REPUBLIC OF KENYA

INTHE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 555 of 2004

SAMUEL NDUNGU NJOROGE..……..……..APPELLANT

VERSUS

REPUBLIC……...……..……..……....RESPONDENT

(From original conviction(s) and Sentence(s) in Criminal Case No. 322 of 2004 of the Principal Magistrate's Court at Kikuyu (M. W. Murage – PM)

J U D G M E N T

SAMUEL NDUNGU NJOROGE was convicted of **DEFILEMENT** contrary to **Section 145(1**) of the **Penal Code** and sentenced to imprisonment for life. He was aggrieved by both the conviction and sentence and therefore lodged this appeal.

The Petition of appeal filed herein cited 21 grounds. However, on perusing the petition, it is quite clear to me that there are not grounds, they are argumentative and repetitive. They can be summarized as follows: -

1. The Complainant's age at the time of offence was not proved.

2. The learned trial magistrate failed to carry out a voire dire examination of the Complainant.

3. The learned trial magistrate overlooked contradictions in prosecution case.

4. The learned trial magistrate ignored the Appellant's alibi defence.

5. The sentence to life imprisonment was excessive.

The brief facts of the case were that the Complainant's grandmother, PW3 parted with the Complainant on 8th august 2003 in the afternoon. PW3 sent the Complainant to deliver beans to her uncle at Rusigiti. PW3 was to learn 2 days later that the Complainant had delivered the beans but had not been seen again.

The Complainant stated that after delivering the beans, she was walking on a path when a man emerged from the bush. The man tied her hands and covered her eyes. She was led by the man with a knife placed on her neck to a one roomed house. She was then tied on the bed, striped of her clothes and raped. Her mouth was 'tied' and she was left in the room. The man took back meat and beer and forced her to eat and drink. The man raped her again that day and at night. The next day was Sunday and she was kept in the house and raped both during the day and at night. On Monday, she was taken some tea. She was then

taken to another house and warned not to say anything. She identified the person who raped her those days as the Appellant. The Complainant was rescued by PW5, her uncle and an Administration Police Corporal, PW2 and Complainant's mother, not called as a witness. The Complainant was later examined by **Dr. Mwaura**, PW4, who found her hymen torn and tenderness in her genitalia and a discharge all consistent with rape.

The Appellant's case was that he did not commit the offence and could not have committed it anyway as since 8th to 12th August 2003, he had been busy in his local church daily between 7.00 a.m. and 11 p.m. The Appellant called one witness, DW2 who confirmed his alibi defence. The Appellant also called his mother, DW3, who said that no girl was ever rescued from her son's house on 12th as alleged and that no one could enter the compound without being let in as the homestead had a fence and a gate. DW4 and DW5 confirmed that the Appellant was arrested after escorting his nieces to a shop where he bought them sweets before taking them to a salonist, DW5 to have their hair braided.

I have carefully analyzed and evaluated afresh all the evidence adduced before the lower court while bearing in mind that I neither saw nor heard the witnesses and giving due allowance. **SEE OKENO vs. REPUBLIC 1972 EA 32**.

Mr. Wachira Advocate, argued the appeal on behalf of the Appellant while **Mr. Makura** State Counsel represented the State and opposed the appeal.

The Appellant's first ground of appeal had to do with the Complainant's age. **Mr. Wachira** submitted that age was an essential ingredient for the offence of defilement and that the prosecution needed to adduce evidence in its support. Counsel submitted that the Complainant's evidence giving her age was hearsay and that the only person who could give direct evidence on that point was the Complainant's mother who was not called as a witness.

Mr. Makura, Learned State Counsel submitted that in addition to the Complainant's evidence that she was 13 years. The doctor corroborated her evidence, when he assessed her age to be 13 years. Learned State Counsel submitted that the Complainant's evidence giving her age was not hearsay.

I agree with the Learned State Counsel that the Complainant's evidence as to her age could not qualify to be termed as hearsay evidence. In any event, this was a non-issue given the doctor's evidence confirming the Complainant's evidence that she was 13 years of age in his expert assessment.

The second ground argued was that the learned trial magistrate ought to have conducted a *voire dire* examination. He relied on the re-known case of **MUIRURI vs. REPUBLIC 1983 KLR 445**. Counsel submitted that the learned trial magistrate should have conducted the examination to determine whether the Complainant understood the nature of an oath and whether she was possessed of sufficient knowledge to give evidence.

Mr. Makura submitted that the learned trial magistrate did carry out the said inquiry albeit very briefly. Counsel relied on an *obiter dicta* in the Ugandan case of **SULA vs. UGANDA [2001] EA 556** which was in the following terms: -

"***Obiter dicta: there are two ways of recording voir dire proceedings (preliminary proceedings to establish whether a child witness understands the nature of oath and importance of being truthful). Firstly, the trial judge can write down the question put to the witness and the answer of the witness in the first person in the words spoken by the witness, in a dialogue form. The judge can then make his conclusion after the dialogue.***

Secondly, the judge can omit to record the questions to the witness but record the answers verbatim in the first person and make his conclusion thereafter; Gabrile s/o Maholi v. R [1960] EA 159 followed."

Learned Counsel further submitted that in **NJOKI vs. REPUBLIC [1988] KLR 342** the High court ruled that a child of 12 yeas should not be considered to be of tender age.

I will start by referring to the learned trial magistrate's record of proceedings to determine whether *voire dire* examination was carried out. The record shows as follows:

"***PW1JUVENILE***

I am 14 years old. I know the meaning of oath. It is to tell the truth.

PW1 dully affirmed states in swahili..."

Section 19(1) of the Oaths and Statutory declarations Act provides: -

"***19(1)Where, in any proceedings before any Court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the Court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with Section 233 of the Criminal Procedure Code, shall be deemed to be a deposition within t he meaning of that section."***

In the case of **KIBAGENY vs. REPUBLIC [1959] EA 92** at page **94, FORBES V – P, GOULD and WINDHAM** JJA held: -

"***There is no definition in the oaths and Statutory Declarations Ordinate of the expression "child or tender years" for the purpose of Section 19. But we take it to mean, in the absence of special circumstances, any child of an age, or apparent age, of under fourteen years; although, as was said by LORD GODDARD, C.J., in R. v. Campbell (1), [1956] 2 All E.R. 272,***

'***Whether a child is of tender years is a matter of the good sense of the court…"***

In **NJOKI vs. REPUBLIC SUPRA**, **Mbito Ag. J.** and **Shah CA** held:

"***The Complainant in this case was aged 12 years. He was therefore not a child of tender years whose evidence required corroboration as a matter of law."***

We must distinguish here the purpose of *voire dire* examination and the duty of the court during such an examination, and on the other hand, the evidential value of evidence of children of tender years and what is expected of the court under **Section 124** of the **Evidence Act**.

The learned judges of Appeal in **Kibageny Case Supra**, referred with approval an earlier decision of the same court **NYASANI S/O BICHANA vs. REPUBLIC [1958] EA 190** where **SIORE 'CONNOR P, BRIGGS V-P** and **FORBES JA** held: -

"***It is clearly the duty of the court under that section to ascertain, first, whether a child tendered as a witness understands the nature of an oath, and, if the finding on this question is in the negative, to satisfy itself that the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth."***

The position is therefore very clear that the presiding magistrate has a duty to conduct an inquiry, referred to as *voire dire,* with an aim of determining whether the child tendered as a witness before the court first and foremost understands the nature of an oath, whether the answer to this question is positive or negative, the court must satisfy itself that the child is possessed of sufficient intelligence to justify the recognition of the evidence and that he or she also understands the duty of speaking the truth.

Going back to the instant case, I am satisfied that the learned trial magistrate was aware of her duty to conduct the *voire dire* inquiry. The examination was very brief. There was however totally lacking a

short ruling, at the end of the inquiry and before the reception of the evidence, to express the decision arrived at by the learned trial magistrate and the reason for same.

The learned trial magistrate should have made a ruling saying whether she found the child to have understood the nature and solemnity of an oath and whether the child was possessed of sufficient intelligence to satisfy the reception of her evidence and also the duty to tell the truth. Was that failure fatal to the instant case?

I do not find the failure to make the short ruling fatal to the case or to have occasioned a failure of justice for the simple reason that at the age of 14 years, the Complainant was not a child of tender years. She was a secondary school student. At that age I do not believe that the short inquiry conducted by the trial magistrate and the omission to make a ruling affected the veracity of the Complainant's evidence adduced thereafter. As much as I would caution the learned trial magistrate to conduct an inquiry with sufficient detail to enable an appellate court assess the all important issue whether the learned court's decision after inquiry was correctly exercised; I find that inquiry is the more important where the child witness is 12 years of age or below.

Mr. Wachira submitted that the learned trial magistrate failed to consider contradictions in the prosecution case. Counsel highlighted the Complainant's evidence that she did not know where she had been held the first three days yet she told the Investigating Officer PW6 that she was held in a lodging at Kamangu. Further that the Complainant had said that she did not know the Appellant yet evidence adduced by defence witnesses shows that the two were from the same area. **Mr. Wachira** also took issue with the Complainant's denial that she was present at the time the Appellant was arrested yet the evidence adduced indicated otherwise.

Learned Appellant's Counsel also submitted that the doctor's evidence indicated that the rape took place on 12th, which contradicted the Complainant's evidence that she was raped between 8th and 11th

Mr. Makura did not think that there was any contradiction between the doctor's evidence and that of the Complainant regarding the day the rape took place. In my own view, I find that point immaterial whether rape was on 12th or before then given the facts of the case. The Complainant's evidence was she was raped daily between 8th and 11th. The doctor's evidence confirmed the rape in his findings that there was evidence of a torn hymen and tenderness and discharge in the genitalia. The issue of the actual date it occurred is not substantial but a question of detail, which in the nature and context of the case is of little, if any, significance.

As regards whether or not the Complainant and Appellant knew each other before, the Complainant denied knowing him. The other prosecution witnesses were non-committal on the issue. The Appellant's mother however stated that she knew the Complainant's grandmother, PW3, for over 12 years and that they were neighbouirs.

That evidence was unchallenged. The Appellant also stated that he knew the Complainant because he was in standard 8 when the Complainant was in nursery in the same school.

From the evidence adduced in this case, it does appear that the Appellant and Complainant were not strangers to one another. During cross-examination of the Complainant, the Appellant did suggest that the case arose out of a grudge the Complainant's mother had against the Appellant over an incident. The prosecution despite that very serious allegation did not call the Complainant's mother as a witness. The failure to call her, yet she had been involved in the Complainant's 'rescue' and the Appellant's arrest seems to me contrary to **Mr. Makura's** submissions a deliberate attempt to cover up some information. In the circumstances, I make an adverse inference that had the Complainant's mother been called, her evidence may have been unfavourable to the prosecution case. See **BUKENYA vs. UGANDA 1972 EA**.

Mr. Wachira submitted that the appellant gave an alibi defence detailing where he spent his day and part of the night between 8th and 12th August 2003, which was the person in question. **Mr. Wachira** further submitted that the Appellant called a witness, the Evangelist, DW2, who corroborated his

defence. Counsel submitted that since the Appellant put up an alibi defence as early as during cross-examination of the prosecution witnesses, the prosecution should have called witnesses in answer to the alibi. **Mr. Wachira** urged the court to find that in light of the defence, serious doubt arose in the case, that the learned trial magistrate should have accepted the defence instead of shifting the burden of proof.

Learned Counsel for the State submitted that there was no shifting of burden against the Appellant but that the learned trial magistrate was commenting on the evidence adduced before her generally.

It is trite law that an accused person assumes no burden to prove an alibi defence. That such an accused person need not put up a strong defence. The test to be applied was well set out in the Court of Appeal case in **KARANJA vs. REPUBLIC 1983 KLR 501 where HANCOX, JA, CHESONI & PLATT Ag. JJA** held: -

"***The word "alibi" is a Latin verb meaning "elsewhere" or "at another place". Therefore where an accused person alleged he was at a place other than where the offence was committed at the time when the offence was committed and hence cannot be guilty, then it can be said that the accused has set up an alibi….***

In a proper case, the court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence or his alibi at an earlier stage in the case,…"

A further test to be applied to alibi defence is well set out in the case of **LEONARD ANISETH vs. REPUBLIC [1963] EA 206** at page 208 where **SINCLARE P, SIR, GOULD AG. V-P** and **NEWBOLD JA** quoted with approval from **REPUBLIC vs. JOHNSON** thus: -

"***Though an alibi is commonly called a defence, it is to be distinguished from a statutory defence such as insanity or diminished responsibility and is analogous to a defence such as self-defence or provocation. A prisoner who puts forward an alibi as an answer to a charge does not assume any burden of proving that answer, and it is a misdirection to refer to any burden as resting on the prisoner in such a case."***

In the instant case, the Appellant raised his alibi defence long before his defence case. He alluded to it during the cross-examination of witnesses. It therefore behooved the prosecution to investigate the alibi and confirm or disprove it.

The Appellant assumed no duty to prove himself but he did go out of his way to prove his alibi defence through two defence witnesses, DW2 who said they spent all five days and most of the night working at the church together and DW3 his mother who said the Appellant had no company any of those days in his house.

The learned trial magistrate, in the analysis of the evidence before her concluded thus at page J3;

"***I have weighted all the evidence in its totality. I observed complainant and found her to be truthful. She had no reason to lie. Doctor confirmed she had no reason to lie.***

I find the defence offered by accused person has not challenged prosecution evidence particularly that of the Complainant but stayed with accused for 3 days. Accused did not account for his night hours and the morning hours before he went to church. None of his witnesses knew how he spent the night. His defence is unconvincing*…"*

The learned trial magistrate misdirected herself. An accused person assumes no duty to prove alibi defence and the learned trial magistrate not only misdirected herself as to the manner in which such defence should be treated by the court but also misdirected herself by shifting the burden of proof against the Appellant.

The learned trial magistrate should have analyzed the alibi defence as against the rest of the evidence and should have made a finding on the alibi. In **PETER NJUGUNA MURIU vs. REPUBLIC [1982-88] 1 KAR 376**, the Court of Appeal held that failure of the lower court to make any finding on an alibi is fatal.

In the instant case, the learned trial magistrate treated the Appellant's alibi defence as a mere evidence in defence and therefore made no finding to the alibi raised by the Appellant.

Having evaluated the entire evidence by both sides, I find that the Appellant's alibi defence raised a reasonable doubt of his involvement in the offence charged. The Appellant proved that he had been busy from 7.00 a.m. to 10.30 a.m. or after every day between 8th and 12th, the dates in question. He brought DW2 who corroborated his alibi defence. He called DW3 who said that the Complainant was not removed from her compound where the Appellant also lived. The prosecution evidence was hazy regarding the ownership of the two places where the Complainant alleged to have been taken and defiled. Even though the evidence before court sufficiently shows that the Complainant was defiled, I find there was reasonable doubt created that the Appellant committed the offence.

I find Appellant's appeal has merit and allow it. In the circumstances, I quash the conviction, set aside the sentence and discharge the Appellant and his surety from the terms of bond pending appeal granted to him by this court.

Dated at Nairobi this 14th day of February 2007.

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LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant

Mr. Wachira for the Appellant

Mr. Makura for the Respondent

CC: Tabitha

…….

LESIIT, J.

JUDGE