



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 54 OF 2018 [SO]

CORAM: HON. R.E.ABURILL J

GILBERT GEORGE ODHIAMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence in Siaya PM's Court Sexual Offence Case No.51 of 2017 delivered on 18TH September,2018 by Hon. T.M.Olando, SRM)

JUDGMENT

Introduction

1. The Appellant was charged before the **Principal Magistrate's Court in Siaya** in Sexual Offence Case No. 51 of 2017 with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006, the particulars being that on 9/9/2017 at Siriwo in Siaya the accused unlawfully and intentionally caused his penis to penetrate the vagina of CAO a girl aged ten years. The appellant also faced the alternative charge of Committing an Indecent Act with the child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006.
2. The appellant pleaded not guilty to both the main and alternative charge and the matter proceeded for hearing.
3. The trial magistrate, Hon. T. M. Olando after hearing four prosecution witnesses and testimony of the appellant found that the prosecution had proved their case beyond reasonable doubt and proceeded to convict and sentence the appellant to 20 years imprisonment.
4. Dissatisfied by the said conviction and sentence the appellant filed his petition of appeal based on the following grounds;
 - a) **That the trial court failed to appreciate that Section 48 of the Evidence Act was not complied with.**
 - b) **That the trial court failed to appreciate that the investigation done on prosecution case was shoddy.**
 - c) **That the trial court failed to consider that the circumstances which prevailed during the alleged offence were not favourable for a positive identification.**
 - d) **That his sworn defence statement was not given due consideration whereas the same was capable of awarding him an acquittal.**

Appellant's Submissions

5. The appeal was canvassed by way of written submissions. The appellant submitted that the trial magistrate erred in law when he failed to properly to find out, evaluate and analyse the evidence on record and in his statement that the complainants father harbored a grudge against him because he stopped the complainant's father from having an intimate relationship with the appellant's female relative and her daughter.
6. The appellant also submitted that the learned trial magistrate erred in law by convicting him on the allegedly purported identification through a recognition by the complainant who was either coached or incited to do so by her resentful father.
7. The appellant further submitted that the learned magistrate erroneously fabricated unfounded analysis that the complainant was actually defiled by him without citing any medical proof to that effect especially considering that the doctor stated in his evidence that there was

normal external genitalia appearance without tear or lacerations and further that the epithelial cells were seen but there was no spermatozoa when laboratory test were carried out.

8. It was further submitted by the appellant that the learned trial magistrate erroneously convicted and sentenced him to 20 years imprisonment on circumstantial evidence whereas there was no proof of sexual defilement and without any tangible proof confirming that the appellant committed the offence as there was no actual evidence in corroboration with the medical officer's statement and that of the complainant. He further submitted that the alleged absence of hymen seems to have been there long before the alleged defilement date as there was no fresh injuries and blood stains reported by the doctor.

9. The appellant submitted that the Prosecution did not rebut the defence statement illustrated in court and that the learned magistrate rejected the same without cogent reasons. He further submitted that the trial magistrate's judgement did not contain a summary of the defence case and this showed that the trial magistrate did not refer to the contested and the uncontested elements of the charge and as such constituted breach of rules of natural justice and therefore sufficient to unsettle the judgment.

10. The Respondent did not file any Submissions.

Analysis & Determination

11. This being a first appeal, this court is expected to re analyze, reevaluate and reassess afresh all the evidence adduced before the lower court and arrive at its own independent conclusions bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno v Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). 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 court's finding and conclusion; it must make its own 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 witnesses, see Peters vs. Sunday Post [1958] E.A 424.”

12. Similarly, in **Kiilu & Another v Republic [2005]1 KLR 174**, the Court of Appeal 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 Court's findings and 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 witnesses.”

13. Revisiting the evidence before the trial court, PW1 CAO the complainant testified that on the 9/9/2017 she had gone to the river in the morning to wash her clothes but as she was bending down, the appellant came from behind and got hold of her and pushed her down and told her not to make noise. That the appellant removed her skirt and pant and then removed his trouser and (*alimfanyia tabia mbaya*),-did bad manners to her (defiled her). She further testified that she was terrified and did not tell anybody. She testified that as the appellant was leaving, two condoms dropped from his pocket and she picked them and put them in her bag and while at school, a teacher who was searching the bags of all pupils found the condoms in her bag and took them to the head master who subsequently sent her home to call her parents.

14. The complainant further testified that she then told her parents and the headmaster what happened and the appellant was arrested and taken to the police. She further identified the accused before court admitting that she did not know the appellant's name but knew him by appearance.

15. In cross-examination the complainant reiterated that she was telling the truth and that on the particular Saturday of the incident she had gone to the river when the appellant came and removed her pants. She further stated that she did not make noise when the appellant defiled her and that after the incident she went on to wash clothes. The complainant also stated that the condoms dropped from the complainant's pocket.

16. PW2 Sila Omondi Oluoch a clinical officer at Siaya county referral hospital testified that the complainant, a 10-year-old, was treated at the hospital on 15/9/2017 after being presented with an allegation that she had been defiled on 9/9/2017 at 10 am by someone known to her, and on examination of the genitalia he noticed that she had normal external genitalia, there was no tear, no laceration nor bruises but noted that the hymen was absent.

17. PW2 further testified that the complainant was sent for laboratory test and epithelial cells were seen but there was no spermatozoa and further that the HIV and other STI tests were negative. He testified that he prepared the report and signed it on the 18/9/2017 which he produced as an exhibit. The appellant did not cross-examine PW2.

18. PW3 PLA, a teacher at [particulars withheld] primary school testified that on 12/9/2017 they were sitting in school when one teacher who was in class 3 came with two children and gave her two condoms and asked her to handle the case. She further testified that CAO, the complainant had the condoms and said she had been given by her friend. PW3 further testified that the complainant told her that she was at

the river when she picked the condoms. PW3 testified that she then took the complainant to the head teacher.

19. In cross-examination by the accused, PW3 stated that she found the unused condoms on 12th and subsequently took the complainant to the head teacher. She further stated that she heard what the complainant said and that she was not the one who called the girl's parents. She further stated that the complainant knew Josiah and that she did not live with the child. She further stated that she did not know if the appellant was related to the father of the complainant.

20. PW4 No. 98805 PC Jane Njeri of Yala police station testified that on the 19/9/2017 at around 12.35 pm one suspect was brought to the station from Akala on allegations that he had defiled one C.A.. she testified that she was allocated the matter and she recorded the witness statements and was told that on 9/9/2017 the complainant had gone to wash clothes at the river when the appellant defiled her and that he had defiled her several time. She further testified that on the material day of the incident when the accused was putting on his clothes after defiling the complainant, condoms fell down and the complainant picked them and when she went to school it was discovered.

21. PC Njeri further testified that she issued the complainant with P3 form and that she got the baptism card for the complainant which revealed that she was born on 4/6/2007. She further testified that the accused was arrested by police from Akala police station and that he was the one before court.

22. In cross-examination, the witness stated that she did not know the appellant prior to the incident being reported to her at the station. She further testified that the complainant stated that the appellant was the one who defiled her on numerous occasions. PC Njeri further stated that the P3 form report was filled and that the doctor confirmed that the child was defiled. She stated that the condoms were not used and that further she did not go to the scene. She also stated that the appellant was brought from Akala police station and that the investigations were conducted from there. PC Njeri further stated that the appellant was not sent for examination.

23. Placed on his defence, the appellant testified as DW1 and gave sworn statement that he was in the company of one David Ochieng Onyango when he found one Nyayombe and David Ochieng together and told them to stop the relationship.

24. The appellant testified that on the 9/9/2017 he was sleeping when the village elder went and told him that David Ochieng Onyango went to his home at night and said that a child had been found in school with a condom prompting him to leave for the place in the company of his mother. He further testified that they found the child sitting in the house and the father of the child, David Ochieng Onyango, who told him that he gave the child a condom to go with to school.

25. The appellant stated that he told the complainant's father that he had stopped him from having a relationship with Nyayombe which prompted the complainant's father to make noises after which people came. He further testified that the complainant's mother was called and she said she did not know about the case.

26. He further testified that they went to the DO's office and he was put in the cell and the following day he was then taken to Akala police station and subsequently was brought to court and later taken to Yala police station and finally he was brought to court and charged with the offence.

27. The appellant further testified that on 9th, the alleged date of the offence he had gone to a funeral to bury his uncle. He produced a burial permit as evidence of his attendance.

28. In cross-examination, the appellant stated that he did not know the complainant CAO and that he only saw her in court. He further stated that it was the complainant's father who was framing him as he had gone to the funeral on Friday. He stated that he had a witness.

29. DW2 Gladys Akinyi Malowa a step mother to the appellant testified that on the material date her brother died and they took him from the mortuary on Friday and buried him on Saturday. She stated that they left in the evening. In cross-examination DW2 stated that the funeral was about 2 km from their home and that they spent at the funeral.

Determination

30. Having carefully considered the appellant's grounds of appeal, the evidence adduced before the trial court and submissions for and against the appeal herein, the main issue for determination is whether the prosecution proved its case beyond reasonable doubt against the appellant to warrant a conviction and sentence imposed.

31. Section 8 of the *Sexual Offences Act* provides as follows:

“8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

(5) It is a defence to a charge under this section if -

(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children's Act.

(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity."

32. It is now trite that for an accused person to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. See the case of Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013, where it was stated that:

"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

33. In the case of Kaingu Elias Kasomo v Republic Malindi the Court of Appeal in criminal appeal No. 504 of 2010 stated as follows:

"Age of the victim of the sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

34. The importance of proving the age of the complainant in sexual offences was emphasized in Alfayo Gombe Okello v Republic (2010) eKLR where the Court stated that:

"In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1) ...proof of age of a victim is a crucial factor in cases of defilement under Sexual Offences Act. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars."

35. In Dominic Kibet v Republic Criminal Appeal No. 155 of 2011 it was held that:

"...while the Court may in certain circumstances rely on evidence other than an age assessment report, the onus of proving the age of the victim resides with the prosecution and a simple statement by the complainant as to their age does not in my view constitute such proof."

36. Rule 4 of the Sexual Offences Rules of Court, 2014 states that when determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school document or in a baptismal card or similar document.

37. In the instant case, PW4 PC Njeri testified that that she got the baptism card for the complainant which revealed that she was born on 4/6/2007. That therefore puts her age, as correctly pointed out by the trial magistrate, at 10 years at the time of the commission of the offence. Accordingly, the learned trial magistrate's finding that the victim was 10 years old at the time of the offence cannot be faulted.

38. On whether penetration of the complainant's genitalia was proved beyond reasonable doubt, PW2 Sila Omondi Oluoch produced the P3 form for the complainant and stated that on examination of the genitalia he noticed that she had normal external genitalia, there was no tear, no laceration nor bruises but noted that the hymen was absent. PW1, the complainant for her part testified that on the material date while she was washing her clothes the appellant accosted her and defiled her. PW4 testified that her investigations revealed that the appellant had defiled the complainant on numerous times. Accordingly, it is my opinion that penetration did occur but because it was not the first time the minor was being defiled, there was no tear as the hymen had already been torn. The same left lacerations on the minor's perineum region.

39. As to whether the act of penetration was done by the appellant herein, the complainant testified that though she did not know the appellant's name she recognized him. On his part the appellant stated that he came to know the complainant in court. It is a well settled principle in criminal law that recognition is better than identification. It is thus clear that the evidence available against the accused person on the issue of identity was the evidence of PW1 the complainant alone.

40. Section 124 of the Evidence Act Laws of Kenya provides that

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him. Provided that where in a criminal case involving a sexual offence, where the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reason to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

41. It is clear from a reading of section 124 of the Evidence Act that a trial Court can convict an accused person in a prosecution involving a sexual offence on the evidence of the victim alone if it believes the victim is truthful and records the reasons for that belief. (See **George Kioyi V R Cr. App. No. 270/2012 (Nyeri)** and **Jacob Odhiambo Omumbo V. R. Cr. App No. 80 of 200 (Kisumu)**). Accordingly, the appellant's claim that the complainant's evidence was not corroborated fails. The trial court carried out a *voire dire* examination on the minor and satisfied itself that the complainant was telling the truth.

42. The trial court which had the opportunity to view the prosecution witnesses as well as the appellant during trial found the prosecution witnesses to be truthful and consistent in their testimonies and thus had no reason to doubt their evidence whereas it found the defence by the appellant to amount to mere denial. I have no reason to doubt that finding.

43. The appellant raised a ground of appeal that the trial court failed to appreciate that Section 48 of the Evidence Act was not complied with. Section 48 of the Evidence Act provides for the taking into consideration of expert witnesses. In his submissions, the appellant alluded to the fact that the clinical officer who examined the complainant produced evidence that cleared the appellant of any connection to the alleged offence.

44. My review of the testimony by PW2 was that though the examination of the complainant's genitalia revealed that there was no tear, no laceration nor bruises, he noted that the hymen was absent. Accordingly, taking into account the provisions of section 124 that creates in cases of sexual offences an exception to the general rule that an accused person cannot be convicted on the uncorroborated evidence, I am satisfied that the trial court rightly considered the expert evidence by PW2.

45. The appellant also raised the ground of appeal that the trial court failed to consider his defence. The record reveals that the trial court considered the defence of the appellant and addressed itself as follows;

"Though the accused in his defence stated that he was being framed, I do not find any reason why the complaint could frame the accused with such serious offence neither did the accused give any reason why the complainant could frame him.

I find the defence of the accused person to be an afterthought since the defence of alibi was not raised during cross examination of the prosecution witnesses nor raised with the prosecution before the defence hearing, I find the defence to be lacking in merit and substance and I disregard the same."

46. The appellant raised an alibi defence that on the alleged date he had gone to bury his uncle and as such was not responsible of defiling the complainant. He even called a witness DW2 and produced a burial permit for the person he allegedly went to attend his burial on the material day. In the case of **Charles Anjare Mwamusi v R CRA No. 226 of 2002** the Court of Appeal stated:

"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to the charge preferred against him 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 Kiarie V. Republic (1984) KLR 739 at page 745 paragraph 25."

47. I take cognizance of the principle that by setting up an alibi defence, the accused does not assume the burden of proving the alibi- see **Ssentale v Uganda [1968] EA 36-**. The foregoing was restated by this court in the case of **Bernard Odongo Okutu v Republic [2018] eKLR** where the court referred to the holding in the case of **Wang'ombe vs. Republic [1976-80] 1 KLR 1683**, where it was stated "the prosecution always bears the burden of disproving the alibi and proving the appellant's guilt."

48. However, this defence should also be raised at the earliest opportune time as was held in the case of **Victor Mwendwa Mulinge v R [2014] eKLR** where the Court of Appeal rendered itself thus on the issue of alibi:

"It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see Karanja vs. R, [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought."

49. The said Court of Appeal has also held that nevertheless, even when the defence is raised late in the day, it must still be addressed. See (**Ganzi & 2 Others vs. R [2005] 1 KLR 52.**) However, in the present case, and as already observed above, the appellant's belated alibi defence is weighed against the evidence adduced by the prosecution which was accepted by the trial court and which I wholly concur with, the conclusion I make is that the alibi defence is and was effectively displaced. I find that the fact that the place of the funeral was only about 2km from the appellant's home, nothing stopped him from returning from the funeral and accosting the complainant minor at the river and defiling her as testified by her.

50. Accordingly, I find that the trial court did not err in convicting the appellant herein and consequently, the appeal against conviction is found to be devoid of merit and is dismissed.

51. On sentence, I observe that the trial magistrate imposed a 20 year prison term on the appellant. The maximum under section 8(2) of the Sexual Offences Act as the child was aged 10 years is life imprisonment. The trial magistrate was therefore extremely lenient as this is a case where the appellant ought to have been punished to serve a longer sentence despite the **Francis Muruatetu** case that outlawed mandatory sentences.

52. I find no reason to interfere with the sentence imposed as the prosecution did not seek for enhancement of sentence.

53. Accordingly, this appeal against conviction and sentence is found to be devoid of merit and is hereby dismissed. File closed.

Orders accordingly.

Dated, Signed and Delivered at Siaya this 6th Day of October, 2020 Via Microsoft Teams. Appellant at Kisumu Maximum Prison. Mr Okachi present for the Respondent. CA: Brenda.

R.E.ABURILI

JUDGE