REPUBLIC OF KENYA

IN THE HIGH COURT F KENYA AT KAKAMEGA

HIGH COURT CRIMINAL APPEAL NO.99 OF 2015

EZEKIEL MURUNGAI MURWA ....APPELLANT

VERSUS

REPUBLIC ....RESPONDENT

(From the original conviction and sentence in Criminal Case No.692 of 2013 at Principal Magistrate's Court Butali(Hon M.L. Nabibya SRM) dated4th September, 2015)

JUDGMENT

1. The appellant, ***Ezekiel Murungai Murwa,*** was charged before the Principal Magistrate's Court at Butali with the offence of gang defilement contrary to ***section 10*** of the ***Sexual offences Act, No.3 of 2006***. Particulars were that on 3rd October, 2013 at (withheld) in Kakamega North District within Kakamega County in association with another not before court, intentionally and unlawfully caused his penis to penetrate the vigina of (withheld), a child aged 15 years.

2. The appellant pleaded not guilty and in the ensued trial in which the prosecution called four witnesses and the appellant's sworn defence, the appellant was convicted and sentenced to twenty years imprisonment. Aggrieved by both conviction and sentence, the appellant lodged an appeal to this court on the following grounds:-

> ***1. The trial magistrate erred in law and fact in convicting the appellant when the ingredients of the charge had not been proved.***
>
> ***2. The trial magistrate erred in law and fact in failing to appreciate that conduct character of complainant was questionable.***
>
> ***3. The trial magistrate erred in law and fact in failing to appreciate that the prosecution's evidence was contradictory and uncorroborated.***
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> ***4. The trial magistrate was biased and the trial was a farce as appellant was not given a chance to defend himself by calling witnesses.***
>
> ***5. The trial magistrate had a pre-determined mind to convict the appellant under whatever circumstances as she had failed deliberately to forward the court file to Kakamega High Court in revision No.171 of 2015.***
>
> ***6. The judgment was against the weight of evidence on record.***

3. During the hearing of this appeal, the appellant who was unrepresented relied on his written

submissions, while ***Mr Oroni***, counsel for the respondent, opposed the appeal orally.

4. In his written submissions, the appellant argued that PW1 was not a credible witness who had been impregnated by another man and only implicated the appellant with the current offence, as a way of covering up her pregnancy. According to the appellant, it was not possible for the appellant to go to school after the incident and nobody noticed her state having been gang defiled with blood stained cloths. The appellant further argued that even though PW1's father was the first to notice PW1's condition no explanation was given why he did not testify in court. The appellant further submitted that prosecution witnesses contradicted themselves and therefore could not be believed. He further argued that PW1's evidence was not corroborated and lacked credibility. The appellant submitted that the medical evidence was unreliable and that the trial court erred in convicting him yet the person who produced the P3 form was not the maker thereof. According to the appellant, the medical evidence was not satisfactory and could not be a basis for his conviction. The appellant in particular submitted that he was not medically examined to match his sperms with those found on the complainant in order to ascertain if he was one of the assailants. Finally the appellant submitted that he was denied an opportunity to call witnesses which was unfair and infringed on his right to a fair trial which led to a miscarriage of justice.

Mr Oroni, on his part, opposed the appeal and relied on the evidence on record and prayed for dismissal of the appeal.

5. I have considered submissions by the appellant as well as those by the respondent's counsel and perused the record of the trial court. This being a first appeal, it is the duty of this court, as first appellate court, to re-evaluate the evidence, re-consider and analyse it itself and come to its own conclusion on that evidence. The court should however bear in mind that it neither saw nor heard witnesses testify and give due allowance for that – see ***Otieno v Republidc*** [1972] EA 32.

6. The evidence before the trial court was that on 3rd October, 2013 PW1 then aged 15 years, was on her way to school when the appellant emerged from the forest with a panga, held her by the neck, led her into the bush where he was joined by another person. The appellant removed her undergarment, removed his own trousers and defiled her. When he was done, the second person took his turn and also defiled the complainant. Meanwhile the appellant was holding a panga over her neck. When they were done, they left. The complainant found her way out of the forest and went to school. After school, she went home and informed her parents who took her to hospital for treatment and reported the matter to police. She was given a P3 form which was filled and signed. In cross examination, PW1 told the court that prior to 3rd October, 2013, she was pregnant with another man. PW1 also told the court that she had seen the appellant earlier on a different date prior to this incident at school.

7. PW2 (withheld) mother to the complainant, testified that on 3rd October, 2013 PW1 was seen walking with difficulty. When she inquired what had happened, PW1 told her how two men had waylaid her on her way to school and defiled her. She told PW2 that she had identified one of the assailants. PW2 took PW1 to hospital where she was examined and treated, and thereafter reported the matter to police. The appellant was later arrested. In cross examination PW2admitted that PW1 was expectant prior to the incident and miscarried thereafter.

8. PW3, ***Sifuna Kizito***, a clinical officer testified that on 3rd October, 2013 PW1 went to hospital with a history of defilement. On examination, there was *oedematious* (swelling) on labia ***majora*** and there was ***difori*** tenderness on ***palpanation*** with blood clots. ***Urinalysis*** showed pus cells. The victim was already pregnant. Vaginal swap revealed presence of live sperms. PW1 was put on treatment. Examination was done after 8 hours from the time of defilement. He confirmed that PW1 had been defiled. He signed the P3 which produced as an exhibit.

9. PW4, ***No.65941 PC Philemon Chebii***, told the court that on 3rd October, 2013, PW1 aged 15 years reported that she had been gang defiled by the appellant and another person. PW1 had already been examined and treated. He recorded her statement and that of PW2. He visited the scene and established that there was presence of foot prints. He issued PW1 with a P3 which was filled. The appellant was

arrested and charged. He produced the birth certificate as PEx3. In cross examination, the witness told the court that PW1 had difficulty in walking when she went to report the incident at the station.

10. DW1 in his sworn testimony told the court that he had been sick since 1st March, 2013 and that on 3rd October, 2013 he had gone to hospital. He denied defiling PW1 on 3rd October, 2012 because he was very sick. The trial court was not convinced with the defence. It therefore convicted the appellant and sentenced him accordingly prompting this appeal.

11. In her judgment the learned trial magistrate set out 3 issues for determination namely whether the complainant was a minor at the time of the incident whether she had been defiled and whether the applicant was responsible. The learned magistrate then stated in her judgment:–

> ***"I have carefully analysed the evidence as presented on record and considered submissions filed by defence counsel and I am satisfied that on 3rd October, 2013, the complainant herein was child (sic), she was aged 15 years, being less than 18 years. On whether she was defiled or not, I am satisfied beyond doubt that she was defiled on 3rd October, 2013, on examination by PW3 (clinical officer) she was found to be pregnant, mobile spermatozoa cells were seen. She had pus cells, and epithetial cells. Clinical findings were defilement ... On whether the accused was responsible or not, I find no doubt he was responsible, firstly because the complainant clearly stated that the incident took place at 10.00 am, in broad daylight where visibility was clear. I do not see any chances of mistaken identity here. She said and mentioned the name of the accused person who showed up first before he was joined by another, the accused defiled her first ..."***

12. The thrust of this appeal is in the first ground of appeal, where the appellant has faulted the trial magistrate for convicting him when the ingredients of the offence had not been proved. For the prosecution to succeed in a charge of gang defilement, it must lead evidence, first to show that there was defilement and that the defilement was committed by two or more people against a minor who was below 18 years of age at the time of defilement.

13. In law, defilement is complete when a person commits an act which causes penetration with a child (see ***section 8(1)*** of the ***Act*** (supra). On the other hand according to ***section 2*** of the same Act, ***Penetration means the partial or complete insertion of the genital organ of a person into the genital organs of another.*** According to section 10 of the Act, ***Gang defilement*** is committed where a person in association with another or others defiles a minor.

14. From the above definition, the prosecution was under duty to prove that there was penetration of the complainant's genitals by the appellant's and other person's genitals, and that the victim (PW1) was a person under 18 years of age.

15. I have perused the record of proceedings and judgment of the trial court. The learned magistrate considered what the prosecution had to prove in order to establish a case for gang defilement and I am satisfied that all the ingredients were proved. As correctly pointed out by trial court, the complainant told the court that she was 15 years, this was supported by the evidence of PW2, the mother and the Birth certificate (PEx3) which shows that the complainant was born on 17th April, 1998 and was therefore a minor on the date she was attacked.

16. Secondly, there was evidence from both PW1 and PW3 that the complainant had been defiled. The complainant's evidence was that she was defiled by two people and the medical evidence by PW3 and PEx1 (P3) confirmed that indeed the complainant had been defiled. There was swelling on the labia majora, presence of blood clots and spermatozoa. There was conclusive medical evidence that there was penetration, a major ingredient in the offence of defilement.

17. On whether the appellant was one of the people who defiled the complainant, the trial court found in the affirmative. I have on my part perused the record of the trial court and the evidence of PW1. She

told the court the person who defiled her. She told the court that the appellant whose name she gave to PW2 and PW4 emerged from the forest with a panga, held her by the neck, led her into the forest where he was joined with another person, and both of them defiled her in turns, the appellant being the first to defile her. The incident took place in mid-morning, in broad daylight and, according to the complainant, she was defiled up to 1 pm when she was left to go. There was sufficient time for the complainant to identity her sexual attacker. Furthermore, the complainant told the court that she had seen the appellant at her school earlier and that she was sure of the person who attacked her.

18. The appellant submitted that the evidence of PW1 was uncorroborated but I am satisfied that her evidence on sexual assault was corroborated by that of PW3 and the P3, (PEx1). PW2 was also clear that the complainant had difficulty in walking on that day and defilement was confirmed when she was taken to hospital. It is also important to point out that by virtue of the proviso to ***section 124*** of the ***Evidence Act Cap 80 Laws of Kenya***, corroboration in Sexual offences is no longer mandatory as long as the trial court finds the evidence of the victim trustworthy, believes the complainant to be ***truthful*** and records its reasons. There is a long list of Judicial decisions on this point but I will refer to two decisions to demonstrate this point.

In the case of J.W.A. v Republic [2014] eKLR the Court of Appeal observed:-

> ***"We note that the appellant was charged with a sexual offence and the proviso to section 1245 of the Evidence Act clearly states that corroboration is not mandatory. The trial court having conducted a*** *voire dire* ***examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the finding of the trial court."***

Earlier on in the case of ***Mohammed v Republic*** [2006] 2 KLR 138. The same court had stated:-

> ***"It is now settled that the courts shall no longer be hamstrung by requirements of corroboration when the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."***

19. Since the trial court believed the complainant's evidence having conducted a ***voire dire*** examination and watched her testimony, I do not see any justification in the appellant's submission that the prosecution did not prove the charge or that there was no corroboration.

The appellant further submitted that he was unproceduraly subjected to a medical examination and that the medical examination was not satisfactory. I have perused the record and the evidence of PW3, the clinical officer who testified that he did not examine the appellant and that if any examination as done on him it was unprocedural. I also note that the trial court did not rely on any evidence of medical examination allegedly conducted on the appellant to hold the appellant to be the sexual attacker.

20. In any case the position in law is that it is not necessary to carry out a medical examination on an accused to ascertain whether or not he was connected with the sexual attack. In the case ***Kassim Ali v Republic*** [2006] eKLR, the court held that absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim or by circumstantial evidence. In the case of ***AML v Republic*** [2012] eKLR, the court stated that the fact of rape or defilement is not proved by way of a DNA test but by way of evidence. And in the case of ***Fappyton Mutuku Ngui v Republic*** [2014] eKLR, it had been argued that there was no tangible medical evidence in the form of a DNA examination to connect the appellant with defilement. However, the Court of Appeal stated that such evidence was not necessary because the trial court had found sufficient medical evidence to support the complainant's testimony.

21. In the present appeal I find, as did the learned trial magistrate, that the evidence of PW1 and PW3 coupled with PEx1 were sufficient to prove the offence of gang defilement.

22. The appellant also complained that the learned magistrate failed to appreciate the conduct of the

complainant. The appellant was alluding to the fact that the complainant had had sexual intercourse before and was pregnant. He tried to suggest that the complainant was looking for away to cover her pregnancy and show the appellant as the person responsible. In her testimony, the complainant told the court that she had a pregnancy from a sexual contact with someone else, and did not at anytime during her testimony, link the appellant with the pregnancy. PW2 also told the court that she had noticed that PW1 was expectant, but did not link the appellant to it either.

23. The fact that the complainant had had a sexual relationship with another person could not be a licence for the appellant to attack her. It could also not be used to show that the complainant was untrustworthy. She was candid on who was responsible for that pregnancy, and even when she though she conceived. The complainant underwent a ***voire dire*** examination and the learned trial magistrate was satisfied that she understood the need to tell this truth. She was affirmed, subjected to cross examination and the trial court believed her as trustworthy. I have not for myself seen anything on the record to suggest that she could not be trusted.

24. The appellant has also complained that the prosecution evidence was riddled with contradictions. He alluded to the discrepancy on whether PW1 was 15 or 16 years. The trial court has a duty to reconcile contradictions where any is alleged and determine them. Where the court fails in this duty, the Court on appeal has an obligation to re-evaluate the evidence and reconcile such contradictions and come to its own conclusion on them. The court can ignore minor contradictions and discrepancies if they do not affect conviction or sentence or even cause prejudice to the accused – (see, ***Kiilu & another v Republic*** [2005] 1 KLR 174, ***Joseph Maina Mwangi v Republic***[2000] eKLR, ***Njuki & 4 others v Republic*** [2002] KLR 77).

25. I have considered the evidence tendered before the trial court but have not seen contradictions that could have a significant bearing on the conviction or sentence or which caused prejudice to the appellant. Any contradictions that do not go to the root of the prosecution's case can be safely ignored without causing the appellant any prejudice.

26. Finally, the appellant raised a complainant that he was denied a chance to call witnesses or to produce a document which he sought to rely on and that the learned magistrate was biased and her judgment was pre-determined.

27. After the appellant was put on defence, the case was fixed for defence hearing on 6th May, 2015. On that day, the appellant's counsel applied for an adjournment for the reason that the appellant had forgotten a vital document he wished to rely on his defence. Although the application for adjournment was opposed by the prosecution, the court granted a last adjournment to the defence and fixed the case for defence hearing on 5th June, 2015. On that day the appellant testified and sought to produce a medical document to show that he was sick on the alleged date of defilement which the prosecution opposed unless the maker thereof was called. The court sustained that objection. The appellant defence was that he was in hospital and therefore did not commit the offence. After the appellant's testimony, appellant's counsel applied for an adjournment to call two witnesses, which the prosecution opposed and the trial court agreed holding that it had given the appellant a last adjournment. That was the end of the appellant's case. The appellant has therefore raised this to demonstrate that the court was biased and did not give him a chance to call witnesses and infringed on his right to a fair trial.

28. According to the record of the trial court, the appellant had been granted a last adjournment. He was expected to proceed with his defence and present his witnesses on that day. They were not in court and the trial court declined to go back on its orders and adjourn the case.

29. The appellant in his defence told the court that he was sick and went to hospital on 3rd October, 2013, when he was alleged to have committed the offence. In essence he raised an ***alibi*** that he was not at the scene and could not therefore have been the sexual attacker. He told the court that he had used a motor cycle rider to take him to hospital together with the help of his wife. His attempt to produce a medical document was thwarted by the prosecution demanding that only the maker of the document could produce it.

30. In her judgment the learned trial magistrate dismissed the ***alibi*** for the reason that the appellant did not call the maker to produce the document. The position in law is tht it is the duty of the prosecution to prove the falsity of the defence of ***alibi***. In ***Kirie v Republic [1984]*** KLR 739, the Court of Appeal stated:-

> ***"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. It was not possible to tell whether the correct onus had been applied and if the prosecution had been required to discharge the alibi."***

31. Addressing itself on the same issue, in the case of ***Wango'mbe v Republic*** (1976-80) 1 KLR 1682, the Court of Appeal held that even where the accused does not call witnesses, it is the duty of the court to weigh the evidence adduced in totality and make a finding on the culpability or otherwise of the accused. And in the case of ***Victor Mwendwa Mulinge v Repub lic*** [2014] eKLR, the Court of Appeal (for majority) quoting ***Karanja v Republic*** [1983] KLR 501, held ***that it is strite law that the burden of proving the falsity of an accused's defence of*** *alibi* ***lies on the prosecution***.

32. In the appeal, the appellant stated in his defence that he had been sick between 1st and 3rd of October, 2013, and that he had a medical document to show this, but which he was not allowed to produce without calling the maker. This was a clear defence of ***alibi*** and the prosecution had the burden to disapprove it. Having declined to allow the appellant produce the document, the trial magistrate should have allowed the appellant an adjournment to call the witness to produce the document and the investigating officer had a duty to visit the hospital and establish whether the defence of ***alibi*** was true or false. ***Section 212 of the Criminal P:rocedure Code Cap 75*** of the laws of Kenya is clear on this and provides:-

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

33. The appellant having raised a defence of ***alibi,*** it was important that it be dislodged or confirmed. The evidence of PW1 on the identity of her attackers may have sufficed, but with the defence of ***alibi***, there was need to deal with this aspect of the defence case conclusively. Taking into account the evidence of PW1 and PW2 that only one name of the assailant (***Mukangai***) was given and the appellant having alleged in his defence that he was sick and therefore far from the scene, this ***alibi*** was sufficient to introduce into the mind of the trial court a doubt that was not unreasonable and which required verification by the prosecution, notwithstanding the fact that the defence had been given a last adjournment. The defence of alibi introduced a different dimension to the case that the trial magistrate should have properly delt with to exclude the possibility of a mistaken identity by allowing the appellant to call a witness to produce the document and the prosecution to dislodge the same. The trial magistrate erred in dismissing the ***alibi*** of hand, without deciding whether it was true or not, and shifted the burden of proving the ***alibi*** defence to the appellant, which is not the position in law.

34. For the above reason I find that the appellant's appeal has merit and is allowed. I hereby quash the appellant's conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Kakamega this 20th day of September, 2016.

E.C. MWITA

JUDGE