REPUBLIC OF KENYA

IN THE HICH COURT AT ELDORET

HIGH COURT CRIMINAL APPEAL NO. 163 OF 2011

WAINAINA KAMAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the original conviction and sentence by Honourable

S. O. Temu Principal Magistrate, dated 6th August,, 2013, in Kabarnet

Principal Magistrate's Court Criminal Case No.157 of 2013)

JUDGMENT

1. The Appellant ***Wainaina Kamau*** was tried and convicted of the offence of defilement contrary to ***Section 8(1) (2)*** of the ***Sexual Offences Act.*** He was sentenced to life imprisonment.

2. The particulars of the offence alleged that on 6th day of April 2013 in Marigat District within Baringo County, the appellant willfully and intentionally committed an act which caused his penis to penetrate the anus of ***L L,*** a girl aged five years.

3. The appellant was aggrieved by his conviction and sentence hence this appeal.

In his petition of appeal filed on 16th August, 2013, the appellant raised nine grounds which can be condensed into the following three grounds:-

(i). That the trial magistrate erred in law and in fact by convicting the appellant on the basis of contradictory and insufficient evidence.

(ii). That the trial magistrate erred in law and in fact by convicting the appellant without appreciating that there was a grudge between him and the complainant's mother.

(iii). That the trial magistrate erred in law by disregarding the appellant's defence without any good reason.

4. When the appeal came up for hearing before me on 24th February, 2015, the appellant was represented by learned counsel ***Mr. Mbugua*** while Learned prosecuting counsel ***Mr. Mulati*** appeared for the state.

In his submissions in support of the appeal, ***Mr. Mbugua*** urged the court to allow the appeal against both conviction and sentence mainly on grounds that the evidence adduced before the trial court did not prove

the offence preferred against the appellant beyond reasonable doubt. Counsel contended that the evidence tendered by the prosecution proved that the perpetrator of the offence was a person identified as ***Morio*** and not the appellant whose name is ***Wainaina Kamau***; that there was no forensic evidence adduced to directly link the appellant with the commission of the offence charged; that the trial court violated the appellants right to a fair trial by denying his request to give a summary of his case as provided for by ***Section 307*** of the ***Criminal Procedure Code.***

Lastly, ***Mr. Mbugua*** submitted that the learned trial magistrate erred by rejecting the alibi defence presented by the appellant and by shifting the burden of proof from the prosecution to the appellant.

5. The appeal was not opposed by the state. ***Mr. Mulati*** on behalf of the state conceded to the appeal on grounds that the appellants conviction was unsafe for two main reasons:-

First, that the complainant's assailant was identified by the prosecution witnesses as one ***Morio*** and not the appellant and secondly, that the trial magistrate did not give any reason for relying on the evidence of PW3 who was a minor contrary to the requirement of ***Section 124*** of the ***Evidence Act.***

6. Briefly, the prosecution case is that on 6th April, 2013 at around 6p.m, PW1, the complainant's mother left her four children at home and left for Marigat town. On her return home, she found ***L L*** one of her children missing. ***L,*** a girl then aged 5 years is the complainant in this case. Upon enquiry from her sister ***A*** who testified as PW3, PW3 informed her that one ***Morio*** alias ***Kamau*** had taken ***L*** away allegedly to give her mandazi. PW1 and her husband (PW4) mounted a search for ***L*** and the man described as ***Morio*** that night without success.

On the following morning, the complainant surfaced at her home naked. She was badly injured on her private parts with human stool all over her body. According to the evidence of PW4, ***L*** took him to an abandoned house in the bush where she claimed she had spent the night with Morio.

PW3 in her evidence after a brief voire dire examination physically identified the appellant in court as the person who had led the complainant away on 6th April, 2013.

The appellant was arrested by PW4 on the morning of 7th April, 2013 and was handed over to PW5 ***CPL Keremi Mbai*** at Marigat police station. PW5 issued the complainant with a P3 form and she was escorted to Kabarnet District Hospital for treatment. After the P3 form was completed, PW5 charged the appellant with the offence of defilement.

7. Accused in his defence elected to give an unsworn statement and called one witness ***Joseph Kamau*** who testified as DW2.

In denying the offence, the appellant claimed that he spent the entire day of 6th April, 2013 at Marigat Township together with his employer (DW2). He was baking cakes while DW2 took them for distribution from 6 a.m upto 6 p.m. At 7 p.m, DW2 invited him to his house. He went to DW2's house at 7.30 p.m and remained there till 9p.m when he left for his house. On arrival in his house at 9.50 p.m, he slept. On 7th April, 2013 in the morning, PW4 went to his house and alleged that he had spent the evening with his daughter, an allegation he denied. PW4 nonetheless escorted him to Marigat Police station where he was arrested.

8. In addition, the appellant denied that the name "Morio" was his alias name. He claimed that this was a name commonly used to refer to Kikuyu's living within Marigat. That he was not the only Morio (Kikuyu) in that area.

The appellant also alleged that the charges were a fabrication by PW1 who was bitter with him after he demanded a debt she allegedly owed him.

9. In his evidence, DW2 confirmed that he had employed the appellant in his cake business. He narrated

his activities on 6th April 2013. His evidence supported the appellant's alibi defence in every material particular.

10. This being the first appeal to the High Court, I am aware of my duty as the first appellate court which is to re-examine and re-evaluate the evidence adduced before the trial court with a view to drawing my own independent conclusions bearing in mind that unlike the trial court, I did not have the benefit of hearing and seeing the witnesses. The Court of Appeal has re-iterated this duty of the first appellate court in many of its decisions; For instance in

Pandya V Republic [1975] EA 336

Simiyu & Another V Republic [2005] 1 KLR 192

Kiilu & Another V Republic **[2005]1 KLR 174** among others.

11. I have considered the evidence on record, the submissions by counsel and the grounds of appeal. I wish to start with a consideration of the appellant's complaint that the learned trial magistrate erred by disregarding his defence. A reading of the judgment delivered by the learned trial magistrate's shows clearly that he considered the defence presented by the appellant and his witness but dismissed it as untrue.

12. Having carefully gone through the court record, I find that Mr. Mbugua's submission that the appellant's right to a fair trial was violated when the trial court allegedly denied him an opportunity to sum up his case is incorrect. The record of the trial court reveals that the appellant submitted handwritten submissions to the court which the court considered in its judgment though the same were not properly filed.

13. After analysing the evidence on record and the submission by Counsel, I find that it is not disputed that ***L*** went missing from her home on 6th April, 2013 after around 6p.m and that she resurfaced on the following morning having been defiled. What is disputed is whether the appellant was the person who had defiled her in the course of the night.

14. It is important to note at this stage that the prosecution did not adduce any direct evidence linking the appellant to the commission of the offence. This is because none of the witnesses claimed to have witnessed the appellant committing the offence and despite the nature of the injuries sustained by the complainant as shown in the P3 form, no forensic evidence was gathered in the course of investigations which could have conclusively linked the appellant to the offence.

15. That being the case, I find that the prosecution case was based on purely circumstantial evidence that the appellant was the person identified by PW3 as the man known as ***Morio*** who had taken the complainant away from the place where they had been playing on the evening of 6th April, 2013; that because ***L*** turned up on the following morning having been defiled, the appellant must have been her assailant.

It is worth noting that ***L*** did not testify in the lower court on account of her age and she did not therefore identify the appellant as her assailant.

16. It is a cardinal principle in criminal law that in all criminal cases, the onus is always on the prosecution to prove the charges preferred against an accused person beyond any reasonable doubt. The burden remains on the prosecution throughout the trial. It does not shift to the accused person. In a case like the present one where the prosecution sought to rely on circumstantial evidence, the law requires that such evidence must be such that it inexplicably leads to the guilt of the accused person as charged; the evidence must be incapable of any other explanation except the accused person's guilt as charged, that is, it must be incompatible with his innocence – See ***Nicholas Muturi Chlande V Republic Criminal Appeal No. 109 of 2013 (2014) eKLR; Sawe v Republic (2003) KLR 364.***

17. In this case, the only incriminating evidence tendered by the prosecution was the testimony of PW3 who identified the appellant as the person who had allegedly disappeared with the complainant on the evening she was defiled. The record shows that PW3 was a child of tender years and because she was not the victim of the sexual offence charged in this case, ***Section 124*** of the ***Evidence Act*** required that her evidence be corroborated by other independent evidence incriminating the appellant before the court could rely on it. As stated earlier, the prosecution did not in this case adduce any other evidence which could have corroborated PW3's evidence by linking the appellant with the commission of the offence.

18. I must at this stage express my disappointment that despite the tender age of ***L*** and the magnitude of harm that she suffered in her ordeal, it is regrettable and unfortunate that the police though notified of the matter chose not to carry out thorough investigations with the aim of nailing the culprit who had committed the heinous crime against her. Though I sympathise with the complainant and the trauma she must have undergone in the hands of her assailant, this is a court of justice which must apply the Constitution and law in every case that comes before it for determination. As stated earlier, the law is that in order to sustain a conviction, the prosecution must prove the charges preferred against an accused person beyond any reasonable doubt. And this burden of proof never shifts to the accused except in certain circumstances which are not applicable in this case. Given my earlier findings regarding the nature of the evidence adduced by the prosecution at the appellant's trial, it is my finding that the circumstantial evidence adduced did not meet the threshold of proof required by the law for the offence for which he stands convicted.

19. The above finding would have been sufficient to dispose off this appeal but I find it important to make one more observation regarding the burden of proof. In convicting the appellant, the learned trial magistrate stated as follows on Page 39 line 9-15.

> ***"The accused could not contradict the prosecution's evidence that he was not in his house from 6p.m 6th April, 2013. To past midnight as he was being searched for.***
>
> ***I thus find that the prosecution's evidence connected the accused beyond doubt with the commission of the offence he was charged with".***

I agree with ***Mr. Mbugua*** that in making such statements, the learned trial magistrate fell into error by shifting the burden of proof from the prosecution to the defence which is contrary to the law.

20. In view of all the foregoing, it is clear to me that the trial court failed to carefully and properly evaluate the evidence tendered before it with the result that the learned trial magistrate arrived at the wrong conclusion that the prosecution had proved the charges against the appellant beyond reasonable doubt.

21. In the result, I find that the appellant's conviction was unsafe. The learned prosecuting counsel was therefore right in conceding to the appeal. It is therefore my conclusion that this appeal is merited and it is hereby allowed. The appellant's conviction is accordingly quashed and the sentence set aside. The appellant shall be set free forthwith unless otherwise lawfully held.

It is so ordered.

C. W. GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 30th day of April 2015.

In the presence of:-

The appellant,

Ms. Mwaniki holding brief for Mr. Mulati for the state.

Mr. Mbugua for the appellant absent though duly notified.