REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 110 OF 2019

(CORAM: F. GIKONYO J.)

JULIUS MWITI .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Appeal arising from the original conviction and sentence by L. Ambasi, C.M in Meru CR. No. 557 of 2016 on 27/6/2019)

JUDGMENT

1. The appellant Julius Mwiti was charged with 9 counts of sexually assaulting 9 girls contrary to Section 5 (1) (a) (1) (2) of the Sexual Offences Act, No. 3 of 2007. The particulars as set out in the charge sheet were that on several dates he inserted his fingers in the vaginas of girls aged between 8 to 10 years who were students of [Particulars withheld] Primary School while he was the Deputy Headmaster. He was tried for the offence and given the maximum sentence of Life Imprisonment.

2. Being dissatisfied with the conviction and sentence, he has filed this appeal based on the following grounds that the magistrate erred in law and in fact;

a. In convicting the appellant without any, or sufficient evidence to support the charges and conviction in view of the standard of proof of beyond reasonable doubt

b. By failing to find hold that glaring doubts discrepancies and inconsistencies lingered in the evidence of the prosecution and so it was not safe to convict the appellant in such circumstances

c. In shifting the burden of proof to the appellant, yet it should always be discharged by the prosecution

d. By dismissing the defense of alibi raised by the appellant, yet it was not tested or displaced or challenged by the prosecution

e. In meeting out the maximum sentence against the appellant, yet the circumstances of the case before her did not warrant such a harsh sentence.

3. This being a first appeal, it is up to this court to re-evaluate the facts afresh and come to own conclusion and findings. See **Okeno v. Republic [1972] EA 32**. However, in doing so the court must warn itself that it did not have the advantage of seeing the witnesses testify in order to gauge their demeanor.

4. In his written submissions the Appellant treated each ground of appeal under separate sub heading. But, the arguments relate to: ***Burden and Standard of Proof; and Glaring Doubts and Inconsistencies in the Evidence of the Prosecution*.**

5. He submitted that the prosecution did not prove their case beyond reasonable doubt as PW1 in her during her examination in chief told the court that on 4/3/2016 the accused person inserted his finger in her private part but during cross examination she contradicted herself and said that on the said date there were ball games at Rwarera School where the appellant was refereeing the said games. She further contradicted herself when she testified again that she was not assaulted on Friday 4/3/2016 but on Wednesday. He continued to submit that PW1 claimed to have been assaulted on 4/3/2016 but the PRC form was signed and stamped on 16/03/2016, 12 days later and said that the hymen was not broken. If indeed there was any penetration the hymen would be broken.

6. PW3 testified that she was assaulted on a Monday, but according to the report she made at the police station, she indicated that she was assaulted on 23/2/2016 and 27/2/2016 which was on a Tuesday and Saturday respectively. PW4 LK testified that she was assaulted on March

2016 when the appellant put his fingers in her private part and pushed and she also testified that she informed the class teacher Mrs. Mutegi PW12 who testified under oath that she did not know anything like that was going on. This was also the same for PW6 LK who said that she was assaulted on 2/3/2016 and she informed PW12 who told her to go pick up her bag and go home.

7. It was therefore his argument that there were glaring contradictions in the witnesses' testimonies. PW1 PW4 PW6 and PW7 all testified that they were sexually assaulted on diverse dates and they told PW12 who denied under oath of knowing any such act occurred. PW7 stated that Mrs. Kimathi PW13 asked her whether the appellant used to sexually assault them but in PW13 testimony she said that she had not heard of any reports of defilement. In support of his submissions he quoted **Joseph Ateka Kinanga v. Republic (2016) eKLR.**

Burden of proof

8. It was also the appellant's argument that the learned magistrate erred when she dismissed his defence of alibi. The appellant was said to have defiled PW1 at 10.00 am on 8/3/2016 and PW2 on the headmaster's office on the same day. However, DW2 Joseph Mwaniki Mwai testified that the accused attended court in Succession Cause No. 600 of 2014. In addition, DW3 also testified that on 4/3/2016 the school was closed because there were ball games in Rwarera and on the same day the appellant was accused of having sexually assaulted PW1 and PW2

Analysis and Determination

9. The core of the appellant's argument is that the prosecution did not prove their case beyond reasonable doubt. To support this submission, he stated that there were glaring contradictions in the testimonies of the complainants herein. On this subject of existence of inconsistencies and contradictions in witnesses' testimony, the Court of Appeal stated in **Richard Munene v Republic [2018] eKLR** that;

> **"It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."**

10. I have perused the record and I find the appellant's argument that there were glaring contradictions in the testimonies of the complainants to merely inflated because the acts complained of took place at various dates, and the complainants testimonies revealed the pertinent acts of insertion of his fingers into their genitalia. They also identified the appellant as the perpetrator of their assault. There was consistency on these fundamentals.

11. The consistency of their testimonies is what led the trial court to make a finding that the children were truthful; were able to withstand cross examination by the appellant's counsel; and were able to face up to the accused. The few mix-up of dates and days does not; amount to contradictions or inconsistencies that go to the root of their testimonies or the main question at hand or create any doubt which should be resolved in favour of the appellant. The evidence clearly proved that he inserted his fingers in the genitalia of the victims herein.

Of alibi

12. It was the appellant's argument that the trail court failed to consider his alibi evidence when he testified as DW2 testified to the fact that on 8/3/2016, the day that PW1 claimed that she was assaulted, the appellant was in court attending Succession Cause No. 600 of 2014. On alibi evidence, the Court of Appeal in the case of **Victor Mwendwa Mulinge Vs Republic [2014] eKLR** held that even if the appellant raised the defence of alibi for the first time during the trial, the prosecution ought to have applied to adduce further evidence in accordance with **Section 309** of the **Criminal Procedure Code** to rebut the appellant's defence.

13. **Section 309** of the **Criminal Procedure Code** provides: -

> **"If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it."**

14. In the case of **Kiarie v 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 is 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".**

15. As a matter of law, by pleading alibi the accused does no assume the burden of proof whatsoever. It was up to the prosecution to rebut the appellants alibi evidence. But, on examination of the trial court record, the appellant herein was accused of assaulting a total of 9 minors on different dates and occasions. Clearly, the assault was not an isolated or single incident but various which happened on diverse dates. Therefore, these offences are not restricted to a single date which is 8/3/2016 to which the alibi relate. Therefore, the alibi does not cover all the incidents herein and failure to rebut it does not rout the prosecution's case.

Overall impression

16. PW1 JN, PW2 CM, PW3 PG, PW4 LK, PW5 JK, PW6 LK all testified to the effect that the appellant called them to the staffroom where

he would be alone and would insert his fingers in their private parts. The testimony of PW8 was that the appellant inserted his fingers in her privates while they were in class and managed to assault her without any other students noticing. Only PW9 EM testified that he only touched her thigh. These testimonies were corroborated by the PRC kit conducted on all the minors except PRC kits on PW1, 5, 7, 8 and 9 PRC showed No physical injuries.

17. The evidence tendered proved the offence under in Section 5 of the Sexual Offences Act which provides the following on Sexual assault

> **(1) Any person who unlawfully—**
>
> **(a) Penetrates the genital organs of another person with—**
>
> **(i) any part of the body of another or that person; or**
>
> **(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;**
>
> **(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.**
>
> **(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.**

18. Accordingly, I find that the prosecution proved their case beyond reasonable doubt and consequently the appeal herein on conviction lacks merit and is therefore dismissed.

Of sentence

19. Under section 5(2) of the Sexual Offences Act

> **A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.**

20. The appellant was sentenced to life imprisonment. I note that he assaulted 9 small girls who were under his care as a teacher. The incidents were numerus. These facts aggravate the crime and his situation with the law. Nonetheless, I am satisfied life sentence is harsh especially given the fact that he is aged 50 years. I therefore sentence him to 20 years' imprisonment to commence from the date he was sentenced by the trial court. His appeal on sentence succeeds to the extent I have stated. It is so ordered.

Dated signed and delivered in open court at Meru this 3rd March 2020

F. GIKONYO

<u>In presence of</u>

Muriithi for appellant

Appellant – absent

M/s Nandwa for state

F. GIKONYO

JUDGE