REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 25 OF 2013

JACKSON ANUSU …………………………………………………………. APELLANT

VERSUS

REPUBLIC ……………………………………….................................. RESPONDENT

(An Appeal from the Judgment of the Resident Magistrate Honourable B. Limo in Kapsabet Criminal Case No. 1352 of 2012, dated 25th February, 2013)

JUDGMENT

1. The appellant *Jackson Anusu* was charged separately in different counts with one other person namely *Levy Kalwale* with the offence of defilement contrary to ***Section 8(1)*** as read with ***Section 8(3)*** of the ***Sexual Offences Act*** with an alternative count of committing an indecent act with a child contrary to ***Section 11(1)*** of the same Act.
2. The particulars supporting the principal court preferred against the appellant alleged that on the 17th June, 2012 at Chebilat location in Nandi County, the appellant caused his penis to penetrate the vagina of *J.A* a child aged 14 years. In the charge against *Levy Kalwale*, it was alleged that on the same date and place, he caused his penis to penetrate the vagina of *J.A*, a child aged 14 years.
3. After a full trial, the appellant was convicted of the main count of defilement. He was sentenced to 20 years imprisonment. His co-accused was acquitted for lack of sufficient evidence.
4. The appellant was dissatisfied with his conviction and sentence hence this appeal. In his amended grounds of appeal, the appellant raised three grounds in which he basically complained that he was convicted on the basis of contradictory, manipulated and coached evidence and that he was discriminated upon by the trial court as he was unlawfully convicted while his co-accused was acquitted.
5. During the hearing of the appeal, the appellant relied on written submissions which he presented to the court. In his submissions, he contended that the complainant’s evidence was contradictory and worthless and ought to have been disregarded by the trial court; that the learned trial magistrate was biased because there was evidence from PW1 and PW5 to prove that his co-accused had committed the offence as alleged but he proceeded to acquit him while convicting the appellant. In a nutshell, the appellant submitted that he was wrongly convicted and that his appeal should be allowed.
6. The appeal is opposed by the state. Learned prosecuting counsel *Ms Oduor* in opposing the appeal submitted that the prosecution had proved the charges against the appellant beyond any reasonable doubt; that PW1 positively identified the appellant as her assailant and that the appellant was placed at the locus in quo by his co-accused; that the appellant was properly convicted and the appeal ought to be dismissed for lack of merit.
7. This being the first appeal to the High Court, I am enjoined to carefully re-evaluate all the evidence tendered before the trial court and to draw my own independent conclusions taking into account that unlike the trial court, I did not see or hear the witnesses and give due allowance for

that disadvantage.

See*: **Kinyanjui V Republic [2004] 2 KLR 364**;* **Patrick & Another V Republic [2005] 2 KLR 162** *;* **Kiilu and Another V Republic [2005] 1 KLR 174**

8. The prosecution called a total of five witnesses. After a brief voire dire examination, the complainant who was said to be 14 years old testified as PW1 and claimed that on 17th June, 2012 at 7 p.m, she was walking from Kapkui to Tamboiyo when she met the appellant who was her neighbour at home. She testified that the appellant greeted her and then dragged her to an abandoned house which was nearby, laid her on the floor, removed her clothes as well as his clothes and then defiled her six times. He thereafter took her to *Levy Kalwale's* home. He left her there saying he would go for her on the following day.

9. According to the complainant, in the course of the same night, the appellant's co- accused also had sexual intercourse with her. On the following day at 6 p.m, *Levy* Kalwale's (*Levy*) wife appeared and upon her enquiry, PW1 explained to her what had happened the previous evening. On 19th June, 2012, her father went to *Levy's* house and she also reported to him what had happened. He arrested *Levy* and his wife and together with the appellant, they were handed over to PW5 at Kabujoi police station. She was issued with a P3 form and she was treated at Kaptumo District Hospital.
10. In her evidence under cross examination, PW1 admitted that she had lied to the police when recording her statement following instructions from *Levy* and that she had told the court half-truths after her father demanded that she explains everything that transpired on the night of 17th June, 2012.
11. PW2 and PW3 were the complainant's father and a village elder respectively. They testified that PW1 went missing on 12th June, 2012 as she did not go home after school and they started looking for her. They found her in *Levy's* home on 20th June 2012. PW1 and *Levy* told the two that it was the appellant who had taken her there.
12. On 26th June, 2012, PW1 was examined by PW4 a clinical officer at Kaptumo District Hospital. According to PW4, he noted that her genitalia had bruises and she had vaginal discharge. He confirmed that there had been penetration of her private parts. He completed a P3 form which he produced as exhibit 1.
13. In his defence, the appellant elected to make a brief sworn statement and did not call witnesses. He denied having committed the offence as alleged saying that he never met the complainant on 17th June, 2012. His co-accused on his part gave an unsworn statement and claimed that it is the appellant who took PW1 to his home and requested him to accommodate her for two days. He agreed because he did not know that she was a minor as she appeared much older.
14. When convicting the appellant and acquitting his co-accused, the learned trial magistrate in his judgment stated inter alia as follows;

> ***"…This court shall fault the evidence of PW1 against the 2nd accused. It emerged during cross examination that the father of PW1 couched her on what to say in respect of accused 2. At this point in time, PW1 was found at the home of accused 2 who did not deny that PW1 was found at his home and had stayed for 2 days. I find the evidence of PW1 against the 2nd accused not believable. PW1 did not tell accused 2 wife that 2nd accused had defiled her during the night. When the accused 2 wife came she appeared composed and even explained the reason for her stay at accused 2 home. PW1 also seems eager to see that the 1st accused will come, meaning there was a meeting of mind between her and the accused 1. Also PW1 did not disappear to a neighbour's house to report not raise alarm to demonstrate that she was under…."***

15. From the above passage, it is apparent that the learned trial magistrate disregarded the part of PW1's evidence which incriminated the 2nd accused (*Levy*) on grounds that in his view, PW1 had been coached by her father on what to say against him. Secondly, he chose to believe that *Levy*

could not have defiled PW1 allegedly because she did not report the defilement to his wife when she appeared on the following day.

16. I am unable to follow this reasoning by the learned trial magistrate because PW1 had also admitted in her evidence on cross examination that she had lied to the police regarding her alleged defilement by the appellant following his co-accused's instructions. This witness had also admitted in her evidence that she had told the trial court half-truths regarding what had happened to her on the material date. It is therefore difficult to understand on what basis the learned trial magistrate accepted and believed the part of her evidence which incriminated the appellant and chose to disregard as unreliable the part of her evidence which incriminated his co-accused.
17. The truth of the matter is that PW1 who was the prosecution's key witness was by her own admission a liar. She did not therefore fit the description attributed to her by the learned trial magistrate of an honest, credible and reliable witness. I find that the learned trial magistrate erred in choosing what part of her evidence to believe and what part to disregard. He ought to have analysed her evidence as a whole alongside the rest of the evidence. It appears to have escaped the trial magistrate's attention that PW1 had even contradicted herself on the issue of whether she had reported her ordeal to *Levy's* wife. In her evidence in chief, she claimed that she had reported the matter to his wife but on being cross examined, she changed her mind and claimed that she did not report anything to *Levy's* wife for the two days she stayed in her house.
18. Though it is clear from PW4's evidence that the complainant had been sexually assaulted, it is impossible to say with any degree of confidence that she had been defiled by the appellant on the date alleged. The evidence on record discloses a possibility that she was defiled by *Levy*. There is evidence that PW1 had disappeared on 12th June, 2012 when she did not go home from school and the next time PW2 saw her, she was in *Levy's* house.

    Even though *Levy* testified that it is the appellant who took her to his home on 17th September, 2012, his evidence did not amount to prove that the appellant had defiled her as alleged and even assuming that it did, it amounted to accomplice evidence which required corroboration as a matter of law. In my view, Pw1's evidence would not have offered sufficient corroboration given its discredited nature.

19. Before concluding my analysis of the evidence adduced before the lower court, I wish to point out that there is another material contradiction in the prosecution case that was overlooked by the learned trial magistrate. This relates to the medical evidence in the P3 form and PW4's evidence. In his evidence, PW4 stated that he examined PW1 on 26th June, 2012 and in the P3 form, he indicated that the injuries noted on her genitalia were only one day old. One wonders how the injuries could have been one day old when the offence was allegedly committed about 9 days prior to the medical examination.
20. In view of the foregoing, it must be clear by now that I have come to a different conclusion from that of the learned trial magistrate. It is my finding that the prosecution failed to prove the charges against the appellant beyond any reasonable doubt. There were too many yawning gaps in the prosecution's case. The appellant did not have any obligation to fill in those gaps or to prove his innocence. The burden of proof in criminal cases rests solely on the prosecution throughout the trial and subject to the provisions of ***Section 111*** of the ***Evidence Act***, it never shifts to an accused person. See: ***Kiarie V Republic (1984) KLR 739, Bhatt V Republic (1957) EA 332.*** In this case, there is a serious doubt whether the complainant was defiled by the appellant or his co-accused. The appellant ought to have been given the benefit of that doubt.
21. For all the reasons outlined above, I am satisfied that the appellant's conviction was unsafe. In the result, I find merit in the appeal and it is hereby allowed. I quash the appellant's conviction and set aside the sentence. The appellant shall be released forthwith unless otherwise lawfully held.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 27th day of April, 2016

In the presence of:

The appellant

Ms Mokua for the state

Ms Naomi court clerk