REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 170 OF 2010

JULIUS NJUKI NYAGA...APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Being an Appeal from the Sentence and Conviction of E.K. NYUTU Resident Magistrate Embu in Criminal Case No. 1124 of 2009 on 9th November 2010)

J U D G M E N T

JULIUS NJUKI NYAGA the appellant herein was charged with the offence of **Defilement of a Child Contrary to Section 8(1) of the Sexual Offences Amendment Act No. 3 of 2006.** The particulars as stated in the charge sheet were as follows:-

JULIUS NJUKI NYAGA: ***On the 14th day of July, 2009 in Embu District within Eastern Province unlawfully and intentionally defiled LM a child aged 11 years.***

ALTERNATIVE COUNT

The particulars **Indecent Assault Contrary to Section 11(6) of the Penal Code.**

JULIUS NJUKI NYAGA: ***On the 14th day of July, 2009 in Embu District within Eastern Province indecently assaulted LM by touching her private parts***

The case was fully heard and the appellant convicted and sentenced to life imprisonment. He was aggrieved by the judgment and appealed against both conviction and sentence raising the following grounds:-

1. ***The learned trial magistrate erred in law and facts by overlooking the fact that his constitutional right which is provided by Section 72(3) of the Constitution was violated.***
2. ***The learned magistrate erred in law and facts by not relying on the evidence of the witness which was full of contradictions.***
3. ***The learned trial magistrate erred in law and fact by not considering that some material witnesses did not present to the court their evidence as required by the law.***
4. ***The learned magistrate erred in law and fact when she convicted him without considering that he was not put on medical check up to prove his involvement.***
5. ***The learned trial magistrate erred in not foreseeing that no identification parade was conducted to establish to correctness of identification.***
6. ***The learned trial magistrate rejected his defence which was pure truth.***

The case of the Prosecution was that PW1 and PW2 are sisters and were aged 12 and 10 years at the time of the hearing of the case in October 2009. Their evidence was that on 14/7/2009 7 a.m. they were going to school. They found a man standing along the road at Difatha. He told them there were dogs ahead. The man grabbed PW2's hand. She bit him and he let go of her. He then came after PW1 and grabbed her bag cutting the strap. He grabbed her neck and lifted her up and took her to a maize plantation. He showed her a knife and threatened to kill her if she screamed. He removed her clothes, pant and had sexual intercourse with her. After he finished he ran away.

PW2 had in the meantime run to a nearby home and reported to one Difatha (PW3) who accompanied her to the scene. PW2 and PW3 found PW1 at the scene but the defiler was not there. PW3 took the minors home. In the evening he went to find out from the grandmother (PW4) if she had reported the matter. Both PW3 and PW4 said PW1 did not report to her about the defilement. All she told the grandmother was that they had not gone to school because a man had told them that there were dogs ahead of the road where they were going. PW4 advised PW1 to go and tell her teacher what had happened. PW5 the guidance and counseling teacher at Gatune Primary School was asked by the headmaster to find out why PW1 and PW2 had not come to school the previous day. She is the one whom PW1 explained to what had been done to her. She took the minors to Kibugu police station to make a report. She also accompanied PW1 to the hospital.

PW7 produced a P3 form on behalf of Dr. Farah. She found the girl to have bruise marks on the neck, hyperemia of vaginal walls (bruising) and mild blood discharge from the vaginal. There were no tears. The arresting officer PW6 only states that the suspect went underground for about 3 weeks. He was arrested together with his younger brother. The complainant identified him. The appellant in his unsworn statement of defence denied committing the offence. He said he was at home on the date of the offence and that their home neighboured a school and pupils passed there to drink water.

When the appeal came before me for hearing the appellant presented the court with written submissions. In them he says PW1 and PW2 did not know their attacker. Secondly she did not tell PW3 and PW4 that she been defiled. And that she only told PW5 the issue of the defilement after PW5 was dissatisfied with her allegation of dogs having been on the road ahead. To him PW1 was an incredible witness. Learned State Counsel Ms. Ingahizu conceded the appeal on the main ground that the age of PW1 was not established. She requested for an order for a retrial.

As a first appeal court, this court is enjoined to re-evaluate and re-consider the evidence and come to its own conclusion. I do not lose sight of the fact that I did not see nor hear the witnesses. I am guided by the Court of Appeal in the case of ***KIILU & ANOTHER VS REPUBLIC [2005] 1 KLR 174*** stated thus:-

1. ***An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.***
2. ***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 courts' findings and conclusions; it must make its won 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 witness.***

I have considered the submissions by the appellant and by the State. I have equally evaluated the evidence on record and considered the grounds of appeal. The learned State Counsel conceded the appeal and requested for a retrial. The Court of Appeal in the case of ***ELIREMA & ANOTHER VS REPUBLIC [2003] KLR 537*** had this to say of a retrial

> ***"Taking into consideration the question of jurisdiction of the Kenyan courts, the fact that it is unknown whether the witnesses were still available and the fact that the prosecution was entirely responsible for the mistakes that led to the quashing of the convictions, it would not e just to subject the appellants to a fresh trial."***

Later in ***EKIMAT VS REPUBLIC [2005] 1 KLR 182*** it stated thus:-

> ***"A retrial should not be ordered unless the Court is of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on its particular facts and circumstances but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person."***

I would in view of the above holdings revisit the evidence on record, especially on the issue of identification. There is no dispute that PW1 was sexually assaulted. The evidence of PW1 and PW2 is that they found a man standing along the road as they went to school. It is nowhere indicated that they knew this man.

When PW2 ran to PW3's home, the following is what she told him at page 15 lines 15-19

> ***"She called out to me "grandfather" "grandfather". I got out of the house and asked her what the matter was. She informed me that they had met a man along the way who had grabbed her sister and carried her into the maize plantation."***

When these children went home this is what they told their grandmother at page 17 lines 15-19 through to page 18 lines 1-2

> ***"They said that they had met with a man who told him that there were dogs ahead on the way to school. PW1 said that the man had got hold of PW2's hand but PW2 bit him. I asked them if the man was known to them and they said they could identify him if they saw him".***

The report to the teacher (PW5) at page 20 lines 1-9 was this;

> ***"The children told me that on their way to school on 14/7/2009 they met with a man who stopped them and informed them that there were dogs ahead. They informed me that the stranger held PW2 by the hand. She bit him and he released her. She said she ran off screaming when she saw the stranger having held PW1 by the neck. PW1 informed me that the stranger defiled her."***

All this evidence confirms that the children did not know the man by his names or anything else. It was therefore not true that PW1 told PW6 (arresting officer) that the defiler was the son of Nyaga. (page 27 line 9-10). PW6 did not therefore tell the Court what led him to arrest the appellant and his brother. Be it as it may, PW1 and PW2 in their evidence stated that they had been seeing the man at the Difatha area as they went and returned from school.

The most prudent thing for PW6 to have done would have been to have an identification parade arranged for the suspect to be identified as per the Force Standing Orders. He instead arranged for a local identification between the appellant and his younger brother. What would have happened if PW1 picked the appellant's younger brother? Would he still have been the defiler?

My finding is that the identification of the appellant as the person who defiled PW1 is wanting. There would therefore be no need for ordering a retrial in this matter. Finally in her judgment at page 41 lines 5 – 7 the learned trial Magistrate stated:

> ***"The law often placed the burden of proof on an accused who gives a defence of alibi. The accused has therefore failed to discharge his burden at all."***

The learned trial magistrate misconceived the position in law on this. The correct position is that an accused person who has raised an alibi does not have the burden of proving it. Its the duty of the Court to consider that alibi alongside the evidence of the Prosecution and make a decision. Ref.

1. ***SEKI TOLEKO VS UGANDA [1967] EA 531***
2. ***MACHARIA VS REPUBLIC [2001] KLR 155*** the Court of Appeal held as follows:-

> ***"When an accused person puts forth an alibi as his defence it is upon the Prosecution to disapprove it since an accused person is under no obligation to prove his own innocence as the burden of proving a case against an accused person remains on the Prosecution throughout the trial."***

I therefore allow the appeal. The conviction is quashed and the sentence set aside. The appellant to be set free unless otherwise lawfully held under a separate warrant. The Deputy Registrar to ensure that the learned trial Magistrate gets a copy of this judgment.

DELIVERED, SIGNED AND DATED AT EMBU THIS 11TH DAY OF SEPTEMBER 2013.

H.I. ONG'UDI

JUDGE

In the presence of:-

M/s Ingahizu for State

Appellant

Kirong/Mutero C/c