REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

CRIMINAL APPEAL 288 OF 2013

R M M .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the judgment and sentence of A. A. Odawo RM in Criminal Case No. 1609 of 2012

delivered on 20th June 2013 at the Chief Magistrate's Court at Machakos)

JUDGMENT

The Appellant has appealed against his conviction and sentence of life imprisonment. The Appellant was charged in the trial Court with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, Act No. 3 of 2006. The particulars of the offence were that on the 7th day of October 2012 at [particulars withheld] village in Machakos district within Eastern Province, he intentionally and unlawfully caused his penis to penetrate the vagina of F N, a child aged 10 years.

The Appellant was also charged with an alternative offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, Act No. 3 of 2006. The particulars of the alternative offence are that on the 7th day of October 2012 at [Particulars withheld] village in Machakos district within Eastern Province, he intentionally and unlawfully touched the vagina of F N, a child aged 10 years.

The Appellant was first arraigned in the trial court on 19th November 2012 and he pleaded not guilty to the charges against him. He was tried and convicted, and subsequently sentenced to life imprisonment. The Appellant being aggrieved by the judgment of the trial magistrate appealed his conviction and sentence. His grounds of appeal as stated in his Petition of Appeal filed in Court dated 15th July 2013 are as follows:

1. That the learned magistrate erred in law and facts while convicting him on reliance of visual identification by recognition by PW1 and PW3 in light of no first report guidance that had been made either to the AP post or police.

2. That the learned magistrate erred in law while being impressed with his mode of arrest by PW2 of which the same was undoubtful in light of no descriptive evidence to exclude a mistaken arrest.

1. That the magistrate erred in law while convicting him on the prosecution witnesses evidence which was riddled with doubt and inconsistencies which contravened Section 165 of the Evidence Act.

2. That the magistrate erred in law while convicting him on charges that were not proved to the required standard as envisaged in Section 50 (2) of the Constitution.

3. That the magistrate erred in law while convicting him without observing that essential witness were omitted in light of no plausible explanation by the investigations officer.

4. That the magistrate erred in law while rejecting his defence that was not challenged by the prosecution side as they were duty bound to.

The Appellant reiterated these grounds in written submissions dated 7th May 2015 filed in Court by his advocates, Muema & Associates. He submitted on the first ground of appeal that it is clear that the trial magistrate wrongfully relied on evidence of recognition, whereas the court record is silent on how the Appellant was positively identified except for an indication that "he lives near us", no name was given by the victim about the Appellant. Reliance was placed in this regard on the decision in **Roria –VS-Republic, [1976] E.A 583** that dock identification is generally worthless and courts should not place much reliance on it unless this has been preceded by a properly conducted identification parade.

Further, that If evidence had been led of the general appearance and description of the accused person, it would have led to the proper picture of identification of the Appellant by the victim. The Appellant also alleged that the court record was clear that the man positively identified in the dock is K M by PW1 and PW3, while his name is R M M.

On the second ground of appeal, the Appellant submitted that from the investigation diary a report was made in OB No. 17 on 8-10-2012 that the alleged defilement was committed by one K as reported by PW3. However that vide OB 68 on 16-11-2012 APC Duncan Mwangi who was PW2 arrested R M M. Therefore that there had been no explanation from the prosecution to prove beyond reasonable doubt that the person reported to have committed the offence is the same person arrested and charged of the offence.

With regard to ground three, four and five of the petition of appeal, it was submitted that there is no evidence that is the Appellant who committed the offence he was charged with, as PW3 Dr. Emmanuel Loiposha produced a P3 form and stated that in this case there was interference, and that no spermatozoa was seen. Further, that the P3 form did not indicate when the hymen was raptured.

It was also contended by the Appellant that the age of the accused which is of critical value in this proceedings was given by PW1 in her testimony as 10 years, and that the trial magistrate referred to an age assessment note which was produced as Exhibit No. 6. However, that the said document cannot pass for a age assessment report as it is not prepared by a dentist, contains no particulars of what samples were taken in evidence, and was not produced by the author to confirm what parameters were applied to arrive to the conclusion that the victim is a minor.

Finally on ground number six, it was submitted that it is clear from the judgment that the Appellant's defence was not considered at all, and that the trial magistrate only stated that the defence witnesses appeared coached and did not give any reason as to why he did not consider the alibi defence by the Appellant that on the material day of the commission of the offence he was not at home. Reliance was placed on the decision in **Kiarie vs Republic, [1984] KLR 739** that an accused person who raises the defence of alibi does not thereby assume the burden of proving it, and that it is sufficient if the alibi establishes reasonable doubt as to whether or not the accused was at the scene of crime.

Mrs. Saoli, the learned counsel for the State submitted that that charges against the Appellant were proved beyond reasonable doubt. On the issue of identification it was submitted by the State that the complainant, PW1, stated that she was at home when the Appellant who she identified positively by name and stated he was a neighbor and thus knew him very well sent her for a cigarette. Further, that as she

went to pick money the Appellant grabbed her and took her to his parents house and did her 'bad manners'. She testified that the Appellant threatened her that he would kill her if she screamed, and she had to oblige.

On grounds three, four and five of the appeal, the state submitted that the presence of spermatozoa is not all the evidence required to prove defilement, and that the fact that the complainant contracted a disease out of the ordeal and her consistence in her evidence convinced the court that indeed defilement occurred. On the issue of age assessment, it was submitted by the State that any doctor can do age assessment and not a specialist as indicated by the Appellant. Further, that the court was guided on the proper age assessed by the right person in reaching its conclusion.

Lastly, it was submitted by the State that ground number six of the appeal is baseless since it is clear that incase the Appellant was to rely on the defence of alibi he should have informed the prosecution at the earliest time possible and not during his defence. This would have given the prosecution enough time to ensure that the alibi establishes reasonable doubt as to whether or not the accused was at the scene of crime. Reliance was placed in this regard on the decision in **Basil vs Okaroni. ,Busia High Court Criminal Appeal 49.** The State concluded that the decision of the trial court is well reasoned and supported by the evidence, and that the conviction should be upheld and sentence confirmed.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

The key evidence given at the trial is as follows. After a *voire dire* examination, the complainant (PW 1) was found to be sufficiently intelligent and gave sworn testimony. She stated that on 7th October 2012 at around 4.00 pm she was playing with her younger sister, when the Appellant who she identified in Court as K M sent her to buy him a cigarette. She stated that the Appellant lived near them, and that when she went to take the money he grabbed her pushed her into his mother's house, took her to the bed and did bad things and bad manners to her. She explained that he put his "thing" in her several times.

PW1 also testified that the Appellant threatened to kill her if she screamed. She stated that she then reported the incident to her grandmother who took her to hospital the next day and she was treated and stitched. It was PW1's testimony that this was the second time the Appellant had done the act to her.

PW2 was APC Dancun Mwangi who is attached to the Machakos DC office, and he testified that on 15th November 2012, a warrant of arrest was sent to their office at Kasinga AP post for the arrest of the Appellant. Further, that they went to the Appellant's house and arrested him and brought him to Machakos Police Station.

PW3 was B K M the great grandmother of PW1. She testified that on 7th October 2012 at around 4pm she called out to PW1 for assistance and that PW1 came crying. Upon inquiry, PW1 informed her that K M had defiled her. PW3 testified that she knew K M well as he is her grandchild, and she identified him as the Appellant in Court. She testified that she threw the clothes PW1 was wearing away as they were bloody and dirty, and took PW1 to hospital the next day and made a report to the police station where she was given a P3 form to take to the hospital for filling.

PW4 was Dr. Emmanuel Loiposha the medical officer in charge at Machakos General Hospital and he testified that he examined PW1 and filled the P3 form on 25th October 2012. Further, that her hymen was raptured, and there was presence of pus cells which showed that there had been interference with PW1. He also testified that he undertook an age assessment of PW1 and that her age was approximately 10 years. He produced as exhibits the P3 form, the treatment notes and age assessment note.

The last witness for the prosecution was PC Otieno Grace attached to Machakos Police Station and the investigating officer. She testified that on 8th October 2012 she was ta home and PW3 came with a minor and reported that the minor had been defiled on 7th October 2012 by the Appellant. PW5 testified that she

booked the report and referred them to Machakos Level 5 hospital. She also issued them with a P3 form and took the minor to the hospital for age assessment.

After the close of the prosecution case, the Appellant was put on his defence. He made a sworn statement and called three witnesses. He stated that on 2nd July 2012 and 10th July 2012 he was arrested by the watchman of D M together with his friend called M W when they went to collect firewood. He stated that D M is his father's brother. Further, that on 4th October 2012 he passed the said D M and PW3, and the said D M asked him why he cut his trees. He said that he was informed on 14th November 2012 that he was being looked for by the police and later arrested for defiling PW1. He disputed that PW1 was defiled as she did not scream, and that the case was planned against him. Further, that PW3 knew who defiled PW1 and was hiding the information and that is why she burnt the clothes of PW1.

DW2 was A N who testified that the Appellant's house faces hers and that the dispute with M over wood is what brought about the case. DW3 was J M M, the husband of DW2, who testified that there was a dispute between M and PW3 over wood. He testified as to the events surrounding the arrest of the Appellant, and that he also had a dispute with M over his farm. It was his testimony that the Appellant who is his son was framed, so that the people who have a dispute with them could take his land once he is imprisoned.

The last defence witness (DW4) was Rose Kanini who also testified as to the dispute with M about the cut trees, and as to the allegations about the Appellant whom she referred to as K. She testified that she had not heard of the defilement nor had she heard any screams to alert her of the same.

I have considered the grounds of appeal, submissions and evidence given in the trial court, and find that the three issues raised in this appeal are firstly, whether there was positive identification of the Appellant; secondly whether the Appellant's conviction for the offence of defilement was based on consistent and sufficient evidence; and lastly, whether the Appellant's *defence was considered.*

This Court is guided on the issue of identification by the law as stated in **Mwaura v Republic [1987] KLR 645**, where the Court of Appeal held, *inter alia*, that:

> **"In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light".**

Evidence of visual identification may be the basis of sustaining a conviction in a criminal case. However, the court is required to ensure that there is no possibility of mistaken identity before convicting an accused person on the same. In the case of **Wamunga -vs- Republic, [1989] KLR 424 at 430** the court stated as follows with regard to convictions based on identification -

> ***"Whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken the judge must warn himself of the special need for caution before convicting the accused person in reliance on the correctness or the identification or identifications or both."***

In addition, there is a distinction in law between identification and recognition has been stated by the Court of Appeal in **Anjononi and Others vs Republic, (1976-1980) KLR 1566.** It was held therein that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger, because it depends upon some personal knowledge of the assailant in some form or other.

The law on identification is also replete with warnings on the need for caution before sustaining the conviction on the basis of identification of a single witness in difficult circumstances. This was explained in **Maitanyi –Vs- Republic [1986] KLR 198 at 200** as follows:

> **"Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of**

a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error".

In the present appeal, the complainant testified that she was playing during the daytime at around 4 pm when she was called and defiled by the Appellant, whom she knew and named as K M. She was therefore able to see the Appellant well as it was during the day, and there were no difficult circumstances present so as to cloud the complainant's memory. This Court can accordingly rely on her sole evidence of identification.

The complainant was also able to recognize the Appellant who she said she knew as K M and who lived near her. There was thus no need for the description of the Appellant or for an identification parade. PW3 also testified that the Appellant whom she called K M was well known to her as he is her grandchild and his father is PW3's first born son. The Appellant himself during his cross examination admitted to knowing the complainant when he stated as follows:

"Yes I know the complainant. She is F N. My auntie's child. She is 10 years old"

The Appellant has alleged that the witnesses referred to a K M and not him, and that his name is R M M. It is notable that it is not only the prosecution witnesses who referred to the Appellant as K M, but his own witness DW4 as well. More importantly in addition to naming him by that name, PW1 and PW3 clearly indicated from the court record that they were referring to the Appellant who was in court at the time of their testimony. It is therefore evident that this is a name that the Appellant was known by, and the Appellant never disputed that he was the person being referred to by the witnesses during the trial. I therefore find for the above reasons that the Appellant was properly and positively identified.

On the second issue as to whether the conviction of the Appellant was based on sufficient and satisfactory evidence, the Appellant disputed the medical evidence relied upon by the trial court and proof of the complainant's age. This Court in determining this issue is mindful of the ingredients of defilement which were highlighted in **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013** as follows**:**

"**The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."**

This Court has already found that the Appellant was positively identified. The age of the complainant was proved by the age assessment note produced in evidence by PW4, a medical doctor, showing that the complainant was approximately 10 years old. The Appellant claimed that the age assessment ought to have been undertaken by a dentist. No reason or law was given to support this averment.

The law in this regard has been stated in various decisions of this Court and the Court of Appeal. ***In Kaingu Elias Kasomo vs R Malindi Cr. App. No. 504 of 2010*** *the Court of Appeal stated that the age of the minor is an element of a charge of defilement which ought to be proved by medical evidence***.** In the case of **Gilbert Miriti Kanampius -V- Republic (2013) e KLR,** , Gikonyo J. while relying on the case of **Fappyton Mutuku Ngui vs Republic, Machakos H.C.Cr. Appeal No. 296 Of 2010**, noted as follows;

"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. But see the decision by Prof. Ngugi J. in MACHAKOS HC. CR. APPEAL NO. 296 OF 2010 FAPPYTON MUTUKU NGUI -VS- REPUBLIC: "... that "conclusive" proof of age in cases under Sexual Offences Act does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be

used in other cases."

In the present appeal the age assessment notes were produced by PW4 who was a medical doctor upon examination, and therefore qualify as medical and sufficient evidence as to the age of the complainant which was found to be 10 (ten) years.

As regards the requirement of penetration, section 8 (1) of the Sexual Offences Act states that:-

> **"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement".**

"Penetration" under section 2 of the Act is defined to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

The complainant in this regard clearly testified that the Appellant inserted his "thing" which is the colloquial commonly used for a man's penis, into her vagina, and it is my view that this testimony leaves no doubt that there was penetration. Her testimony was clear, consistent and remained unshaken on cross-examination. The learned trial magistrate was satisfied that the witness was consistent and I find no basis to depart from this finding.

The medical evidence by PW4 merely corroborated the fact that PW 1 was defiled, and there is no requirement that for penetration to occur the hymen should be freshly broken or that spermatozoa must be present. The Court is also mindful of the proviso to section 124 of the Evidence Act which provides that no corroboration is required in cases of sexual offences where the court believes that the complainant it telling the truth. The prosecution therefore proved all the elements of the offence of defilement and I find that the Appellant's conviction was safe and on the basis of sufficient evidence.

Lastly, on the issue as to whether the Appellant's defence was considered, the Appellant alleges that the trial magistrate did not consider his alibi defence. I am alive to the principle that an accused person who sets up an alibi defence does not assume any burden to prove the same (See ***Karanja vs Republic** [1983] KLR 501* *and* ***Kiarie vs Republic*** **[1984] KLR 739)**. In the case of **Wangombe v Republic [1976-80] 1 KLR 1683**, the Court of Appeal addressed itself to the treatment of defence of alibi by a court trying a case and 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.

I have evaluated the Appellant's evidence in the trial court, and do not find any assertion of an alibi. He did not in his testimony at any one point indicate that on the material day being 7th October 2012, he was at a specific place other than the place where the offence was alleged to have been committed. None of the Defence witnesses also gave any evidence as to alibi.

The evidence of the Appellant and of the defence witnesses was largely on a dispute that he was alleged to have with one D M over some cut trees and land, and his arrest over the same, and no firm dates were given as to the said dispute or arrest by the Appellant. He referred to being arrested on 2nd July 2012 and 10th July 2012 and having met the said D M on 4th October 2012. However, he did not specifically state was he was doing on 7th October 2012. Therefore there was no alibi whose veracity was required to be determined by the trial court, and its observations that the Defence witnesses were coached was the conclusion reached by that court after considering the defence.

Lastly, the Appellant in his Petition of appeal also appealed against the sentence. This Court notes in this regard that the Appellant was charged with, and convicted of the offence of defilement under section 8(2) of the Sexual Offences Act, which provides as follows:

> **"A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."**

It is to be noted from the said provisions that the offence the Appellant was convicted of attracts a minimum sentence of life imprisonment, and while sentencing is in the discretion of the court, where a minimum penalty is provided, the sentencing court cannot deviate from the provisions of the law. See in this regard the decision in **David Kundu Simiyu –Vs- Republic Criminal Appeal No.8 of 2008 at Eldoret.**

I am therefore in the circumstances unable to vary or review the minimum penalty provided by the law. I accordingly uphold the conviction of, and sentence of life imprisonment imposed upon the Appellant for the offence of defilement contrary to section 8(1) and (2) of the Sexual Offences Act.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 22nd DAY OF OCTOBER 2015.

P. NYAMWEYA

JUDGE