REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 143 OF 2015

SAMUEL KAGIRI NJUGUNA……..……..……..APPLICANT

VERSUS

REPUBLIC……..RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate's Court at Limuru Cr. Case No. 282 of 2010 delivered by Hon. MaryAnn Murage, SPM, on 24th January, 2011)

JUDGMENT

Samuel Kagiri Njuguna the Appellant herein was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2) of Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on 28th February, 2010 at [particulars withheld] in Kiambu West District within Central Province, intentionally and unlawfully caused his male organ namely penis to penetrate M W's vagina, a girl under the age of eleven years. In the alternative, he was charged with indecent assault to a female person contrary to **Section 11(A)** of the **Sexual Offences Act,** in that on the same date and location, he unlawfully touched the vagina of M W. He was tried, convicted and sentenced to life imprisonment. He was dissatisfied with both the conviction and the sentence and he preferred this appeal.

On the date of hearing of the appeal, he presented to the court an amended Supplementary Grounds of Appeal dated 2nd March, 2016 which he submitted he would rely on. In brief, he was dissatisfied that the trial court failed to comply with **Section 150 of Criminal Procedure Code** by not calling a key witness. He faulted the learned trial magistrate for shifting the burden of proof upon him whereas the same lay on the prosecution. He was dissatisfied that the learned trial magistrate did not take into consideration his defence which she dismissed without any satisfactory reason. He took issue with the fact that the prosecution did not discharge its burden in proving the case beyond any reasonable doubt.

In his written submissions dated 2nd March, 2016, he submitted that he tendered an alibi defence which the prosecution did not disprove. In addition, the entire evidence of the prosecution did not satisfactorily prove their case. On non-compliance with **Section 150 of Criminal Procedure Code**, he submitted that the prosecution failed to call a crucial witness who was a sister to the complainant by the name W. According to the Appellant, the complainant testified that during the incident, he chased both the complainant and W and upon catching up with her (complainant), he defiled her. As such, it is only the said W who would have confirmed whether or not the Appellant chased them and pursued the complainant to the scene of the incident. The Appellant's defence is that at the time of the incidence, he was physically incapacitated and was walking on crutches after he sustained fractures on his legs

following a road accident. He was therefore not in a position to chase the complainant let alone to defile her. Further, the Appellant submitted that the medical evidence tendered by the prosecution did not satisfactorily prove penetration which is a key ingredient of the offence of defilement. Finally, he submitted that all the elements of the offence of defilement were not established by the prosecution.

On behalf of the Respondent, learned State Counsel Ms. Wario submitted that all the elements of the offence of defilement were established to the required standard. The medical evidence availed showed that the complainant who testified as PW1 was, at the time of the incident, aged 10 years. She submitted that PW1 was candid in her evidence that the Appellant chased her together with her sister while both were herding goats and when he caught up with PW1, he defiled her. PW1's evidence was corroborated by that of PW2, her mother, who testified that she noticed pus on PW1's vagina and on enquiring from PW1, she told her that she had been defiled by the Appellant. In addition, the evidence of PW3, who was a teacher in PW1's school was that she had detected foul smell and yellow discharge from PW1's vagina and on asking PW1 what had happened, she reported that she had been defiled by the Appellant. Again, the evidence of PW5 who was a doctor who examined PW1, confirmed that PW1 had sexually transmitted parasites which was a sign that she had been sexually assaulted. According to Ms. W, PW1 was well known to the Appellant as both came from the same village. She in fact knew the Appellant by the name Kagiri. The said evidence was corroborated by the evidence of PW2. With regard to non-compliance of Section 150 of Criminal Procedure Code, Ms. W submitted that there was no law requiring the prosecution to call a certain number of witnesses. She contended that they had called sufficient witnesses in prove of their case. Finally, she submitted that he learned trial magistrate properly considered the Appellant's defence.

I have accordingly considered the respective rival submissions. This is the first appellate court whose duty is to re-evaluate the evidence and come up with its own independent conclusion but bear in mind that it has neither seen the witnesses nor heard their evidence and give due regard to that. See **Pandya vs Republic [1957] E.A. 336, and Kariuki Karanja vs Republic [1986] KLR, 190.**

A total of six prosecution witnesses testified. **PW1, M W** was the Complainant. In her *voire dire* examination, she stated that she was ten years old at the time she gave her evidence. Her further evidence was that on 28th February, 2010 at about 5.00 pm, she was in the farm with her sister W when Kagiri the Appellant herein chased them. He caught up with her and then took her to a forest after which her sister ran away. He removed her trouser and other clothes she was wearing. He lay on her and defiled her. Thereafter, she joined her sister W and both continued to play. On 3rd March, 2010, while she was in school, one of her teachers by the name Mrs. K asked her whether a man she lives next to had defiled her and she confirmed the same. The teacher reported to the head teacher and the head teacher in turn informed her mother. Her mother took her to where the Appellant was and on being asked whether he had defiled her, she denied. She was later taken to hospital where she was examined and treated. In contrast to her earlier testimony, PW1 further testified that the person who had defiled her was Kagiri who was her neighbor who used to visit her grandmother's home.

PW2, M W testified as the mother to PW1. Her testimony was that on 3rd March, 2010 at around 3.00 pm, she was summoned from school to go and take her daughter to hospital because she was not feeling well. She was taken to a secluded office by two teachers including the head teacher in the company of the complainant. She was asked to observe her daughter's private parts. She noted there was red pus oozing from her private parts to her pants. She left for home with PW1 and reported the matter to the Assistant Chief. Thereafter, she reported the matter to the police from where they were referred to Tigoni Hospital. According to PW2, PW1 did not disclose to her who had defiled her but she ended her evidence by stating that it was the Appellant who had defiled PW1.

PW3, Mrs. M C was a teacher at [particulars withheld] School where PW1 schooled. Her evidence was that on 2nd March, 2010, at about 2.00 p.m., she was informed by a Miss. K who was also a teacher in the same school, that PW1 had been defiled. She requested Madam K to investigate the matter. On 3rd March, 2010, she called PW1 who told her that she had gone to the farm to take care of goats when one Kagiri chased and raped her. According to PW3, PW1 told her that she had been defiled twice. PW3

noticed that she had yellow discharge from her private parts. The Appellant was also known by PW3 as a person she often used to meet.

PW4, M N K a colleague of PW3 testified that on 2nd March, 2010, she was requested by PW3 to investigate a case in which PW1 had been defiled. On 3rd March, 2010, PW1 informed her that on 28th February, 2010 she and her sister had gone to the farm to cut weeds for the animals. That is when one, Kagiri, started chasing them. He caught up with her and defiled her.

PW5, Dr. Makosi of Tigoni Hospital examined PW1 on 5th March, 2010 on allegations that she had been defiled. The examination revealed that she had a sexually transmitted parasite and red blood cells not expected in a girl of 10 years old. There were also pus cells which was a sign of an infection. HIV and Syphilis were negative. He made a conclusion that PW1 had been defiled. He produced as evidence PW1's treatment card as well as laboratory test examinations.

PW6, Police Constable Dickson Kiloe Ngubi of Lari Police Station investigated the matter. After compilation of the evidence available, he charged the Appellant.

The Appellant gave a sworn statement of defence. He stated that he lived with his parents and he knew the complainant who lived about 3 Kilometres from his home. His defence was that on the material date of 28th February, 2010, he was not at home but had gone to take his mother to Kijabe Hospital. He had left for the hospital in the morning in the company of his sister and a driver. They returned to the house at 5.30 p.m. and never left again. On 4th March, 2010 at about 7.00 pm, he was called by his father J N who was in the company of the complainant and her mother. PW1's grandmother was also present. That is when PW1's grandmother informed them that PW1 had been told to say that she had been defiled. PW1 on the other hand stated that she had not been defiled. He stated that it was the Sub-chief one, K who had told her to implicate him because he and PW1's mother had a grudge. On the other hand, PW1's mother and K had a love affair. He was arrested and thereafter charged.

The Appellant who testified as DW1 called two other witnesses in support of his defence. **DW2 M M** was his sister. Her testimony was that on 4th March, 2010, she had visited her mother who was sick. In the morning, the complainant in the company of her mother and grandmother visited their home. That is when PW1's grandmother informed them that they had been told to say that PW1 had been defiled which was not true.

DW3 T W N testified as the Appellant's Sister. She corroborated the Appellant's evidence that on 28th February, 2010, she and the Appellant had gone to take their mother who was sick to Kijabe Hospital. They left home at 8.00 am and returned at 5.00 pm. Having summarized the respective submissions and the evidence on record, it is now the duty of this court to determine whether the prosecution proved their case beyond all reasonable doubt.

My analysis of the key prosecution witnesses clearly demonstrates that there is lack of consistency with regard to whether the Appellant indeed defiled PW1. From the outset, immediately PW1 was defiled, she did not make a report to anyone about her defilement. This court takes cognizance of the fact that, owing to PW1's age, she may not have gathered sufficient courage to tell anybody what had happened to her. But her evidence must be weighed alongside that of other key witnesses. Of interest, is PW2, the complainant's mother. Nowhere in her entire evidence did she testify that even after interrogating PW1, she told her that she had been defiled by the Appellant. Her evidence in part was as follows:-

> ***"We asked the complainant what had happened, she was quiet. I asked if she was feeling well. She kept quiet. We went home then to the headman's place, I was told to go to hospital. We were referred to police then went to Tigoni Hospital. Complainant was treated. This is the card. We went back home. I know accused, he is Kagiri. He defiled my daughter. Kagiris Home is near Chief's place. I do not know him."***

From that evidence, it is correct to conclude that PW2 on her own volition and without any source of

information, made the conclusion that the Appellant defiled her daughter. She did not testify that PW1 told her that she was defiled by the Appellant. Instead she testified that, ***"he defiled my daughter"*** which is conclusive message that it was her own conclusion that it is the Appellant who defiled her daughter. Even in cross-examination by the Appellant, it was also evident that at no point did PW2 state that PW1 rold her that she had been defiled by the Appellant. The question that then begs is, where did she get the information that the Appellant defiled her daughter? Interestingly, during cross-examination by the Appellant, she stated that she met the Appellant in the presence of her mother. In that company, she also did not speak out to say that she knew it was the Appellant who had defiled PW1.

Turning on to the evidence of PW3, her evidence was that she was told by somebody that PW1 had been defiled. She in turn requested PW4 to commence investigations. In cross-examination too she did not disclose where her source of information was. From the summary of the evidence of PW2 and 4, none had informed PW3 that PW1 had been defiled. It is then doubtful how without any sign of defilement that PW3 knew that PW1 had been defiled. PW3's further testimony was that PW1 had been defiled twice which unfortunately again is not borne out from the evidence of both PW1 and 2. Furthermore, it was the evidence of PW3 that PW1 told her that she did not feel pain after defilement. The court wonders whether this is a possible scenario given the age of PW1. It is also odd as testified by PW1 that a Miss K already knew who had defiled PW1 before a report had been made to her on the incident. According to PW1 Miss K even knew that the defiler was her neighbor as she confronted PW1 with the question of whether she had been defiled by a person who lived near their home. It could not thus be factual as Miss K (PW4) testified that she learnt of the incident from PW1.

Given the above inconsistencies, it is doubtful whether the prosecution witnesses spoke the truth. My conclusion is that PW1 appeared to be coerced by some external forces to state that it was the Appellant who had defiled her. Given that the Appellant gave a sworn statement of defence, which was an alibi the prosecution was under an obligation to dislodge it. See the case of **Kiarie vs Republic [1984] KLR 739**, where the Court of Appeal stated as follows:

> ***"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."***

Also in the case of **Uganda vs Sebyala & Otherss [1969] EA 204**, Goudie,J of Ugandan High Court delivered himself as follows;

"I must also bear in mind, as was pointed out in Tanzania Criminal Appeal 12 d 68 … by GEORGES, CJ:

> ***"The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin and alibi which is not particularly strong may very well raise doubts"***

The onus of disproving an alibi lies with the prosecution. A look at the evidence on record shows that the prosecution did not cross-examine the Appellant with a view to testing the elasticity of his defence. Neither did it challenge the corroborative evidence of DW3. Therefore, it was an error and a misdirection on the part of the learned trial magistrate to dismiss the Appellant's alibi defence primarily on ground that the Appellant's evidence did not dislodge the prosecution's case. Clearly, the prosecution failed to disprove or question the Appellant's alibi.

In view of the foregoing, I find that the prosecution's evidence was riddled with inconsistencies and was not sufficient to establish a watertight case. Indeed, in my view the same did not constitute the entire truth about the incident at hand. Whereas under Section 124 of the Evidence Act, the court can convict an accused person solely on the evidence of a child if it believes that a child was speaking the truth, the contrast obtains in the instant case. PW1's inconsistent evidence coupled with a near denial by PW2, her mother that the Appellant defiled her and further coupled with insufficient evidence of PW3, makes me arrive at a conclusion that PW1's evidence could not solely be relied on to found a conviction.

On whether the prosecution failed to call some crucial witnesses, namely, W who was a sister to PW1, there is no requirement that the prosecution should call any particular number of witnesses to prove its case. This is buttressed by Section 143 of the Evidence Act which provides that:

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

All that the prosecution is required to do is to call such a number of witnesses as it thinks is sufficient to prove its case. With the glaring insufficiency and inconsistency in the present case, the evidence of the said W was not an option. She would have shed light to the court on whether indeed the Appellant confronted her together with PW1 and thereafter defiled PW1. The absence of her evidence definitely rendered a fatal blow to the prosecution's case. There is no doubt from the testimony of PW5 that PW1 was sexually assaulted. As PW1 testified, she was found with sexually transmitted parasites, which was proof of sexual assault. However, there is no candid evidence that the sexual assault was meted out by the Appellant. For that reason, this appeal must succeed.

The appeal is accordingly allowed. I quash the conviction and set aside the sentence. I order that the Appellant be and is hereby set free unless otherwise lawfully held.

DATED and **SIGNED** this **8th** day of **April, 2016**

G.W. NGENYE-MACHARIA

JUDGE

DELIVERED this **18th** Day of **April, 2016**.

L. KIMARU

JUDGE

In the presence of:

1. The Applicant in person

2. ….……..for the Respondent.