



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CRIMINAL APPEAL NO. E012 OF 2020**

**MANASE RICHARD OMOLLO .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an appeal from the judgment by Hon. H. C. Maritim Resident Magistrate in Migori Chief Magistrate's Court S. O. A. Case No. 42 of 2020 delivered on 18/9/2020).**

**JUDGMENT**

**Manase Richard Omollo**, the appellant herein, was convicted for the offence of defilement contrary to Section 8 (1) and 8(2) of the Sexual Offences Act by Hon. Maritim Senior Resident Magistrate Migori, on 18/9/2020.

The particulars of the charge were that on 13/5/2020, in Suna West Sub County, intentionally caused his penis to penetrate the vagina, of SE a child aged six (6) years old.

In the alternative, he faced a charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offence Act. No finding was made on the alternative charge.

Upon conviction, the appellant was sentenced to thirty (30) years imprisonment.

Being dissatisfied with whole judgment, the appellant has preferred this appeal based on three grounds, which are as follows:-

- i) that the court failed to consider the appellant's defence that there existed a grudge;**
- ii) that the prosecution failed to prove their case to the required standard;**
- iii) that his constitutional right to be accorded the service of a lawyer were violated.**

The appellant prays that the conviction be quashed and sentence set aside.

The court directed that the appeal be disposed of by way of written submissions. The appellant filed his submissions on 6/5/2021 and further submissions were filed by his counsel, the firm of **Brian Mboya Advocate** on 13/7/2021. **Mr. Mboya** appeared for the appellant. The appeal was opposed through submissions filed by **Mr. Kimanthi** Learned Counsel for the ODPP, on 31/5/2021.

In his submissions the appellant argued that his right to fair hearing was violated in that the court did not comply with Article 50(2)(g) and (h) of the Constitution in that he was not informed of his right to counsel and that the failure caused him prejudice.

Ms. Okota, the appellant's counsel, went on to argue that the offence of defilement was not proved because the perpetrator was not properly identified; that the offence was allegedly committed in the evening, when darkness was setting in and the complainant was alone and there was possibility of mistaken identity and it was unsafe to rely on the evidence of PW1 alone. For that proposition. Counsel relied on the decision of **Wamunga vs= Republic (1989) KLR 424**. Counsel also cited the case by **Simiyu vs= Republic (2005) 1KLR 192** where the court underscored the risk of relying on uncorroborated evidence and **R vs= Turnbull (1976) 3ALL ER 351** where the court gave guidelines on what the court should consider where the only available evidence is that of identification of the assailant e.g. whether the witness knew the suspect before, the intensity of the light; it was counsels' submission that the complainant did not positively identify the appellant as the perpetrator.

As to whether there was penetration, counsel argued that the first medical report was not tabled before the court; that PW6 did not examine

the appellant and could not link him to the offence.

It was further submitted that the appellant raised an alibi defence and it was the duty of the prosecution to dislodge the alibi but no further evidence was adduced to dislodge the alibi; that it is not the duty of the appellant to prove the truth of the alibi but the duty always rests on the prosecution to do so. Counsel relied on the decision of **Elias Kiambati Njeru vs= Director of Public Prosecution (2015)EKLK and Kiarie vs= Republic (1984)KLR** where the court held that when an accused puts forth an alibi defence, it was sufficient if the alibi introduced a doubt in the prosecution evidence; that if the alibi raised later in the defence, the prosecution can apply to adduce evidence for purposes of rebutting the alibi.

Lastly, it was counsel's submission that *mens rea* or criminal intent was not proved as against the appellant and hence the cases was not proved beyond reasonable doubt as is required in criminal case as was set down in the decision of **D.P.P. vs= Woolmington (1935) AC 462**.

In opposing the appeal, **Mr. Kimanthi** for the Assistant Deputy Director Public Prosecution also filed his submissions on 31/5/2021 and urged that the prosecution proved its case against the appellant to the required standard; that penetration and identity of the perpetrator were proved; that PW3's evidence was corroborated by PW2 who saw the appellant pull PW1 into the maize plantation and went to report to the complainant's mother; that the appellant is a person who was known in the area; that the offence took place at 2:00p.m, and there was no possibility of mistaken identity by the witnesses; that PW6 who examined the complainant found the hymen freshly broken and there was evidence of penetration; that the complainant's age was six years as per the birth certificate; that the alibi raised by the appellant was contradictory; and he admitted to being a cobbler, a fact that supported the prosecution evidence; that DW2 and DW3 contradicted the appellant's defence.

As regards the grounds of appeal, counsel argued that the appellant failed to explain the allegation of existence of a grudge; that the court clearly explained to the appellant his right to representation and therefore that ground must fail. As regards the sentence, counsel urged that the appellant was sentenced to thirty (30) years imprisonment instead of life imprisonment as provided under Section 8(2) of the Sexual Offences Act. Counsel urged the court to dismiss the appeal.

This being a first appeal, this court has the duty to re-examine all the evidence adduced in the trial court, analyse it and arrive at its own findings and draw its own independent conclusions. In doing so, this court has to bear in mind that it neither saw nor heard the witnesses testify, and has to make allowance for that fact. I am guided by the decision of **Okeno vs= Republic (1972) EA 32**.

A summary of the evidence that was tendered in the trial court is as follows:-

**PW1 SE** a child aged six (6) years was playing at the veranda of M's home when the appellant took PW1 by the hand, led her to the maize plantation. He made her touch his private parts in his trouser but when people appeared, he asked her to remove the hand. He undressed her, partly removed his trouser and did 'tabia mbaya' to PW1 by putting his 'dudu' for urinating in her 'dudu' for urinating. She demonstrated to the court where the appellant put the dudu. PW1 identified the appellant as Rasta, who works in the area as a cobbler.

**PW2 IA** told the court that she was going to play when she saw Rasta (the appellant) taking PW1 to the crop maize plantation. She got scared and ran back home; she informed her mother (PW4) of what she had seen.

**PW3, PA**, PW1's grandmother overheard PW1 and her cousin talking about what had happened to PW1, and on enquiring from PW1, informed her that Rasta had done bad things to her in the maize plantation the previous day. PW3 also received a report from PW4 that PW2 had witnessed Rasta taking PW1 into the maize. PW3 reported to the police. PW1 was taken to hospital. Later, PW1 identified the appellant when he went to repair shoes at M's home and he was later arrested on 17/6/2020 by PW5 and called PW1 to confirm if he was the one, which she did.

**PW6 MOINDI Justus** a clinician at Migori County Referral Hospital examined PW1 on 18/5/2020 and found both labia minora and majora were inflamed and the hymen was freshly broken.

When called upon to defend himself, the appellant testified on other hand that he left for Kisii on 12/6/2020 and reached home on 14/6/2020. He produced receipts to prove the travel. He called two witnesses. **DW2 George Okinyo Okumu** who testified that on 12/5/2020 he escorted the appellant to the stage to board a vehicle to go to Kisii and he returned on 14/5/2020 and the appellant refunded the money he paid fare for him.

**DW3 Eunice Atieno Oketch** on her part told the court that she lives with the appellant and that he left for Kisii on 12/5/2020 to sell stones, and that he returned on 14/5/2020 and that she heard that he was arrested on 13/5/2020

The grounds of appeal, evidence tendered in court and the rival submission have been duly considered. Having been charged under Section 8(1) of the Sexual Offences Act, the prosecution has to prove the existence of the following elements beyond reasonable doubt:-

- 1) **The age of the victim;**
- 2) **That there was penetration of the victim;**
- 3) **The identity of the perpetrator.**

**Age of the victim:** The trial court observed the child, took her through a *voire dure* examination and in the judgment, noted that indeed she

was a minor. The complainant told the court that she was six (6) years old and a birth certificate was produced in evidence which indicated that she was born on 15/11/2014. It means that as of 15/5/2020 when the incident allegedly occurred, she had just turned six (6) years old. She was in fact a child of tender age.

**Of Penetration:** Penetration is defined in Section 2 of the Sexual Offence Act as:

**“The partial or complete insertion of the genital organ of a person into the genital organ of another person.”**

In the case of **Mark Oiruri Mule vs= Republic (2013)eKLR**, the Court of Appeal stated that:-

**“many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside the girl’s organ.”**

PW1 stated that

**”... He took my hand and he took me to the maize plantation where he did tabia mbaya.... He did tabia mbaya to me. This tabia mbaya he did it while he had made me lie down. He did the tabia mbaya on my body part (points to her vagina” he did tabia mbaya to me. He was using his dudu... I told police he used his dudu to do tabia mbaya in my dudu. Dudu is what I use to urinate and this is also what he uses to urinate..”**

**PW6 the Clinical Officer** examined the complainant on 18/5/2020 and found that both labia minora and majora were inflamed, the hymen was freshly broken and that is evidence that there was penetration of PW1. I find that the medical evidence supports the complainant’s evidence to the effect that there was penetration.

**Whether the appellant was the perpetrator:** It was the appellant’s submission that there was mistaken identity of the appellant. As is common in sexual offences, the complainant was alone when the offence allegedly occurred. PW1 said that she was playing at M’s Verandah when the appellant took her away. Unfortunately, PW1 did not state the time of day or night it was but she said that the appellant was Rasta who worked as a cobbler near Oruba. PW2 on the other hand told the court that in the evening as she was going to another home she saw the appellant whom she referred to as Rasta, who used to roam about in the area and worked as a cobbler, taking the complainant to the maize plantation and she feared and ran away. She informed her mother PW4 about what she saw on the following day. When PW3 learnt of what had happened to PW1, PW1 informed her that it was Rasta, a cobbler and PW2 did confirm that fact. PW3 also testified that PW1 pointed out the appellant before they called the police to arrest him. PW1 and PW2 also pointed out the appellant in court as the perpetrator. I am satisfied that the offence took place during the day time and the appellant picked up the complainant when she was playing with others.

The appellant put forth an alibi defence, that he was in Kisii between 12/6/2020 and 14/6/2020. DW2 and DW3 on the other hand contradicted the appellant when he talked of the appellant having gone to Kisii between 12/5/2020 to 14/5/2020.

I am alive to the principle that by setting up an alibi defence, the accused did not assume the burden of proving the alibi as was held in the case of **Ssentale vs= Uganda (1968)EA 36**. The burden always rests on the prosecution of disproving the alibi and proving the appellant’s guilt. In **Kiarie vs= Republic (1984) KLR**.

The Court of Appeal held:

**An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate’s finding on the alibi because the finding was not supported by any reasons.”**

In the instant case, the Appellant’s defence does not amount to an alibi because his testimony relates to 12/6/2020 to 14/6/2020 and he even produced receipts to try to show that he was in Kisii on those dates.

On the other hand, DW2 and DW3’s testimonies relate to 12/5/2020 to 14/5/2020, respectively. Which is totally contradictory to the appellant’s testimony. I agree with the trial court’s observation that DW2 and DW3 were not in a position to tell where the appellant was on 13/5/2020 and that their evidence was all made up to try and salvage the appellant from the situation he found himself in.

The purported alibi did not introduce any doubt in the prosecution case. The offence was committed during the day and the possibility of mistaken identity did not arise. The appellant was known to PW1 and PW2 who saw appellant and PW1 (as Rasta who was a cobbler) together and described him to PW3 and a report made to the police to that effect. The appellant admitted to the fact of being a cobbler this corroborating PW1’s evidence that the suspect was a cobbler.

I agree with the trial courts finding that the prosecution proved beyond reasonable doubt that it is the appellant who defiled the complainant.

Lastly, the appellant alleged that his rights under Article 50(2) (g) were violated. Article 50 (2) (g) provides as follows:

**“50(2). Every person has the right to a fair trial which includes the right....**

**(g) to choose and be represented by an advocate, and to be informed of this right promptly.”**

I have seen the court record of 19/6/2020 when the appellant was arraigned in court and I do note that before plea was taken, the court recorded that the right to legal representation was explained to him. This is a right that cannot be limited. The court has the duty to explain it to an accused at the earliest time possible. The appellant never alleged that the right was not explained to him properly. He just made an allegation that was not expounded. This court is satisfied that the appellants right to counsel under Article 50(2) (g) was not violated and that ground fails.

The appellant was sentenced to thirty (30) years imprisonment. Under Section 8(2) of the Sexual Offences Act, upon conviction, one is liable to life imprisonment. The appellant was handed only thirty (30) years imprisonment. The sentence is legal and lenient considering that the child that he violated was only six (6) years old. The appellants action were beastly, when he took advantage of a child of tender age whose innocence was stolen through his heinous act and the trauma she suffered may never be healed in her life. I find no convincing reason to interfere with the sentence

In the end, I find no merit in the appeal both on conviction and sentence and the appeal is dismissed in its entirety.

**DATED, SIGNED AND DELIVERED AT MIGORI THIS 3RD DAY OF NOVEMBER, 2021**

**R. WENDOH**

**JUDGE**

**JUDGMENT DELIVERED IN OPEN COURT AND IN THE PRESENCE OF: -**

**MR. KIMANTHI. STATE COUNSEL**

**MR. MBOYA FOR APPELLANT**

**APPELLANT PRESENT**

**MS. NYAUKE COURT ASSISTANT**