REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL NO. 281 OF 2011

BETWEEN

SAMSON IMBIAKA ..... APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence from the judgment of [HON. S.N. ABUYA, SRM] delivered on 16.12.2011 in the Senior Resident Magistrate's Court at Butali in Criminal Case No. 1011 of 2010)

JUDGMENT

Introduction

1. The appellant herein Samson Imbiakha was charged with the offence of defilement of a child contrary to **section 8(1)** as read with **section 8 (3)** of the Sexual Offences Act No. 3 of 2006. Particulars of the offence were that SAMSON IMBIAKA *on the 25th Day of August 2010 at [particulars withheld] Village, [particulars withheld] Location in Kakamega North District within Western Province unlawfully inserted his Penis in to the genital organ namely vagina of one **E J** a girl aged 12years.*
2. After a full trial the Appellant was convicted and sentenced to twenty (20) years' imprisonment. He has appealed against both the conviction and sentence.

Grounds of Appeal

3. The appellant, who appears in person, filed this appeal on the following grounds :

1. *That he pleaded not guilty to the charge.*
2. *That the learned Trial Magistrate erred in Law and in Fact by failing to consider that there was a material irregularity in the failure by the prosecution to supply the defence with all relevant evidence in their possession for a fair trial as guaranteed under article 50(2) c, j and k of the Constitution of Kenya thus rendering the whole trial and subsequent conviction and sentence unconstitutional and unsafe.*
3. *That the learned Trial Magistrate erred in Law and in Fact by failing to consider and protect the requirements of section 36(1) of the Sexual Offences Act No. 3 of 2006 as there was no any scientific evidence and/or a DNA test carried out to gather the necessary evidence of incriminating the appellant with the charged offence hence renders the subsequent conviction and sentence unsafe.*
4. *That the decision of the trial court was made without proper jurisdiction and the same was totally based on belief and anticipations not warranted by evidence on record.*

5. *That the learned Trial Magistrate erred in Law and in Fact by rejecting the appellant's alibi defense which sufficiently created a reasonable considerable amount of doubt as to the strength of the prosecution case.*

The Prosecution Case

4. During the trial the prosecution called a total of five (5) witnesses. **PW1 E J** the complainant a minor aged 15 years was taken through a voir dire examination by the trial court and was found to understand the nature of an oath and the consequences of lying to the court and allowed to testify. She was then sworn and went ahead to tell the court that she was in class 7 at [particulars withheld] Primary School. She testified further that on the 25/08/2010 at 10 p.m. she was at home when the appellant approached her and asked her to go to his place promising her that he would give her Kshs.100/=. She claimed that she agreed to the appellant's proposition, went to his house and at mid night her father caught them but she managed to run and hide in the nearby sugarcane plantation but the appellant was arrested. She testified that she was later arrested and taken to Malava police station and then to the hospital where she was issued with a P3 form dated the 25/8/2010 "PMFI-1". She claimed to have known the appellant who had come to herd cows. On cross examination by the appellant PW1 maintained that she went to his house because of the promise of Kshs.100/= and added that her father had gone to arrest him (appellant) at mid night but they arrested him in the morning while she hid at the sugar cane plantation.
5. **PW2 S S** a member of the community policing testified that on the 25/08/2010 at 1 a.m. he got a call from the Assistant Chief of [particulars withheld] telling him to go to J L place. He went to J L place and found him standing outside. J Lu told him that his child had run from home and was at S L house. They went to S L house immediately but waited there until 6 a.m. when the appellant came and opened the gate together with the girl and they arrested them and took them to the assistant Chief of [particulars withheld] where they were given a letter which they took to the Malava Police Station. On cross examination he maintained that he arrested the appellant together with the girl and not the appellant alone.
6. **PW3 J J L** a resident of [particulars withheld] sub-location [particulars withheld] Area the father to the complainant told the court that on 25/08/2010 the complainant was found missing from where she normally sleeps (the kitchen) which prompted him to go to the Assistant Chief who then called the youth. He testified that he suspected that the complainant was at the appellant's house because she had told him that the appellant had given her money earlier. They went to the appellant's home and they found PW1 and the appellant. They arrested them and took them to the Assistant Chief who gave them a letter to take to Police Station.
7. **PW4 No. 70716 P.C ERICK KEMBOI** told the trial court that on the 25/08/2010 while at Kabras Police Station Crime Branch office, he received a report from PW1 and her parents alleging that she had been defiled. He gave her a letter and escorted her to Malava Hospital for examination and later took her to Kabras Police Station where he took her statement. He gave her a P3 Form which was filled by the Doctor that same day. Armed with the Doctors report he charged the appellant accordingly.
8. **PW5 SYLVANCE OSIDA** a Doctor at Malava Hospital told the court that PW1 was taken to Malava Hospital on 25/8/2010 with complaints of pain in her private parts. He further told the court that PW1 was not a virgin. He examined her and found that she was not pregnant nor did she have HIV and her urine was clear. He stated that he filled the P3 form 5 days after the incident. He produced the P3 form as Exhibit.
9. After carefully considering the evidence on record the trial court was satisfied that the prosecution had made out a prima facie case against the appellant requiring the appellant to be put on his defence.

The Defence Case

10. In his sworn testimony **DW1** the appellant herein told the court that on the 25/08/2010 at 6 a.m. he woke up to do his work of milking the cows. He told the court that the home where he worked was fenced and had a gate which was locked at night and it is the owner of the home who kept the keys after locking. He testified that when he heard dogs barking he went to check why they were

barking and at the gate he found two (2) elders. He then notified the owner of the home who opened for the elders. He alleged that one of the elders tied his hands with a rope and they went to the Assistant Chief's Office. At the Chiefs Office he saw PW1 who was also tied with a rope. PW1's brothers were also at the chief's office. He was then taken to Malava Police Station. On cross examination the appellant told the court that he knew PW3 who was a brother to his boss. He claimed that the brothers do not get along well at all and to the extent that they do not even greet each other. He also testified that PW3 was one of the elders arrested.

11. **DW2 I I L** told the court that in the morning of 25/08/2010 her worker, the appellant herein woke up to go milk the cows at around 6.00 a.m. That he (appellant) knocked on her door and told her that two people were waiting at the gate. She then woke up and went and opened the gate where she saw her in-law and the Assistant Chief's Police Officer. She welcomed the two into her home but they refused to enter her compound and they requested for the appellant who she told to accompany them which he did. She testified further that she was left to carry on with the work of milking of the cows which she finished and then called her husband and told him what had happened to the appellant. Her husband then tried to call her in -law but never got him.
12. DW2 also testified that she later heard that DW1 was taken to the Assistant Chief's Office and then to Malava Police Station. She called DW1's relatives who followed up the issue. On cross examination she confirmed that the appellant was her employee and that he used to sleep alone in a house in her boma and that her compound was fenced with barbed wire. She also explained that the complainant is a daughter to her brother in-law who lives about 100 meters from her compound. She maintained that the appellant had no key to the gate and that her compound is fenced with barbed wire. She denied seeing the complainant in her compound that night.

Trial Court's Judgment

13. After considering the evidence on record the Learned Trial found that the ingredients of the offence of defilement had been proved namely penetration and that the complainant was aged between 12 to 15 years. The trial court found that the appellant was the defiler because the appellant had talked to the complainant and even promised to pay her Kshs.100/=. The trial court also found that PW2 and PW3 found the complainant in the appellant's house from which they arrested them. Upon conviction the appellant was sentenced to 20 years imprisonment.

The Submissions

14. During the hearing of the appeal, the appellant put in his written submissions which I have carefully read. In addition to the written submissions, the appellant purported to say that the case against him was a frame-up by his employee's brother because he (appellant) had refused to attend the animals of his employer's brother to graze on the land. I find such submissions to be baseless as it was not raised during the trial.
15. Mr. Ngetich, prosecution counsel conceded the appeal on grounds that there was no medical evidence to prove penetration, that the evidence given by the prosecution witnesses was contradictory especially as regards the arrest of the appellant, namely whether the arrest took place inside the house or at the gate; and whether the appellant and the complainant were arrested when they were together or they were arrested separately.

Duty of this Court

16. As a first appellate court, I am under a duty to reconsider and evaluate the entire evidence that was placed before the trial court and come to my own independent conclusions in the matter, only remembering that I do not have the privilege of seeing and hearing the witnesses. In the case of Okeno –vs- Republic [1972] EA 32, the Court of Appeal for Eastern Africa observed:

> "An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. R (1957) EA 336) and to the appellate's Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic (1957)

EA 570). 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 magistrate's findings should 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, (See Peter v. Sunday Post, (1958) EA 424)".

17. After carefully reconsidering and evaluating the evidence afresh, I find that the complainant never explained to the trial court what happened on the night of 25/08/2010 after 10 p.m. namely whether she had sexual intercourse with the appellant. All she said was that the appellant promised to give her Kshs.100/= if she agreed to go to his house. Her evidence and that of PW2 and PW3 seems not to add up. She claims that she was not arrested by PW2 and PW3 when they went to the appellant's house as alleged since she ran and hid in the sugarcane plantation. PW2 and PW3 claim to have gone to the appellant's house as early as 1 a.m. and were forced to wait until the gates were open at 6 a.m. when they arrested the appellant together with the complainant which contradicts the testimony of the complainant PW1. The boma where the appellant stayed was admittedly fenced with a lockable gate which DW2 kept in the night. DW2 the employer of the appellant maintained that she was the one who normally closes the gate of her compound and she is the one who opened for PW2 and PW3. She also said she never saw the complainant in her compound. She maintained that the appellant was alone when he was arrested. The appellant also said so.
18. PW5 in his testimony told the court that the complainant had had sexual intercourse before. He filled the P3 Form five (5) days after the alleged incidence and made a finding that it was not PW1's first time to have sex. No medical report was produced apart from the P3 Form. It is therefore hard to conclude that there was penetration and if the penetration was attributed to intercourse between the complainant and the appellant on the material night. The complainant never explained what happened that night and the fact that she had had intercourse before and lastly that the P3 Form was filled 5 days after the alleged incident all make the prosecution's case very week. As rightly stated by Mr. Ngetich for the D.P.P the doctor PW5 did not raise the issue of penetration at any specific time and his findings did not place the appellant directly at the scene of crime.
19. Coming to the grounds of appeal raised by the appellant the trial court was duty bound to ensure that the appellant was supplied with all relevant documents to prepare for his case. However, I do not think that failure to comply with Article 50 (2) (c) and (j) of the Constitution of Kenya perse would render a trial, conviction and sentence unconstitutional. The appellant should have exercised due diligence to ensure that he was supplied with the relevant documents needed for the preparation of his case. It is normal practice of trial courts to supply accused persons with the charge sheet and statements of witnesses at the accused's expense which requires accused to exercise due diligence. My own assessment of this matter is that there was no violation of this provision. Nowhere in the record does it appear that the appellant complained that he had not been provided with the witness statements before any of the witnesses started testifying. It is however advisable, for a trial court to make a record that witness statements and all the prosecution's evidence have been availed to an accused person, so as to remove doubt as to whether the statements have been availed or not.
20. The appellant also raised the issue that the trial court did not consider the requirements of Section 36 (1) of the Sexual Offences Act No.3of 2006 on scientific evidence or a DNA test which rendered the conviction and sentence unsafe.
21. The Appellant's case is that contrary to the provisions of section 36 (1) and (2) of the Sexual Offences Act, 2006, he was not subjected to a DNA test. It is true that the court did not call for the medical examination of the Appellant. Was he thereby prejudiced by such failure? Precedents show that medical examination of an accused person under Section 36 (1) of the Sexual Offences Act, 2006 is not mandatory but discretionary on the trial court. In the case of Ahmed Ibrahim Adan v Republic, Garissa High Court Criminal Appeal No. 36 of 2013, [2013] eKLR, Mutuku, J. stated that:

"On failure by the court to order for DNA test in respect to the appellant, Section 36

Sexual Offences Act gives courts discretion to or not to order for this depending on the relevance of this test and the nature of the case."

22. The learned Judge adopted the same position in the case of Abdinsir Guhad Bore v Republic, Garissa High Court Criminal Appeal No. 74 of 2012, [2014] eKLR where she stated as follows:

> "My understanding of Section 36(1) of the Sexual Offences Act is that it gives the court discretion to order for the medical examination of an accused person in order to gather evidence and to ascertain whether or not the accused person committed an offence."

I entirely agree with the above holdings regarding interpretation of section 36 of the Sexual Offences Act.

23. A similar holding was made by Meoli, J. in the case of Charles Karanja Somba V Republic, Malindi High Court Criminal Appeal No. 141 of 2010, [2012] eKLR where the learned Judge stated:

> "And contrary to the appellant's assertions in the appeal, there existed no legal burden on the part of the [court] to order forensic tests as anticipated under Section 36 of the Sexual Offences Act. Moreover, no application was made to the court in the course of the trial."

24. There are three main ingredients that have to be established in a case of defilement under **section 8** of the Sexual Offences Act, 2006. These are: whether the complainant is a child; whether there was penetration of the complainant's genitalia; and finally whether the penetration was by the accused [See the case of Fappyton Mutuku Ngui (supra).

The question of whether the complainant was a child is answered in the affirmative by the above finding that she was aged fourteen (14) years and therefore the first requirement is satisfied.

25. In a defilement case such as this one, the age of the victim child is very material because under Section 8 of the Sexual Offences Act, 2006, the extent of the sentence to be meted out to the accused person upon conviction is determined by the age of the child. In the case of Gilbert Miriti Kanampiu v Republic, Embu High Court Criminal Appeal No. 97 of 2009, [2013] eKLR, Gikonyo, J. stated that:

> "Proof of age is critically important in proving offences of defilement or attempted defilement as it is the age of the victim that determines the amount of sentence to be imposed on conviction."

26. In the instant case, the age of the complainant was not verified by the trial court although this was not an issue raised in the appeal but it is very crucial in cases of this nature that the age of the complainant be thoroughly assessed before conviction as the age of the complainant will determine the extent of the sentence.
27. The prosecution did not oppose grounds 1, 2, 3 and 5 of the appeal. This court finds that the trial court had jurisdiction to adjudicate the dispute before it.
28. For the above reasons I do find merit in the appellants appeal. The appeal is allowed, conviction entered by the Trial Court is quashed and sentence of 20 years imprisonment is set aside. The appellant is henceforth set free unless otherwise lawfully held.
29. Orders accordingly.

Delivered, dated and signed in open court at Kakamega this 18th day of March 2015

RUTH N. SITATI

JUDGE

In the presence of

Present in person -- for Appellant

Mr. Oroni (present) -- for Respondent

Mr. F. Juma -- Court Assistant