child of 10 years was on 25th September, 2012 called by appellat to his home. She knew him well and he was a neighbour. Appellant gave WK Kshs. 10/= and sent WK to go and buy two cakes. On her return to his house appellat gave her tea to take with the cakes. He then after locking the door told WK to lie down on the seat. He removed her panty and then defiled her. WK stated in evidence.

“He removed his private part and inserted it on my private part. He told me not to tell anyone so that he will (sic) buy me bread.”

WK described feeling pain when she was defiled and also noted that she was bleedings after being defiled. She however did not tell anyone about the offence.

4. On the night of 2nd October, 2012 when she asked her mother to take her outside to urinate her mother noted she was experiencing pain. WK on being asked by her mother explained to her that Mutwiri had defiled her.

5. On being cross-examined WK stated that when the incident occurred appellant's wife was at work.

6. On being re-examined WK stated that appellant threatened her that if she did not allow him to defile her he would take her to his home in Chuka.

7. The mother of WK (**P W 2**) stated that WK woke her upon 2nd October, 2012 at 10.00 p.m. requesting that she be escorted outside to urinate. P W 2 state:

"I took her (WK) out and she sat down crying and urinated on herself. She told me what Mutwiri had done to her."

8. P W 2 took WK to hospital and thereafter a P3 form was filled.

9. On being cross-examined P W 2 confirmed that her husband had at one time borrowed Ksh.500/= which money she paid to appellant. She denied under cross examination that she sought money from the appellant so that they could settle the matter of the defilement of WK out of court.

10. Joseph Kangongo (P W 4) the clinical officer examined WK on 3rd October, 2012. He examined her eight days after the defilement. On examination of WK he found WK's hymen was missing but there was no discharge and no bleeding. He testified thus:

"My conclusion,(sic) the broken hymen and hyperaemic vaginal wall is a strong indication of penetration."

11. The appellant gave sworn evidence in his defence.

12. He stated that he was, as at the time the incident occurred, a charcoal seller. He used to work at his charcoal business from 9.00a.m to 9.00p.m. To prove he was a charcoal seller he produced a charcoal movement permit whose validity was between 4th June, 2012 to 5th June 2012. On the material date he said he was at work selling charcoal.

13. He denied committing the offence but admitted he knew WK and her parents. He said he lived in the first house and WK's parents were in the third house.

14. On the day the offence is said to have happened appellant said his wife was at their home, appellant therefore said that it was not possible for him to commit offence in the wife's presence.

15. Appellant by his defence alleged that the case was framed against him due to the debt WK's father owed him of Kshs.3,000/=.

16. Appellant called his wife Florence Ngatha as a witness. She stated that on 25th September, 2012 she was at their home the whole day because she was off duty. That she normally went off duty one day a week. This witness also attributed the charges her husband (the appellee) was facing to the fact WK's father owed the appellant Ksh. 3,000/=.

17. On being cross examined this witness said that her husband sold charcoal by the roadside about 100 meters from their residence. She however stated that appellant was not at home on the day the incident occurred. That he was out of their home selling charcoal from morning until evening.

THE GROUNDS OF APPEAL

18. The learned advocate Mr. Mahan for the appellant by his written submissions abandoned grounds 1 and 3 of the ground of appeal.

19. The grounds that remained for consideration in this appeal touch on the appellant's argument that WK's evidence of defilement was not corroborated: that WK's age was not confirmed; and that the trial court did not consider appellant's alibi.

CORROBORATION

20. WK was able to give evidence on how she was called by the appellant to his home and where after they consumed tea and cake and how he defiled her. P W 4 the clinical officer confirmed penetration. On the evidence tendered by WK I can do no better than refer to trial Magistrate's judgment where he stated:

"Firstly, from the complainant evidence it is clear that she knows the accused well and even refers to him by his surname. Further the accused and the complainant even from the defence evidence are neighbours. Accordingly, it is clear that the accused was well known by the complainant and thus properly recognized by the minor as the person who defiled her.

The testimony of the minor was also very explicit, clear and detailed on who did the act and how it was committed. she give a whole description of the whole incident to the court and even in cross-examination maintain the version of events and the assailant as being the accused."

21. I am in agreement with that assessment of WK's evidence. Further WK's evidence alone suffices without corroboration as provided under **Section 124 of the Evidence Act Cap 80**. That Section Provides:

"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.

22. The trial court by its judgment gave reasons, seen above why it believed the evidence of WK. I wholly agree with that finding.

23. The submissions by appellant therefore that the evidence of WK could not be relied upon because it lacked corroboration, for the reasons above is rejected.

AGE OF WK

24. WK, when voire dire exam was conducted stated she was 10 years old.

P W 2 her mother also stated she was 10 years old. The P3 form also indicated WK's estimated age to be 10 years.

25. Appellant's Learned Counsel submitted that there was no age assessment submitted before the trial court.

26. The court of appeal in the case **KAINGU ELIAS KASOMO - V- REPUBLIC CRIM APP. NO. 504 OF 2010** stated thus :

"Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the

sentence to be imposed will be dependent on the age of the victim.”

27. The court of appeal sitting in Nyeri in the case **RICHARD WAHOME CHEGE – V- REPUBLIC [2014]eKLR** on the age of a child in sexual offence case stated:

“On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. P W 2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by P W 2 but supportive evidence who examined the complainant ...”

28. I note that trial court in its judgment quoted and relied on that decision of court of appeal sitting at Nyeri. The reasoning used by the court of appeal in that case is exact match to this appeal and accordingly the prosecution’s case is not defeated by its failure to produce birth certificate.

ALIBI EVIDENCE

29. The appellant was critical of the trial court’s treatment of his defence. Appellant through his Learned Counsel argued that the trial court failed to consider his alibi evidence.

30. The trial court in its judgment stated that the appellant’s alibi was a fabrication. The trial court faulted the alibi evidence on the basis that both the appellant and his wife (D W 2) stated that WK’s mother confronted appellant on 25th September, 2012, whereas the prosecution had led evidence that that confrontation was on 2nd October 2012.

31. In addition to that finding of the Learned trial Magistrate I state that the alibi evidence did not at all displace the prosecution’s evidence. The court is under duty, such as in this case, where a party introduces evidence of alibi where the prosecution did not previously know of such evidence; to weigh that evidence against prosecution’s evidence. This was the sentiment in the case **KENNEDY OCHIENG ODONGO – V- REPUBLIC [2015]eKLR** thus :

*“As regards the alibi, the Learned Magistrate directed her mind to the case of **STEPHEN CHEBII CHEBOWO V – R ELD HCCRA NO. 172 OF 2011 [2013]EKLR** where **Kimondo J., following Wangombe V Republic [1976 – 80] KLR 1683** stated that: *When alibi evidence is proffered, the prosecution is obliged to investigate it the appellant had not given any notice that he would raise it. It was being set up well after the close of the prosecution’s case. It was thus open to the trial court to weigh it against the evidence already tendered.*“*

32. WK, as stated before said in her testimony that appellant lured her to his home with an enticement of cake and tea. She then proceeded to testify how appellant defiled her.

33. Appellant and his wife however testified that on the material date appellant was not at home but that rather was at work selling charcoal from 9.00 am to 9.00p.m. Their testimony was that it was appellant’s wife who was at home because she was off duty for one day. Appellant in his testimony however said that his wife had an off duty of two days and not one day, and that on the material date she was at home.

34. It is clear that appellant’s wife was employed and she did indeed say so in her evidence. If that was so it is possible that she could have produced written evidence from her said employer stating that on the material date she was off duty. She did not produce that evidence.

35. Further appellant’s testimony relied on his engagement at his charcoal business. It was however only at his defence hearing that he introduced this business of charcoal. No prosecution witness was questioned about the existence of that charcoal business. WK’s parent’s home is a few doors always from the appellant’s home. It would then be expected that the appellant’s business, which D W 2 (appellant’s wife) said was 100 meters away from their home would be known by P W 2, WK’s mother and P W 3, a neighbours.

36. Even the Kenya Forest Service Charcoal Movement Permit produced by appellant as supportive evidence proving the existence of his charcoal business was very limited. Its validity was from 4th to 5th June, 2012. It simply allowed appellant to move 70 bags of charcoal. It did not indicate he sells charcoal at a fixed place of business.

37. Could it then be that the appellant did not ask prosecution witness questions touching on his charcoal business because he feared that they would contradict him. It is for that reason that I find that alibi evidence of the appellant fails to stand the test. It does not displaced the evidence of the prosecution. It does only in my view amount to afterthought and or fabrication as correctly stated by the trial court.

38. The court in case **VICTOR MWENDWA MULINGE – V- REPUBLIC [2014] eKLR** referred to the test that ought to be applied to alibi evidence which is introduced during defence hearing. The court in that case stated:

*“In **KARANJA v REPUBLIC (Supra)**, this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused’s guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought ...*

*But even assuming that the appellant raised the defence of alibi for the first time while in court, as rightly submitted by Mr. Oguk, pursuant to the provisions of **Section 309 of the Criminal Procedure Code** the prosecution could have sought leave to adduce further evidence in reply to rebut the appellant’s defence. The section states as follows:*

“309. 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.”

OTHER ISSUE

39. Appellant faulted prosecution’s case for failing to call the father of WK as a witness. It is assumed that appellant wanted to question him about the alleged debt that father owed him of Kshs, 3,000/=. The law does not state the number of witnesses which need to be called to prove any fact, It is so provided in **Section 143 of the Evidence Act**. It provides:

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for proof of any fact.”

40. The issue of number of witnesses to be called was subject of discussion in the case **CHRISPINE WAWERU NJERI- V- REPUBLIC [2015]eKLR** where the court referring to another case stated;

*“The court is alive to the fact that Section 143 of the Evidence Act provides that no particular number of witnesses shall, in the absence of an provision of the law to the contrary, be required for the proof of any fact, an issue that was addressed in **Criminal Appeal No. 31 of 2005 Julius Kalewa Mutunga V republic** (unreported in which the court of appeal held that:*

“ As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”

41. It follows that the prosecution’s case having sufficiently being proved by the witnesses who testified was unaffected by its failure to call WK’s father. That ground of appeal is therefore rejected.

42. Learned Counsel for appellant raised a further issue in his submissions which issue was not captured

in the grounds of appeal. It is the issue of police prosecutor. He submitted that the trial was partly conducted by a police constable **Contrary to Section 85 of Criminal Procedure Code.**

43. That issue was well responded by Learned Counsel Mr. Tanui Principal Prosecution Counsel. Learned Counsel referred to amendments to Section 85 and submitted that those amend merits did away with qualification of prosecutor's. That Section as amended provides:

85. Power to appoint public prosecutors

(1) The director of Public Prosecutions, by notice in Gazette, may appoint public prosecutors for Kenya or for any specified are thereof, and either generally or for any specified case or class of cases.

(2) The Director of Public Prosecutions, by writing under his hand, may appoint an advocate of the High Court or person employed in the Public service, to be a public prosecutor for the purposes of any case.

(3) Every public prosecutor shall be subject to the express directions of the Director of Public Prosecutions.

[Act No. 22 of 1959, s. 10, Act No. 7 of 207,Sch., Act No. 12 of 2012, Sch.]

44. Considering the above provision it is clear Learned Counsel for appellant was as submitting on provisions of a repealed Section. He did in fact in the end of his oral submissions before court admit as much.

45. The above discussion leads me to find that there is no merit in the appellant's appeal.

46. However before concluding this Judgment it is important to note that appellate was charge of the offence of defilement **Contrary to Section 8(1) (3) of the Sexual Offences Act.** Section 8(1) (3) relates to offences against children between twelve and fifteen years old. WK was 10 years old when the offence was committed. The correct Section that appellant should have been charged under is **Section 8(1) (2).** Under that Section the offence contemplated thereof relates to children of the ages 11 years and below. The sentence under Section 8(1) (2) is life imprisonment. The trial court found the appellant guilty of defilement and sentenced him to life imprisonment. That is the correct sentence under Section 8 (1)(2). It follows that an amendment of the charge to read Contrary to Section 8 (1) (2) will not lead to any prejudice to the appellant. Accordingly the charge is so amended.

47. In the end this appeal is hereby dismissed.

Dated and Delivered at Nanyuki this 25thFebruary, 2016

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant – Kiruja

Appellant: Morris Mutwiri

For state

For Appellant

COURT

Judgment delivered in open court

MARY KASANGO

JUDGE