REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 20 OF 2015

MARTIN KARUGU NGANGA.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence in Criminal Case No. 982 of 2013 at Chief Magistrate's Court at Kajiado (Hon. E. A. Mbicha) dated 5th day of August 2014).

JUDGMENT

1. The appellant was charged 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. Particulars were that on the 16th November 2013 at [Particulars withheld] Village in Kajiado District within Kajiado County, he intentionally and unlawfully caused his genital organ to penetrate the anus of LK, a boy aged 10 years.

2. The appellant faced an alternative count of indecent act with a child contrary to section 11 as read with section 11(1) of the Sexual Offences Act. Particulars were that on 16th November 2013 at [particulars withheld] Village in Kajiado District within Kajiado County, he caused his genital organ to come into contact with the anus LK, a minor aged 10 years.

3. The appellant pleaded not guilty and after a trial in which the prosecution called 7 witnesses and the appellant's testimony, he was convicted and sentenced to life imprisonment.

4. The appellant was aggrieved with both conviction and sentence and filed a memorandum of appeal raising the following grounds, namely:

> ***1. That the learned trial magistrate erred in law and fact by basing his conviction on flawed and scanty prosecution case.***
>
> ***2. That the learned trial magistrate erred in law and fact in failing to observe contravention(sic) of section 124 of the Evidence Act.***
>
> ***3. That the trial court erred in law and fact by failing to observe contravention(sic) of section 163 of Evidence Act.***
>
> ***4. That the learned trial magistrate erred in law and fact by failing to observe contravention of section 169 of the criminal Procedure Act.***

5. The appellant filed supplementary grounds of appeal dated and filed on 12th February 2020 stating that:

> ***1. The learned trial magistrate's finding on the issue of burden of proof was bad in law and contained a crucial mis-direction as the same was not supported by evidence;***
>
> ***2. The learned trial magistrate erred in law in failing to find that there was need for an identification parade so as to test PW1's ability to identify his sodomiser and therefore the identification evidence was invalid and dock identification is evidence of weakest kind and incapable of being acted on as a basis for conviction.***
>
> ***3. That the prosecution's case was not proved to the required standard and that provisions of section 169(1) of Criminal Procedure Code was not complied with in relation to his defence.***
>
> ***4. That his conviction was unjustified and unsafe.***

6. When this appeal came up to hearing on 22nd July 2020, the appellant relied on his written submissions filed together with his supplementary grounds of appeal. Mr. Meroka for the respondent undertook to file his submissions within 7 days.

7. The court directed that he files his submissions within 7 days and in default the court would proceed to write the judgment and set the date for delivery on 9th October 2020.

Appellant's submissions

8. The appellant submitted that the prosecution did not discharge its burden of proof. He faulted the trial court for finding that PW1 was able to remember and describe the clothes which were the same as he was arrested with. He relied on ***Ramadhan Ahmed V Republic*** (1955) EACA Vol. 22 page 395 for the submission that it is upon the appellant to show that the trial court was wrong in law and that the same is supported by evidence on record.

9. The appellant argued that according to evidence, PW1 was held from behind and pushed to the ground and the attacker removed his trouser and inserted his male organ in his anus. The appellant argued that PW1 could not have seen nor identified him as the attacker.

10. It is the appellant's further case that the trial court was clear in its judgment that PW1 only identified his attacker in the dock and that PW1 was able to remember and describe the clothing which was the same the appellant was wearing when he was arrested. He argued that the record did not show anywhere when PW1 was able to remember and describe the clothing.

11. He further argued that PW1 never mentioned or described the clothing his attacker wore. He urged the court to allow the appeal, quash the conviction and set aside the sentence.

Respondent's submissions

12. The respondent did not file submissions although directed to do so.

Determination

13. I have considered this appeal; submissions and the authorities relied on. I have also perused the record of the trial court and considered the impugned judgment. This being a first appeal, it is the duty of this court as the first appellate court, to reanalyze, reevaluate and reconsider the evidence afresh and come to its own conclusion on it. The court should however bear in mind that it did not see the witnesses testify and give due allowance for that. (See ***Okeno v Republic*** [1972] EA 32)

14. In ***Kiilu& Another v Republic*** [2005]1 KLR 174, the Court of Appeal held that:

> ***"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. 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."***

15. Further in ***victor Owich Mbogo v Republic,*** criminal appeal No. 152 of 2015 [2020] eKLR, the same court stated:

> ***"It is the duty of the first appellate court to reevaluate the evidence afresh and reach its own conclusion bearing in mind that unlike the trial court, the appellate court did not have the benefit of hearing or seeing the witnesses testify***."

16. **PW1 LK** a child of 10 years, testified on oath *(was there voire dire examination?)* that on 16th November 2013 at about 12 noon, he was herding goats when the appellant went and asked him the way to his home which he(PW1) did. He had never seen the appellant before. As he went back to the goats, the appellant turned and held him from behind the neck and PW1 fell down. The appellant removed PW1's shorts, undressed himself and sodomized him. When PW1 stood up, his eyes were in pain and **black**. The appellant had left. A lady came by; picked him up and carried him home where her grandmother was informed what had happened. The grandmother also informed PW1's father what had happened.

17. PW1 was taken to hospital the same day in the evening. He told the court that he knew the appellant when he asked him for the direction as he was not a Maasai. PW1's father followed the footsteps to where charcoal was burning. He was told that the appellant had boarded a lorry. PW1's father followed the lorry on a motor cycle. He told the court that it was the appellant who sodomised him and pointed at him in the dock.

18. In cross-examination, the witness told the court that he did not know whether the appellant was burning charcoal at the time; that there are many people who burn charcoal in the bush and that it is quite a distance from where the incident took place and his home. He also stated that a part from the Maasai no other person heard about the incidence; that he did not feel being sodomised and that the lady who assisted him was also the one who picked his trouser.

19. **PW2 KP** and father to PW1, testified that on 16th November, 2013 at about 12.30pm, he was at home when a lady went with PW1 and informed him that PW1 had been defiled (sodomised) by a person who burns charcoal. He left with two other elders and PW1 to the scene.

They followed foot prints to a temporary makeshift house where the appellant lived.

20. He told the court that he did not know the appellant but the land where he lives belonged to the area Chief; that when they arrived at the makeshift the appellant was not present but there was another person packing charcoal.

21. PW2 further told the court that he asked the man where the person whose footprints led to the makeshift was. He informed them that the man had gone to town. They went with the man to Torosei Centre and asked the appellant's employer where the appellant was. They were informed that he had boarded a lorry that had just left.

22. PW2 together with Area Chief and the other man took a motor cycle and went to Mile 46, stopped the lorry; arrested the appellant and took him to Mile 46 Police Station. They returned to Torosei and later took PW1 to a Health Centre and later to Kajiado District Hospital. PW1 was treated and a P3 form filled for him. The witness told the court that PW1 had described the person and the clothes he was wearing, a red tracksuit and the shoes before they decided to pursue him. He also told the court that when they arrested the appellant, he was wearing similar clothes.

23. In cross-examination, the witness admitted that he had not known the appellant prior to the incident; that he got to know him after he had been arrested; that he was informed of defilement at 2pm and that the foot prints they found were for akala shoes. He admitted that the akala shoes were not in court.

24. **PW3 JKS,** a boda boda rider, testified that on 16th November 2013 at around 5pm, he was heading home from Torosei when he found a crowd. He stopped and his father who was on the motor bike with him alighted and went to the crowd. Later his father asked him to pursue a man who was said to have defiled PW1. He rode the bike to Endepess where he found a lorry he had been told the appellant had boarded. They found the appellant who was pointed out by the person he was carrying on the motor cycle and arrested him. The area chief arrived and they took appellant to Mile 46 Police Station. He stated that he had never seen the appellant. In cross-examination, the witness told the court that the person he was carrying and who pointed out the appellant was not present in court.

25. **PW4 Elijah Muloiwi,** Assistant Chief of Emukatan Sub-Location, testified that on 16th November 2013 at around 5pm, he was in Torosei Town when he saw a crowd of people. He inquired what was happening and was informed that a person who had sodomised a young boy had left in a lorry to Endepess. He requested PW3 to take the person who knew the appellant to stop the lorry. He also took another motor cycle and followed them. They found the appellant who had been surrounded by a crowd and took him to Maili 46 Police Station. He told the court that he could not remember the person and that he had not seen him before.

26. **PW5 Dr. Martin Mureithi** of Kajiado District Hospital testified that he attended to PW1 who had been referred to hospital by police. PW1 had pain on the neck and redness in the eyes. Anal mucosal was inflamed and red. There were neither tears nor lacerations. The other systems were normal. Approximate age of injuries was 2 days. Injuries were due to possible anal penetration. He prepared and signed a P3 form which he produced as PEX 2. He also filled a PRC Form on 18th November2013 which he also produced as PEX 4. Age assessment PEX 1 and treatment notes as PEX 3.

27. **PW6 NM** testified that on 16th November 2013 at around 12 noon, she was cutting grass for use as firewood. She heard screams of a child. She saw PW1 and she went to where he was. She found him on the ground. The PW1 told her that he had been sodomised but although he did not know the person but that he burns charcoal. She did not get the person there. She took PW1 home and informed his grandmother what had happened. In cross-examination, the witness admitted that there were other people who burn charcoal in the area and that there were also many people on that road. She also admitted that she did not see the appellant commit the offences.

28. **PW7 No. 53610 PC Lucy Okumu** based at Kajiado Police Station the officer dealing with crime, gender and child desk, testified that on 17th November 2013, the appellant was brought to the station by police officers from Maili 46 and the area Chief, Torosei. They informed her that the appellant had sodomised PW1 10 years old child. She recorded the report; talked to PW1 who explained how the appellant asked him to show him the way to his home and after showing him the way, the appellant turned on him and sodomized him.

29. She took PW1 to hospital where he was examined and a P3 form filled and signed. Age assessment was also carried out on PW1. After investigations, she charged the appellant with the offence.

30. When put on his defence, the appellant gave an unsworn testimony and told the court that he is a sand broker; that on 16th November 2013, he was called to assist a lorry. He woke up at 5am went with the Lorry to Oletepesi in Torosei area arriving at 10am. They loaded sand and paid the owner of the sand. On their way back, they found Maasai men who blocked the road. They wanted a fee of Kshs. 500/= to open the road. They informed them that they did not have money and promised to pay when they came back for the second trip. When he was covering the lorry with a tarpaulin (canvas) motor cycle with people armed with pangas came and surrounded them. He did not know what was going on. Later the men called a Probox vehicle, tied him put him in the Probox and took him to Maili 46 Police Post where he put in cells.

31. He was taken to Kajiado Police Station the following day 17th November 2013 and was charged in court on 18th November 2013. He denied committing the offence.

32. After considering the above evidence, the trial court was satisfied that the prosecution had proved its case beyond reasonable doubts, convicted the appellant and sentenced him prompting this appeal. The trial court stated at page 6 of its judgment:

> ***"PW2, the accused (sic) complainant's father was alerted shortly after the subject incidence. They moved with speed, pursed (sic) the tracks of the suspect to the makeshift house where the said suspect was staying. The suspect the accused herein colleague (sic) was able to inform the said PW2 and other elders on the whereabouts of the accused. PW2 with the aid of other community***

members including PW3 and PW4 were able to mount an operation where the said suspect, the accused herein was able to be arrested. the quick arrest, the circumstances of the arrest, the speed and timing of the accused arrest (sic) buttresses and corroborates the PW1's evidence. PW1 was able to remember and describe the clothing which were the same when the accused person was arrested."

33. The appellant faulted the trial court's decision to convict and sentence him arguing that the prosecution did not prove its case beyond reasonable doubt. According to the appellant, he was not identified as the perpetrator of the crime and relied on several decisions to support his argument. Although the respondent, (Prosecution) undertook to file its submissions, it did not do so.

34. The appellant was charged with defilement. He was accused of committing sodomy against PW1 on 16th November 2013 and was charged for defilement under the Sexual Offences Act. There is no doubt that PW1 is a child. His father testified that he was in standard 3 and 10 years old. Age assessment was also conducted and PW1 was found to be about 10 years (PEX 1). The aspect of age was proved given that the appellant did not challenge the issue of age.

35. The second ingredient was that of penetration. PW6 the doctor testified that he examined PW1 and found signs of sodomy. He had pain on the neck and redness in the eyes. Anal mucosal was inflamed and red. He did not find tear or lacerations. The other body systems were normal. He concluded that the injuries were due to possible anal penetration. The critical question is; who committed the offence?

36. According to the prosecution witnesses, it was the appellant who committed the act. PW1 told the court that he had not seen the person who attacked him prior to the incident. That is, he did not know him. PW6 was the first person at the scene. She told the court that she heard screams in the bush and when she went to the scene, she found PW1 on the ground. She took him home and informed his grandmother what had happened. She never saw the attacker or any charcoal burner. She admitted in cross-examination that there are many people burning charcoal in the area and that there also were many people on the road. What is clear from her evidence is that she did not know who committed the offence.

37. PW2, father to the PW1, told the court that he went with PW1 and other people to look for the attacker. They followed footsteps to a makeshift house where they found a man. They asked him where the owner of the footsteps was and he told them the man had gone to town. They followed him to Torosei town and were told that he had boarded a lorry.

38. They pursued the lorry and arrested the appellant. His evidence was not different from that of the other witnesses. According to PW2, PW1 had described the clothes his attacker was wearing before they went pursuing him. He said they arrested him on the basis of the cloths he was wearing.

39. PW3, a motor cycle rider was the one who went in pursuit of the attacker. He rode the bike to Endepess where he found the lorry the appellant was said to have boarded. They found the appellant in the lorry and was pointed out by the person he was carrying on the motor cycle and arrested him. He did not tell the court the name of this person and how he knew the appellant. That man was also not called to testify yet he was the most critical witness in identifying the appellant as the perpetrator of the crime.

40. PW4, the area Assistant chief testified that he was in Torosei Town when he saw a crowd of people. When inquired what was happening, he was informed that the person who had had attacked PW1 had left in a lorry to Endepess. He asked PW3 to take the person who knew the appellant and stop the lorry. He followed in another motor cycle. They found the appellant who had already been surrounded by a crowd. They took him to Maili 46 Police Station. He told the court that he had not seen him before.

41. In criminal trials, the prosecution has the burden of proving its case beyond reasonable doubt. That burden does not for a moment shift to the accused. In ***Bakare v State (***1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria, emphasized on the phrase "beyond reasonable doubt", stating:

"Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability".(emphasis)

42. In ***Stephen Mulili v Republic*** (CRA No. 90 of 2013), the Court of Appeal held that;

"[The degree is well settled; it need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean beyond a shadow of doubt…If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice."

43. In ***Pius Arap Maina v Republic*** [2013] eKLR, the Court of Appeal also stated that the prosecution must prove a criminal charge beyond reasonable doubt and any evidential gaps in the prosecution's case raising material doubts must be in favour of the accused.

44. Even where there may be strong suspicion that an accused had committed the offence, such suspicion, however strong cannot be the basis of conviction. The court was clear in ***Joan Chebichii Sawe v Republic*** [2003] eKLR that:

"The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this Court made clear in the case of Mary Wanjiku Gichira v Republic (Criminal Appeal No 17 of 1998) (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must

be proved by evidence. We disagree with the learned judge's view that the prosecution had proved its case against the appellant beyond any reasonable doubt."

45. I have carefully reanalyzed the evidence before the trial court. All prosecution witnesses except PW1, never saw the appellant commit the offence. PW 6, who was the first person at the scene, did not see the person who committed the offence either. PW2 stated that they followed footsteps to a makeshift house of a charcoal burner. They found a man in the house but he did not tell the court why they thought he was not the one who had attacked PW1. He also told the court that the footsteps were for akala shoes but admitted that there were many people with akala shoes in the area.

46. There was also the contention that PW1 had described the cloths the person wore. There was no evidence that only the appellant could wear such cloths in the area. Further, the witnesses stated that the appellant had boarded a lorry which they pursued and arrested him in. No one gave the registration number; colour or even the owner of the lorry for purposes of identifying the lorry the appellant was said to have boarded.

47. What is also clear is that the appellant was arrested and taken to the police who did not investigate the matter but simply charged him in court. He was not, as he correctly argued, subjected to any form of identification. The trial court therefore fell into error when it allowed dock identification as the basis of PW1 identifying his attacker, even when the description of the cloths he allegedly wore was only made to PW1.

48. In the circumstances, I am satisfied that the prosecution did not prove its case against the appellant beyond reasonable doubt. Consequently, this appeal is allowed, conviction quashed and sentence set aside. The appellant is hereby set at liberty unless otherwise lawfully held.

Dated, Signed and Delivered at Kajiado this 9th day of October, 2020.

E. C. MWITA

JUDGE