REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO.5 OF 2016

GEORGE MBOGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case

No. 820 of 2015 of the Senior Resident Magistrate's Court

at Tigania by Hon. P.M Wechuli – Resident Magistrate)

JUDGMENT

The appellant, **GEORGE MBOGO**, was convicted for the offence of defilement contrary to section 8 (1) (2) (sic) of the Sexual Offences Act.

The particulars of the offence were that on 24th May 2015 in Tigania West sub County of Meru County intentionally caused his penis to penetrate the vagina of **F.K** a child aged 2 years.

The appellant was found guilty of the offence and sentenced to serve life imprisonment. He now appeals against both conviction and sentence.

The appellant was represented by Wamache associates, advocates. He raised six grounds of appeal as follows:

1. That the learned trial magistrate erred in law and in facts by making a presumption of guilt which was not supported by any evidence on record.

2.That the learned trial magistrate erred in law and in facts by failing to find that the prosecution did not adduce sufficient evidence to convict him.

The state opposed the appeal through Mr. Odhiambo, the learned counsel.

The facts of the case were briefly as follows:

BM (PW2) left her daughter in a neighbour's home and went to attend to a patient at Meru hospital. Upon her return she found the small girl crying and alleged she had been stabbed. She checked the minor's

genitalia and noted some bruises and some white discharge. She reported to the police and the appellant was arrested and charged with the offence.

The appellant denied involvement in the offence and pleaded an alibi.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO Vs. REPUBLIC 1972 EA 32.**

The charge was wrongly drafted. It ought to have read:

> ***"... contrary to section 8 (1) as read with section 8 (2) ..."***

The appellant understood the charge against him and fully participated in the proceedings. I therefore find that the appellant was not prejudiced.

Though the appellant raised an alibi defence and called witnesses who supported it, the learned trial magistrate appeared to shift the burden of proof to him. This is what the trial magistrate said:

> ***"The accused himself does not deny that he was at home until 10 AM when he went to church. Consequently, the prosecution contend that the offence occurred between 8 AM and 10 AM and not later"***

Other than shifting the burden, this proposition is not supported by any evidence on record. The complainant's mother returned home at about 11 AM and this is the first time in the proceedings we learn that something was amiss with the minor.

Any trial court is enjoined to analyze the alibi without shifting the burden of proof to an accused person. In the case of **KIARIE V. R. (1984) KLR 739,740** the court held:

> ***"An alibi raise 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 alibi defence of the appellant was not in any way displaced by the evidence adduced by the prosecution.

Before a conviction is entered in a case of defilement, the trial court must satisfy itself that the necessary ingredients have been proved beyond any reasonable doubts. These ingredients are:

(a) Age of the complainant,

(b) Penetration of(in case of a male victim) or into the genitalia; and

(c) The identity of the perpetrator.

In this case it was fairly easy for the prosecution to establish the first two but the issue lies in the third ingredient.

Though the court stated that it was relying on circumstantial evidence, with respect, my perusal of the entire record reveals none. In the case of **MOHAMED & 3 OTHERS –V- REPUBLIC [2005]1 KLR 722** circumstantial evidence was described as follows;

> ***"Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the***

fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved".

This was a serious misdirection on the part of the learned trial magistrate.

The prosecution did not produce any evidence against the appellant. What there is on record is just a whiff of suspicion. It is trite law that suspicion however strong cannot be a basis for conviction. This is a very unfortunate case where the appellant did not need to offer his defence for no prima facie case had been established against him.

From the foregoing analysis of the evidence on record, it is clear that the conviction cannot stand. The conviction is therefore quashed and the sentence set aside. The appellant is set at liberty unless if otherwise lawfully held.

DATED at Meru this 20th day of December, 2016

KIARIE WAWERU KIARIE

JUDGE