REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 251 OF 2018

OBADIAH MAGARA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the

Chief Magistrate's Court at Makadara Cr. Case No. 2026 of 2013

delivered by Hon. H. M. Nyaga (CM) on 14th November 2018).

JUDGMENT

Background

1. Obadiah Magara, the Appellant herein was charged with the offence of defilement contrary to **Section 8 (1) (2)** of the **Sexual Offences Act No. 3 of 2010**. The particulars thereof were that on the 13th day of April, 2013 at [Particulars Withheld] in Nairobi, Nairobi County, intentionally caused his penis to penetrate the vagina of **SGW**, a child aged nine (9) years.

2. He pleaded not guilty to the charge. Upon trial, he was convicted accordingly and sentenced to serve life imprisonment. Aggrieved by both his conviction and sentence, he filed the instant appeal to this court.

3. The Appellant raised twelve (12) grounds of appeal in his Petition of Appeal filed on 29th November 2018 by learned counsel, Weda & Co. Advocates. However, the same can be summarized into the following six (6) grounds: That that prosecution evidence was insufficient to warrant a conviction, that the complainant minor's evidence was not corroborated, that the prosecution failed to call crucial witnesses, that the medical evidence did not link the Appellant to the offence, that the case was not proved beyond a reasonable doubt and that the trial court failed to consider the Appellant's uncontroverted evidence.

Summary of Evidence

4. This being the first appellate court, its the duty is to re-evaluate the evidence adduced and come up with its own independent conclusions. The court must bear in mind that it has neither seen nor heard the witnesses and give due regard for that. (See **Okeno v Republic (1972) EA 32).**

5. I now summarize the prosecution's case as follows: In her unsworn evidence, the complainant **PW1, SGW** then a minor aged 10 years recalled that on 13th April, 2013 at about 2.00 pm, the Appellant's wife one "Mama Peter" sent her to get her a baby shawl from her house. PW1 went to the house where she found the Appellant. Since the house did not have a seat, the Appellant told her to seat on the bed. He then asked her if she has ever had sex with anyone. She replied in the negative adding that she was not interested. When she tried to leave, the Appellant held her shoulder and pushed her to the bed. He tore her clothes then removed her pant and threw it out of the window. The Appellant then removed his clothes and remained with a vest. He used a stocking to cover PW1's mouth and eyes and had sex with her for about thirty (30) minutes from 2.30 to 3.30 pm. He also touched her breasts. She felt pain and started bleeding but did not raise alarm. Thereafter, the Appellant removed the blood stained bedsheet and spread a clean one. PW1 also saw him remove the sperms from the carpet.

6. He gave her Kshs. 20/= and she went to their house. She however did not tell her mother because her mother would have gotten angry.

About three days later, their house maid one Mwende saw her torn blood stained skirt and told her friend Faith who told PW1's mother. Upon cross examination, PW1 stated that her mother and the Appellant's wife had quarreled before he was arrested although they were initially friends and the two would drink together in the Appellant's house. PW1 also stated that she had never seen the Appellant before the date of the incident. Further, she stated that her mother would beat her until she bleeds...

7. On 29th April, 2013 at about 12.30 pm, PW1's mother **PW2, NWN** heard her house help saying that PW1 was not bathing. The house help told her that she had seen blood stains on PW1's panty and biker. PW1 told Mary about the incident. PW2 took PW1 to NYS Health Centre where PW1 was examined by **PW5, Dorcas Mugure** a medical practitioner at the health facility. No discharge was seen, no physical injuries were noted but PW1's hymen was broken. PW5 filled a post rape care form which she produced in evidence.

8. Thereafter, PW2 reported the incident at Muthaiga Police Station on the same day whereupon the OCS directed **PW4, CPL Virginia Murage** to investigate the case. On 2nd May, 2013, PW4 accompanied PW1 to police surgery for filling of the P3 Form. PW1 was further examined by **PW3, Dr. Kezzie Shako** of police surgery who also relied on the post rape care form**.** PW1's external genitalia were normal, labia minora was tender, hymen was torn and she had a white discharge which was normal. PW3 signed a P3 form which she produced in evidence.

9. On 7th May, 2013, PW4 arrested the Appellant in Mathare 4 at about half past midnight. PW4 produced PW1's birth certificate number [……] showing she was born on 27th March, 2004.

10. In cross examination, PW2 stated that she had never seen the Appellant before. She also denied ever borrowing money from the Appellant's wife and/or quarreling with her before this incident. She stated that she used to drink together with the Appellant's wife in her house and further, that the Appellant's wife only abused her after the Appellant had been arrested over the incident. PW2 also stated that PW1's skirt which had been torn by the Appellant was not an exhibit in court.

11. Upon being put on his defence, the Appellant elected to give an unsworn testimony. He denied defiling PW1 and stated that on the material date, he was working at Tuskys (supermarket). He later came to learn that his ex-wife and PW1's father had an affair but then disagreed which led to him being fixed. He also stated that he came to know that PW1 used to go to his house while he was away.

Analysis and determination

12. This Appeal was canvassed by way of oral submissions. The Appellant was represented by learned counsel, Mr. Shadrack Wambui & Mr. Omaiyo Mogaka whilst the Respondent was represented by learned State Counsel, Ms. Kimaru. Upon carefully reevaluating the evidence on record and considering the parties' respective submissions, I find that there are only two issues for determination namely; whether the prosecution proved the offence beyond a reasonable doubt and whether the sentence imposed was legal and proper.

Whether the prosecution proved the offence beyond a reasonable doubt.

13. In proving the offence of defilement, the prosecution must establish three key elements namely; age of the victim, penetration and identity of the perpetrator. According to PW1's birth certificate number [……] which was produced in evidence by PW4, she was born on 27th March, 2004. This is conclusive proof that PW1 was nine (9) years old at the time of the alleged offence.

14. As regards penetration, Mr. Wambui submitted that the tear on the hymen was not sufficient proof of penetration. In rebuttal, Ms. Kimaru submitted that the same was proved beyond all reasonable doubt. PW1 gave uncontroverted evidence that on the material day, the perpetrator pushed her to the bed, tore her clothes and had sex with her. Her evidence was corroborated by the medical evidence of PW5 who stated on examination, no discharge was seen, no physical injuries were noted but PW1's hymen was broken. The fact of the broken hymen was further confirmed by PW3 who examined her when filling her P3 form. I am therefore satisfied that penetration was sufficiently established.

15. On identification, Mr. Wambui submitted that PW1 confirmed that she had never seen the Appellant during the day and that PW2 too had never seen the Appellant. Counsel questioned why no identification parade was conducted in the circumstances to clear the doubt that the Appellant was culpable. In this regard, he cited the case of ***Kazungu Goda v Republic [2017]eKLR***. Counsel also questioned why PW1's panty and biker that were alleged to have been blood stained were not adduced in court or subjected to scientific test to ascertain that she was sexually assaulted by the Appellant if at all.

16. Ms. Kimaru submitted that the *voire dire* examination determined that PW1 was intelligent but did not understand the meaning of an oath hence she gave unsworn testimony. She stated that under **Section 124** of the **Evidence Act**, the evidence of a minor need not be corroborated if the court is convinced that the minor is speaking the truth. In her view however, PW2 corroborated the evidence of PW1. In rebuttal, Mr. Wambui submitted that the Respondent's understanding of **Section 124** of the **Evidence Act** was dishonest as the evidence of a minor is considered uncorroborated if it's the only evidence available which was not the case in this instant.

17. According to the evidence on record, the incident occurred between 2.30 pm to 3.30 pm which leaves no doubt in my mind that PW1 was able to see the Appellant. Further, before the ordeal, the Appellant engaged PW1 in a conversation in which he enquired to know whether she had ever had sex before. He then proceeded to defile PW1 for about thirty minutes. PW1 stated that she started bleeding and saw the Appellant changing the soiled bed sheet. Thereafter, the Appellant gave her Kshs. 20/= after which she left for their home. Considering the foregoing, it is evident that PW1 had sufficient time to observe the Appellant at length and at a close proximity which enabled her to positively identify her. She however did not disclose the incident to her mother, PW2 immediately because she feared that PW2 would get angry. I find this to be believable since she revealed during cross examination that her mother used to beat her until she nosebleeds. It is therefore no wonder that the incident was reported about two weeks later when PW2 found out about the incident from someone else.

18. Further, it is firmly settled that medical evidence is not a mandatory requirement for proof of defilement. I cannot therefore fault the

prosecution for failing to subject PW1's pant and biker that were alleged to have been blood stained to scientific test to ascertain that she was sexually assaulted by the Appellant. I am guided by the case of **George Kioji vs. R: Nyeri Criminal Appeal No. 270 of 2012 (unreported)** where the Court of Appeal held that-

> ***"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person."***

19. Further, it was submitted by Mr. Wambui that this case was initiated because of the differences between the Appellant's wife and PW2. According to Ms. Kimaru however, the Appellant's sentiments that he was framed was an afterthought as he was not clear what defence he wanted to adopt.

20. From the record, it is clear that the Appellant raised two sets of defences in his unsworn testimony. First, he claimed to have been framed due to an affair that his wife had with PW1's father. I find this to be an afterthought because it was a complete about turn from the insinuation he gave during cross examination that he was framed because of a dispute between his wife and PW2. The differences between PW2 and the Appellant's wife only arose after he had defiled PW1. There is no way he could have been framed with an offence he had already committed.

21. Secondly, the Appellant raised an alibi in which he claimed to have been at work in Tuskys at the time when the offence is alleged to have happened. Mr. Wambui submitted that the prosecution failed to investigate and interrogate the alibi raised by the Appellant when cross examining PW1 and in his unsworn defence. He submitted that when the Appellant asked PW1 whether she had ever seen him during the day, the prosecution should have deduced that he was raising a defence of alibi. He argued that if that escaped the attention of the prosecution then his defence was clear and the prosecution should have sought for an adjournment to go and verify the defence. Counsel submitted that in view of the failure by the prosecution to interrogate the alibi, the trial court should have acquitted the Appellant of the charge. He relied on the case of ***Athuman Salim Athuman v R (2016) eKLR*.**

22. In response, Ms. Kimaru submitted that the Appellant did not raise the alibi at the earliest opportunity. She stated that the cross examination of PW1 was not a defence. Further, she submitted that the Appellant gave an unsworn statement whose credibility could not be tested and cited the case ***George Mboya Githinji HCCR Appeal No. 30 of 2017*** in this regard.

23. In rebuttal, Mr. Wambui argued that it was only during cross examination of the prosecution witnesses that the Appellant could introduce this defence. Notably, Counsel conceded that an unsworn defence has no probative value but argued that **Section 309** of the **Criminal Procedure Code** should have been applied by the prosecution.

24. In **Athuman Salim Athuman v Republic [2016] eKLR** the Court of Appeal stated as follows:

> ***"The principle has long been accepted that an accused person who wishes to rely on a defence of alibi must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi. Way back in 1939 in R. V. SUKHA SINGH S/O WAZIR SINGH & OTHERS (1939) 6 EACA 145, the former Court of Appeal for Eastern Africa upheld a decision of the High Court in which it was stated:***
>
> ***"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped".***
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> ***(See also R. V. AHMED BIN ABDUL HAFID (1934) 1 EACA 76* and *WANG'OMBE V. REPUBLIC [1976-80] 1 KLR 1683).***
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> ***The Supreme Court of Uganda, in FESTO ANDROA ASENUA V. UGANDA, CR. APP NO 1 OF 1998 made a similar observation when it stated:***
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> ***"We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence."***

25. It is evident that the Appellant first raised his alibi defence in his unsworn testimony. Be that as it may, the burden of proof in criminal cases never leaves the backyard of the prosecution. As such, it was imperative for the trial court to weigh the alibi defence against the evidence adduced by prosecution. (See ***Juma Mohamed Ganzi & 2 Others v Republic [2005] eKLR)***. In this case, the Appellant's alibi defence did not displace the prosecution evidence regarding his identification as discussed hereinabove. In the circumstances, I find that the Appellant was positively identified as the perpetrator of the offence.

26. Further, Mr. Wambui Advocate submitted that the prosecution's evidence was marred with inconsistencies. In this regard, counsel pointed out that PW1 confirmed that the quarrel between the Appellant's wife and PW2 ensued before the incident whereas PW2 said that the only time she was abused by the Appellant's wife was after the incident. He also stated that PW1 stated that PW2 and the Appellant's wife were drinking buddies whereas PW2 denied ever setting foot in the Appellant's house.

27. My view is that the inconsistencies were not material to the main issues in question. In ***Philip Nzaka Watu v. Republic [2016] eKLR*** the court stated as follows:

> ***"However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.***

28. Mr. Wambui also faulted the prosecution for failing to call as a witness the house maid who allegedly discovered PW1's blood stained panty and biker. **Section 143** of the **Evidence Act** provides that:

> "***No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."***

29. In the case of **Sahali Omar vs. Republic [2017] eKLR** the Court of Appeal held that:

> ***"The prosecution reserves the right to decide which witness to call. Should it fail to call witnesses otherwise crucial to the case, then the court has the mandate to summon those witnesses. But should the said witnesses fail to testify and the hitherto adduced evidence turns out to be insufficient, only then shall the court draw an adverse inference against the prosecution. This is because the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt (see. Keter v Republic [2007] 1 EA 135).***

30. In the present case, the evidence adduced by the five prosecution witnesses was sufficient to prove that PW1 had been defiled by the Appellant. As such, the maid's evidence would have been of little value had she been called to testify.

31.In totality, I find that the prosecution proved the offence against the Appellant beyond reasonable doubt. His conviction was therefore safe and I accordingly uphold it.

Whether the sentence imposed was legal and proper.

32. On the sentence, Mr. Wambui urged the court to set aside the life imprisonment meted by the trial court in view of the Supreme Court decision in ***Francis Kariokor Muruatetu & Anor v Republic [2017]eKLR.*** Ms. Kimaru conceded to the submission urging the court to exercise its discretion and impose an appropriate sentence.

33. In mitigation, the Appellant urged the trial court for leniency because he has children who rely on him. It is clear that the Appellant took advantage of a nine year old child, causing her trauma that will haunt her for the rest of her life. The magnitude of the injuries was serious because her genitalia were still sore more than two weeks after the incident when she was being examined by a doctor. It is an offence that deserves a stiff punishment. I accordingly set aside the life sentence and substitute it with twenty six (26) years imprisonment commencing from the date of conviction.

34. In the upshot, this Appeal lacks merit and is accordingly dismissed save for the substituted sentence. It is so ordered.

Dated and delivered in Nairobi This 9th Day of April, 2020.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant present in person.

2. Miss Chege for the Respondent.