REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 6 OF 2017

EDWIN WANJALA NYONGESA.....1ST APPELLANT

GEOFFREY WANJALA JUMA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal from the original conviction and sentence in criminal case number 87 of 2014*

***in the Senior Principal Magistrate's Court at Kimilili – D. O. Onyango (SPM) on 13/01/2017*)**

JUDGMENT

1. Two appeals arose from the decision of the Senior Principal Magistrate's Court at Kimilili in criminal case number 87 of 2014 namely, Bungoma Criminal Appeal No. 6 of 2017 and Bungoma Criminal Appeal No. 8 of 2017. The two appeals were consolidated by an order of this court granted on 5th September, 2018 which order made Criminal Appeal No. 6 of 2017 the lead file.

2. The 1st Appellant was charged with the offence of child prostitution contrary to **section 15(a)** of the **Sexual Offences Act No. 3 of 2006**. The particulars were that on the 27th day of December 2014 in Kimilili District of Bungoma County knowingly permitted NNW a child aged 14 years to remain in his house to be sexually abused. (Name redacted on account of age).

3. The 2nd Appellant was charged with the offence of defilement contrary to **section 8(1)** as read with **subsection (3)** of the **Sexual Offences Act**. In the alternative, he was charged with committing an indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act**. The brief particulars as per the charge sheet were that on the night of 27th and 28th December, 2014 in Kimilili District of Bungoma County, he intentionally caused his penis to penetrate the vagina of NNW and in the alternative, that he intentionally touched the vagina of the said NNW

4. A synopsis of the case presented in the lower court was that on 27th December, 2014 the 1st Appellant, Edwin Wanjala, went to the Complainant's home and informed her that the 2nd Appellant, Geoffrey Wanjala, wanted to make her his wife. He asked her to accompany him to the 2nd Appellant's house. On the way, they met the 2nd Appellant standing at a sugar cane plantation and they all proceeded to the 1st Appellant's house. The Complainant was offered a room at the 1st Appellant's house where she and the 2nd Appellant slept until the following day. They engaged in sexual intercourse that night. The following day, on 28th December, 2014 she and the 2nd Appellant left the 1st Appellant's home at around 4.00 p.m. enroute to Musemwa. On the way, they came upon the Complainant's brother whereupon the 2nd Appellant fled. The Complainant's father accompanied the Complainant to Kimilili Police Station where they reported the incident. The Complainant led the police to the 1st Appellant's home where both Appellants were arrested. They were consequently arraigned in court and charged with the present offences.

5. The trial culminated in the Appellants being found guilty and were convicted on their respective charges. The 1st Appellant was sentenced to serve 10 years imprisonment while the 2nd Appellant was sentenced to serve 20 years imprisonment.

6. This appeal stems from the dissatisfaction of the Appellants with the conviction and sentence imposed by the trial court. In their grounds of appeal, the Appellants argued that: the charge sheet was defective; the prosecution's case was shoddy and unable to sustain a conviction; the prosecution failed to call crucial witnesses; their constitutional rights guaranteed under **Article 50(2)** of the **Constitution** were infringed; the prosecution shifted the burden of proof to the Appellants and that their defence was not considered.

7. The state opposed the appeal through learned state counsel Mr. Oimbo who submitted that the prosecution had proved the offences against both Appellants to the required standard. He urged the court to dismiss the appeals and uphold both the conviction and sentence meted out to the respective Appellants.

8. I have scrutinized and re-evaluated the evidence on record bearing in mind that the duty of the first appellate court is not merely to scrutinize the evidence on record to see if there was some evidence to support the lower court's findings and conclusion, but to make my own findings and draw my own conclusions in line with **Boru & Anor vs. Republic Criminal Appeal No. 19 of 2001 [2005] 1 KLR 649**.

9. On the first ground that the charge sheet was defective, the 2nd Appellant argued that the Complainant testified that she was aged 15 years which differed with the charge sheet which indicated that she was aged 14 years. That the birth certificate produced in court indicated that the Complainant was born on 14th March, 1999 which placed her at 15 years of age at the time of the offence. He urged that the evidence was in variance with the charge and such variance occasioned an injustice.

10. Whereas there is no copy of a birth certificate on the record, I note that the record demonstrates that PW3, the Complainant's father, testified that she was born on 14th March, 1999 and produced a birth certificate serial number 3990778 in this regard. The record shows that the original was produced in court and a copy produced in evidence as Pexh 3.

11. From the evidence on record, it is therefore not in doubt that the Complainant was aged 15 years as at 27th December, 2014 which was the date of the offence. This was correctly pointed out by the trial court in its judgment of 13th January, 2017. I however note that not all defects detected in a charge sheet on appeal will render a conviction invalid.

12. In the present case, while there is a discrepancy between the age of the Complainant indicated in the charge sheet and her actual age, this did not occasion the 2nd Appellant any injustice since the sentence meted to him was on account of the Complainant being aged 15 years. In any event, the discrepancy is one that is curable under **section 382** of the **Criminal Procedure Code** because the age indicated on the charge sheet was merely the Complainant's apparent age and the actual age was proved by the Complainant's birth certificate produced in court.

13. The second ground of appeal essentially attacked the evidence upon which the Appellants were convicted. The Appellants argued that the prosecution's case was shoddy and lacked probative value to warrant a conviction. On his part 1st Appellant argued that the age of the Complainant which is a major ingredient of the offence of defilement was not proved. Further that **section 36(1)** of the **Sexual Offences Act** was not complied with since a DNA test was not conducted.

14. Mr. Oimbo submitted on this ground and stated that the prosecution had proved the offence of defilement and child prostitution against the 2nd Appellant and the 1st Appellant respectively to the required standard.

15. I will determine this ground in two parts: first whether the offence of defilement was proved against the 2nd Appellant and secondly whether the offence of child prostitution was proved against the 1st Appellant.

16. The critical ingredients forming the offence of defilement that the prosecution needed to prove are the age of the Complainant, penetration and positive identification of the assailant. See – **Dominic Kibet Mwareng vs. Republic Criminal Appeal No. 155 of 2011 [2013] eKLR**.

17. After a careful scrutiny of the evidence on record, I find that the prosecution proved all three ingredients of the offence of defilement to the required standard. The age of the Complainant was proved by the evidence of her father who also produced her birth certificate which affirmed his statement that she was born on 14th March, 1999 and was therefore aged 15 years at the time of the offence. A birth certificate is a formal and credible document and is therefore conclusive as to the age of the Complainant.

18. On penetration I note that this was proved by the testimony of the Complainant who testified that she and the 2nd Appellant engaged in sexual intercourse on the material day. This was corroborated by PW2 George Koinange the medical officer who examined her and filled the P3 form which was produced together with the treatment notes. The P3 form indicated that the Complainant had normal external genital, her hymen was missing and there was presence of a whitish discharge. PW2 formed the impression that the Complainant had been defiled, approximated the age of her injuries to be three (3) days, and administered to her STI preventive drugs, post-exposure prophylaxis (PEP) and emergency contraceptives.

19. On the issue of identification, I note that this was a case of recognition as opposed to identification as the Appellants were persons who were well known to the Complainant prior to the incident. The relevant part of her testimony in her own words during examination in chief is as follows:

> "*Accused 2 came and asked for water. I knew him. I used to see him around. I gave him water he told me he had been sent by Wanjala whom I also knew.*"

On cross-examination by Accused 1 who is the 2nd Appellant herein she stated thus:

> "*You are Wanjala. We had met before in Luanda.*"

And upon cross-examination by Accused 2, the 1st Appellant herein, she stated as follows:

"*I gave you water because I knew you…I had seen you earlier at a football match.*"

20. The evidence on record therefore demonstrates that the Appellants were persons well known to the Complainant prior to the incident, and she spent approximately 24 hours in their company. It is therefore not in doubt that they were both positively identified by the Complainant.

21. The 2nd Appellant also took issue with the fact that no DNA test was conducted on him to ascertain that it was indeed he who defiled the Complainant contrary to **section 36(1)** of the **Sexual Offences Act**. It should be pointed out that whereas **section 36(1)** of the **Sexual Offences Act** makes provision for DNA testing as a means of ascertaining whether an accused person committed a sexual offence, the provision employs the use of the word "may" which means that it is not a mandatory requirement. Further, the fact of rape or defilement is not proved by way of a DNA test but rather by way of evidence as observed by Odero J in the case of **AML vs. Republic Criminal Appeal 74 of 2011 [2012] eKLR**.

22. On whether the offence of child prostitution was proved against the 1st Appellant, Mr. Oimbo submitted that the prosecution proved that he had procured the Complainant and allowed the 2nd Appellant to remain in his house for purposes of defiling her.

23. The 1st Appellant was charged with child prostitution contrary to **section 15(a)** of the **Sexual Offences Act** which states that any person who knowingly permits any child to remain in any premises, for the purposes of causing such child to be sexually abused, or to participate in any form of sexual activity, or in any obscene or indecent exhibition or show, commits the offence of benefiting from child prostitution and is liable upon conviction to imprisonment for a term of not less than ten years.

24. In the present case, the prosecution was therefore under a duty to prove that the 1st Appellant had knowingly permitted the Complainant to remain in his house for purposes of being defiled by the 2nd Appellant.

25. From the evidence on record, it was the 1st Appellant who went to the home of the Complainant and intimated to her that the 2nd Appellant wanted to marry her. The relevant part of the Complainant's testimony in her own words is as follows:

"*On 27/12/14 at 3.00 p.m. I was at home sleeping outside alone. Accused 2 came and asked for water…I gave him water he told me he had been sent by Wanjala whom I also knew. Wanjala had sent him to inform me he wanted me to be his wife in his home. He then told me to accompany him to Wanjala's place. We found Wanjala standing at the sugarcane plantation. We went with him to Kambini with Edwin. We reached Edwin's home at 6.00 p.m. we found his wife. She cooked and we ate. They gave us another room to sleep in. we slept till the following day. We had sex with accused 1 he said I should be his wife.*"

26. The Complainant's testimony found support in the testimony of her father RW who testified as PW3 and stated as follows:

"*I recall on 27.12.2014 I was in my house asleep when N who had been sitting outside the house talked to a man. I heard their voices. I peeped and saw it was Edwin talking to NNW After that Edwin left. At around 4.00 p.m. N disappeared from home. I looked for her but did not find her.*

On 28.12.2014 I went to the home of Edwim which is about 2 km from my home. Edwin told me that Geoffrey Wafula and N had gone to Wabukhonyi. "

From the evidence on record, it is therefore not in doubt that the Complainant was lured by the 1st Appellant, Edwin Wanjala, whom she knew before and whom she positively identified in court. She accompanied him to his house where she spent the night with the 2nd Appellant who defiled her. Having so determined, I find that the offence of child prostitution was conclusively proved against the 1st Appellant.

27. On the third ground that the prosecution failed to call crucial witnesses, Mr. Oimbo submitted that the state called all the witnesses it needed to prove its case. I note however that the prosecution is always at liberty to call the witnesses they deem relevant to their case, as stated under **section 143** of the **Evidence Act** which 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. The prosecution therefore has the latitude to call the witnesses necessary to prove their case, and from the record, it is evident that the witnesses called were able to establish the prosecution's case.

28. On the fourth ground of appeal that their right to a fair trial was contravened, the 2nd Appellant submitted that their case was delayed for too long contrary to **Article 50(2)(e)** of the **Constitution** which provides for the right of an accused person to have the trial begin and conclude without unreasonable delay.

29. The record shows that the matter was first set down for hearing on 25th March, 2013 when the first prosecution witness testified and concluded on 14th December, 2016 when the defence closed its case. The record demonstrates that during the period, the matter was adjourned several times for various reasons to wit: the accused persons' were absent having not been produced in court; the 2nd accused who is the 1st Appellant herein was not in police custody; prosecution witnesses were not bonded; the trial court was on transfer; the trial magistrate was bereaved and time constraints which saw the court adjourn the matter to later dates.

30. It is therefore important to determine whether in the present case the delay resulting from the numerous adjournments occasioned an injustice to the Appellants.

31. Article 50(2)(e) which the Appellants allege had been contravened is anchored on the maxim *justice delayed is justice denied*. I note however that this maxim has its flip side which was termed as the "The Two Sided Speedy Trial Problem" by Mativo J in the case of **Joseph**

Ndungu Kagiri vs. Republic Criminal Appeal 69 of 2012 [2016] eKLR where he rightfully observed that:

> **"The two sided problem caused by speedy trials was ably discussed by Shon Hopwood who while invoking the maxim *"justice delayed is justice denied"* considered the fuller picture of criminal justice. He postulates what he calls the flip side of the said maxim and argues that it poses an equal danger. This danger was ably brought out by *Martin Luther King, Jr.'s Letter from Birmingham Jail* where he wrote:- '*justice too long delayed is justice denied. Not because delays contrary to justice should be tolerated for any time. Rather, because the flip side of justice delayed can be an equal danger: a rushed, unconsidered justice*'.**
>
> **In my considered opinion, the speedy trial provided for in our constitution is not "*a rushed and unconsidered justice.*" No. it cannot be nor can it be so construed under any circumstances. In my considered view, our constitution provides for a speedy trial but it anticipates a trial with two sides, which must of necessity exhibit the best antidote to both sides. It must demonstrate a criminal justice system that is not too fast, and not too slow, but just right.[11] To me that is the proper meaning of the phrase '*to have the trial begin and conclude without unreasonable delay*'."**

32. The record herein demonstrates that there was some delay in concluding the trial. It was however not an unreasonable delay and the Appellants' claim that their right under **Article 50(2)(e)** was violated cannot therefore stand. In any event, hurried trials are not necessarily efficient since they may prevent accused persons from properly exercising their constitutional rights in presenting their case. The record clearly demonstrates that the trial court granted adjournments to accommodate both sides.

33. Further, I note from the record that when the matter came up for further hearing on 22nd September, 2016, the prosecution sought an adjournment which was denied by the court since it had granted the prosecution a last adjournment on 6th April, 2016 in the interests of justice, thereby forcing the prosecution to close its case. The Appellants who were in custody during the trial can be compensated by including the period of remand in the time of the sentence.

34. On the fifth and sixth ground, the Appellants argued that their defence was not considered and further that the prosecution shifted the burden of proof to them.

35. In criminal trials, the burden of proof lies with the prosecution to prove its case beyond reasonable doubt. This court has stated times without number that at no point should the burden of proof shift to the accused person. In the case of **Republic vs. Gachanja Criminal Case 37 of 1997 [2001] eKLR 425**, Etyang J held thus:

> **"It is a cardinal principle of law that the burden to prove the guilt of an accused person lies on the prosecution. An accused person assumes no burden to prove his innocence. Any defence or explanation put forward by an accused is only to be considered on a balance of probability."**

36. Once the prosecution discharged its duty and established a *prima facie* case, the Appellants were put on their defence as required by law. The trial court then assessed the evidence and found that the Appellants had not cast doubt on the prosecution's case. This does not amount to shifting the burden of proof because the law affords an accused person a right to put up a defence which must then be evaluated by the court.

37. The record clearly demonstrates that both Appellants gave sworn testimony in their defence, in which they merely denied the charges leveled against them and gave accounts of the events surrounding their arrest. The trial court evaluated each of their defences, and found that they had both failed to displace the evidence of the prosecution which implicated them. The trial court found that there was no doubt that the Appellants had committed the offences with which they were charged.

38. During the hearing of this appeal, the 1st Appellant submitted that he had been framed by the Complainant's father because he refused to give him some trees which he had requested from him. I note however, that on the record at no time did the 1st Appellant put it to any of the witnesses in cross-examination that there was cause to suggest that he was being framed. I therefore find that there was no basis for this argument and in my considered view, it is an afterthought intended only to exculpate the Appellant and did not dislodge the evidence tendered by the prosecution.

39. While submitting on his part, the 2nd Appellant complained that when he was arrested he was aged 17 years but that the trial court treated him as an adult. The 2nd Appellant's age assessment form dated 2nd January 2015 tells a different story as it approximated the 2nd Appellant to be aged 18 years. In the absence of a birth certificate, an age assessment report will be taken as conclusive proof of age. The 2nd Appellant cannot claim to have been aged 17 years at the time of the offence without any evidence such as from a parent, or a baptismal card or school documents to counter the age assessment report which puts his apparent age at 18 years. It is therefore right to state that the 2nd Appellant was an adult at the time of the offence.

40. After subjecting the evidence to a fresh and careful scrutiny, I must conclude, as did the trial court, that the prosecution's case against the Appellants was proved beyond reasonable doubt. Their respective defenses did not go any length in denting the prosecution's case. They were therefore properly convicted. In the end, I find that the appeals are without merit and are both therefore dismissed.

41. On the sentence however, I take due consideration of the period that the Appellants spent in custody and order that the sentences imposed will run from the date of their arrest.

It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF DECEMBER 2018

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L. A. ACHODE

HIGH COURT JUDGE

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUNGOMA THIS 17TH DAY OF JANUARY 2019.

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S. N. RIECHI

HIGH COURT JUDGE