REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 105 OF 2018

EKB.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of Hon. S. Telewa, RM, delivered on the 30th day of October 2085 in Eldoret Chief Magistrate's Criminal Case No. 253 of 2016)

JUDGMENT

[1] This appeal was filed herein by the Appellant, **EKB**, against the conviction and sentence of 20 years' imprisonment imposed on him in **Eldoret Chief Magistrate's Criminal Case No. 253 of 2016: Republic vs. Edwin Kipchoge Biwott**. The Appellant had been charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act, No. 3 of 2006**. The particulars thereof were that on the 4th **day of December 2015** at [particulars withheld] in Eldoret East Subcounty, within Uasin Gishu County, he wilfully and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of **JJ**, a child aged 12 years.

[2] In the alternative, the Appellant was charged with indecent act with a child, contrary to **Section 11(1)** of the **Sexual Offences Act,** in that, on the 4th **day of December 2015** at [particulars withheld] in Eldoret East Subcounty, within Uasin Gishu County, he wilfully and unlawfully caused his genital organ (penis) to come into contact with the genital organ (vagina) of **JJ**, a child aged 12 years.

[3] As the Appellant denied those allegations, the Prosecution adduced evidence in support of its case; and upon hearing the defence version as well, the Learned Trial Magistrate came to the conclusion that the Main Charge of defilement had been proved against the Appellant beyond reasonable doubt. Accordingly, she found the Appellant guilty and convicted him of the Main Charge of defilement and sentenced him, on the **30 October 2018**, to 20 years' imprisonment as prescribed by **Section 8(3)** of **the Sexual Offences Act**.

[4] Being aggrieved by his conviction and sentence, the Appellant preferred this appeal on **9 November 2018** on the following grounds:

> **[a]** That the Learned Trial Magistrate erred in law and in fact by failing to note that the prosecution side did not prove its case beyond reasonable doubt as required by law;
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> **[b]** That the Learned Trial Magistrate erred in law and fact by failing to recognize that the evidence tendered was inconsistent;
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> **[c]** That the Learned Magistrate erred in law and in fact in failing to hold that the prosecution witnesses were not credible;
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> **[d]** That the Learned Trial Magistrate erred in law and fact in failing to consider the defence of *alibi;*
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> **[e]** That the Learned Trial Magistrate erred in fact and in law in shifting the burden of proof to the Appellant, yet the burden of proof lay with the prosecution;
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> **[f]** That the Learned Trial Magistrate erred in fact and in law by failing to consider that the evidence and P3 Form produced did not support the charge;
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> **[g]** That the Learned Trial Magistrate erred in fact and in law by convicting the Appellant yet no evidence of defilement was proved because penetration was not proved; and,

[h] That the Learned Trial Magistrate erred in fact and in law by passing a hard and improper sentence in the circumstances;

[5] Accordingly, the Appellant prayed that his conviction be quashed and the sentence set aside. The appeal was urged on his behalf by **Ms. Tum** who relied on the written submissions filed herein on **3 April 2019;** which she highlighted on **23 May 2019**. **Ms. Tum's** submissions were two-pronged; firstly, that there was no proof of penetration; and secondly, that the accused's *alibi* defence was not given any consideration by the trial court. On penetration, Counsel urged the Court to take into consideration that, whereas the offence was alleged to have occurred on **4 December 2015,** the matter was not reported to the Police until **13 October 2016**; and that the minor was only examined by the doctor on **25 October 2016**, after a period of over 10 months from the date of the alleged offence. She further faulted the Prosecution for failing to produce the treatment notes given to the minor at **Merewet Health Centre**, noting that they were crucial to the case, as they formed the basis of the information presented in the P3 Form.

[6] It was further the contention of Counsel for the Appellant that since the trial court had expressed doubts as to whether indeed the Appellant committed the crime, she ought to have acquitted him, as there was no independent corroborating evidence to lend credence to the evidence of the minor. Counsel relied on **Chrispine Waweru Njeri vs. Republic** [2015] eKLr; **Dominic Kibet Mwareng vs. Republic**, Criminal Appeal No. 155 of 2011 and Eldoret Criminal Appeal No. 37 of 2015: **Ben Kipkorir Kiyai vs. Republic,** and urged the Court to find that penetration by the Appellant was not proved beyond reasonable doubt.

[7] In respect of the defence of *alibi*, Counsel cited **Section 309** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya** and the cases of **Karanja vs. Republic** [1983] KLR 501; **Victor Mwendwa Mulinge vs. Republic** [2014] eKLR and **Elias KIamati Njeru vs. Director of Public Prosecutions** [2015] eKLR to support the submissions that the trial magistrate neither analysed the *alibi* defence nor considered the applicable law and procedure in handling such evidence; yet the defence was raised quite early at the onset of the trial. Thus, in sum, it was the contention of Counsel for the Appellant that there was no sound basis for the conviction of the Appellant; that the trial magistrate shifted the burden of proof; and that the sentence was improper. She accordingly urged for the quashing of the Appellant's conviction and the setting aside of the sentence of 20 years imposed on him by the trial court.

[8] On behalf of the State, **Ms. Oduor,** opposed the appeal and submitted that all the key ingredients of the offence of defilement were proved beyond reasonable doubt; namely, penetration, age of the complainant and that the complainant was defiled by the Appellant. She reiterated the evidence of the complainant at pages 9 and 10 of the Record of Appeal and added that the evidence of the complainant was corroborated by the evidence of **Dr. Rono** at page 14 of the Record of Appeal. Counsel for the State did not think that the delay in filling the P3 Form was detrimental to the Prosecution case, arguing that it was ameliorated by the fact that the minor immediately sought treatment at **Merewet Dispensary** and was issued with treatment notes on which the doctor relied in filling the P3 Form.

[9] Ms. Oduor further submitted that credible evidence was adduced to prove the age of the minor by way of a Birth Certificate. The same was marked the **Prosecution's Exhibit No. 3** before the lower court; and as to the identity of the offender, Counsel submitted that the Appellant was well known to the minor, as they are not only neighbours but are also related by blood; and therefore that the Appellant was no stranger to the complainant. She further pointed out that the incident occurred in broad daylight at around 2.00 p.m. and therefore that the complainant had ample opportunity to see and identify the Appellant. Citing the case of **R. vs. Turnbull** (supra), Counsel urged the Court to find the evidence of identification credible.

[10] On the Appellant's defence of *alibi*, Counsel for the State submitted that the same was duly considered by the trial court and dismissed as an afterthought. Counsel further submitted that although the Appellant alleged that he was away on duty at a place called **Merewet**, about 2 kilometres away, he did not call any evidence to strengthen that evidence. According to her, whoever alleges must prove; and that the Appellant was under duty to prove that he was at **Merewet;** and that that does not mean a shift in the burden of proof. She added that, in any case, the Prosecution disproved and displaced the *alibi* defence.

[11] Counsel for the State also defended the decision of the trial court on sentence, contending that, granted the age of the complainant of 12 years at the material time, the penalty of 20 years is lawful under **the Sexual Offences Act**. She therefore concluded her submissions by urging the Court to disallow the appeal.

[12] I have given careful consideration to the appeal. I have also taken into account the written and oral submissions made herein by the Appellant and Learned Counsel for the State. This being a first appeal, I am mindful of the obligation to reconsider afresh the evidence adduced before the lower court and the need for this Court to come to its own conclusions thereon. In **Okeno vs. Republic [1972] EA 32,** the Court of Appeal for East Africa had the following to say in this connection:

> **"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 whole 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; 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..."**

[13] A reconsideration of the evidence taken by the lower court shows that the complainant testified before the lower court as **PW1** and stated that she was born on **10 October 2002** and was in Standard 7 at the time of her testimony. She stated that in the years preceding **2015**, she was living in Children's home in Kisumu but would be released in the month of December to go home and visit her grandmother in **[particulars withheld]** area. On the date in question, her neighbor, the wife of the Appellant had gone to her grandmother's home and left her daughter, **M**, under her care; and that after giving the girl a bath, she sent her to their home to bring body oil with a view of applying the same on the girl.

[14] PW1 further stated that M did not come back and so she followed her home and found her with her father, the Appellant, in the sitting room, and that he was drunk. According to her, the Appellant invited her into the house but she declined; and that he then put **Kshs. 200/=** on

the table for her to take but she refused to take the money. That the Appellant then got hold of her as she was going to the bedroom and defiled her before pushing her outside. She did not disclose the occurrence to anyone; and instead went to **Merewet Dispensary** for treatment. She added that the Appellant is her uncle and that his home is close her grandmother's home; and that the incident took place at about 2.00 p.m. on **4 December 2015.**

[15] PW2, BW, was one of the caretakers of the complainant at the Children's home in Kisumu. She stated that the orphans would be released in December to visit their relatives; and that this was the case with **PW1** in **December 2015**. She further told the lower court that, when the complainant returned to the home at the beginning of **2016**, she was very aggressive and violent; and that she kept asking for sanitary pads, which was unusual. She later on opened up in **August 2016** and disclosed to the doctor that she had been defiled in **December 2015** but had not spoken about it with anyone. **PW2** then took up the matter and had it reported to **Moiben Police Station** where the complainant was issued with a P3 Form and that the P3 Form was later filled at **Moi Teaching and Referral Hospital** and returned to the police station. The Appellant was then arrested and prosecuted for the offence.

[16] CN (PW3) told the lower court that she was a youth leader in **SOS Children's Home** and that in **August 2015**, she got to learn that the complainant, one of the children under their care, had been defiled in **December 2015**; and that she took long to disclose the incident. Jointly with her colleague, **PW2**, they took up the matter with the Police and caused the arrest of the Appellant who was identified by the complainant as the culprit.

[17] Dr. Rono of **Moi Teaching and Referral Hospital** testified on **16 August 2017** on behalf of **Dr. Timet** who had examined the complainant and filled the P3 Form on **26 October 2016**. He produced the P3 Form as the **Prosecution's Exhibit 2** and stated that the minor was found with old hymenal tears and some physical injuries.

[18] The last Prosecution witness was **PC Gabriel Wanyama (PW5)** whose testimony was that he was on duty at **Moiben Police Station** on **13 October 2016** when the complainant, in the company of two ladies from a children's home in Kisumu, reported a case of defilement. He accordingly booked the report and issued the complainant with a P3 Form and sent them to **Moi Teaching and Referral Hospital** for examination. He confirmed that the P3 Form was returned to him duly filled and that he then arrested the Appellant, who was implicated in the crime by the complainant, and arraigned him before court. He produced the Birth Certificate for the complainant as the Prosecution's Exhibit 3 along with a letter from **FIDA-Kenya** and the **SOS Children's Home**.

[19] In his defence, the Appellant told the lower court he left home on the **4 December 2015** at 9.00 a.m. and was away until 4.00 p.m. having gone to collect animal feeds at **[particulars withheld]**, about 2 kilometres away. It was therefore his contention that he did no see or meet the complainant on that day or at all in **December 2015.** The Appellant accordingly denied the allegations that he defiled the minor on the **4 December 2015**, adding that they are related by blood in that the complainant is her niece. The Appellant called his wife, **NC (DW2)** as his witness, to support his *alibi*. **DW2** denied that she had left her daughter under the care of the complainant on the **4 December 2015**, contending that she was at home throughout that day.

[20] Granted the foregoing summary of the evidence, the Learned Trial Magistrate correctly framed the issues for determination in her Judgment at page 29 of the Record of Appeal. She was satisfied that all the ingredients of the offence of defilement had been proved beyond reasonable doubt. She accordingly found the Appellant guilty thereof and convicted him in that regard. That Charge was laid pursuant to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act, which stipulates that:**

> **(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.**

[21] Accordingly, it was incumbent upon the Prosecution to prove the following essential ingredients:

> **[a]** That the Complainant was, at the material time, a child for purposes of **Section 8(3)** of **the Sexual Offences Act**;
>
> **[b]** That there was penetration of the complainant's genitalia;
>
> **[c]** That the penetration was perpetrated by the Appellant.

[a] <u>On the age of the Complainant:</u>

[22] There is no gainsaying that for purposes of **Section 8** of **the Sexual Offences Act,** the age of a complainant is an essential ingredient that must be proved beyond reasonable doubt; not only for purposes of proving that the complainant is a minor, but also for purposes of sentence, should the accused person be found guilty at the end of the trial. In **<u>High Court Criminal Appeal No. 34'B' of 2010: John Otieno Obwar vs. Republic,</u> Hon. Makhandia, J.** (as he then was) observed that:

> **"Defilement is a strict offence whose sentence upon conviction is staggered depending on the age of the victim. The younger**

the victim, the stiffer the sentence. Accordingly it is important that the age of the victim to be proved by credible evidence..."

[23] Similarly, in **Kaingu Kasomo vs. Republic Criminal Appeal No. 504 of 2010** the Court of Appeal reiterated this point thus:

> ***"Age of the victim of 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".***

[24] And in **Rule 4** of the **Sexual Offences Rules of Court Rules** it is recognized 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 documents or in a baptismal card or similar document."**

[25] In this case, there is uncontroverted evidence on record to show that the minor was aged 13 years as at **4 December 2015** and therefore a minor for the specific purposes of **Section 8(3)** of the **Sexual Offences Act. PW1** gave evidence that she was born on **10 October 2002** and that evidence was corroborated by the Birth Certificate marked the **Prosecution's Exhibit 3.**

[b] On Penetration of the Complainant:

[26] The minor told the lower court that she was defiled on the **4 December 2015** in the house of the Appellant where she had gone to get body oil. When she was examined by **Dr. Timet** on **25 October 2015**, the doctor found her with healed hymenal tears at positions 3 o'clock and 7 o'clock. Granted the age of the child, the trial court cannot be faulted for the finding that there was cogent proof that the complainant had been subjected to penetration of his genital organ for purposes of **Section 8(3)** of the **Sexual Offences Act.** In my view therefore, in terms of proof of penetration, not much turns on the fact that the P3 Form was filled ten months after the fact; a plausible explanation having been given before the lower court for that state of affairs.

[c] On whether the penetration of the Complainant was perpetrated by the Appellant:

[27] Granted the line of defence adopted by the Appellant, the key issue that the lower court had to grapple with and resolve is the question whether the defilement of **PW1** was perpetrated by the Appellant. There appears to be no dispute that the Appellant was well known to the complainant. He conceded that they were neighbours and blood relatives. However, a pertinent issue was raised before the lower court that demanded specific consideration by the lower court and a clear finding as by law established; and this is the defence of *alibi* raised by the Appellant. According to the Appellant, he left his home in the morning at 9.00 a.m. for **[particulars withheld],** about 2 kilometers away; and did not return until about 4.00 p.m. In essence, his contention was that he could not have committed the offence in his house at 2.00 p.m. as alleged by the complainant. It was further the contention of the Appellant that the *alibi* was raised at the first opportunity, and therefore that the Prosecution had an obligation to specifically disprove it.

[28] In **Kiarie vs. Republic** (supra), the Court of Appeal had the following to say in this regard:

> **"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 the court a doubt that is not unreasonable…"**

[29] Similarly, in **Athuman Salim Athuman vs. Republic [2016] eKLR,** the Court of Appeal held that:

> **"It is trite that by setting up an alibi defence, the appellant did not assume the burden of proving its truth, so as to raise a doubt in the prosecution case...The burden to disprove the alibi and prove the appellant's guilt lay throughout on the prosecution...the purpose of the defence of alibi is to account for so much of the time of the transaction in question as to render it impossible for the accused person to have committed the imputed act...the correct approach is for the trial court to weigh the defence of alibi against the prosecution evidence..."**

[30] A careful consideration of the Judgment of the lower court shows not only that sufficient attention was not given to the Appellant's *alibi*, but also that the court reversed the burden of proof. This is manifest from the following excerpt of the Judgment:

> **"The accused in his defence, stated that he was away on the day that the offence was alleged to have happened. He had left to get animal feeds. He was therefore raising the defence of alibi. Just by telling this court that he was away is not sufficient. There was no proof that he was away. Does he own a cow? What exactly had he gone to get as animal feeds? Where had he gone to get the said feeds? From whom had he gone to get the feeds? Was this person called to give evidence in his support?"**

[31] The trial court evidently expected the Appellant to furnish answers to the questions that she posed and apparently concluded that he did not do so. Likewise, while making reference to the evidence of the Appellant's wife, **DW2**, the trial magistrate did not make any conclusive findings as to her credibility before concluding that the *alibi* was an afterthought, yet the burden was on the Prosecution to displace the *alibi*; and if need be, resort to **Section 309** of the **Criminal Procedure Code**. In **Joseph Waiguru Wang'ombe vs. Republic** [1980] eKLR the Court of Appeal expressed the view that:

> **"The defence of alibi was put forward for the first time some four months after the robbery when the appellant made his unsworn statement in Court. Even in such circumstances the prosecution or the police ought to check and test the alibi**

wherever possible…To weigh one set of evidence with another set of evidence is not to remove the burden of proving that which has to be proved from the party charged with the proof of it…"

[32] It is therefore pertinent that **PW5** expressly conceded in cross-examination, with respect to the Appellant, that **"…I did not do further investigations to confirm whether he was present at the scene…"** That was, in my view, a grave omission. Indeed, in **Kiarie vs. Republic [1984] eKLR** where the Appellant's *alibi* defence was considered but dismissed for unrevealed reasons, the Court of Appeal took the view that:

> **"...That was a grave omission. The errors of law on the finding on identification and on the alibi are of such a nature that it is reasonably probable that without them the Senior Resident Magistrate would not have convicted the appellant..."**

[33] Thus, for the reasons aforementioned, and having given a careful consideration to the evidence presented before the lower court, I am unable to find that the conviction of the Appellant was based on sound evidence. Accordingly, I would allow his appeal, quash his conviction, and set aside the sentence of 20 years' imprisonment imposed on him by the lower court. It is hence, ordered that he be set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 3RD DAY OF DECEMBER, 2019

OLGA SEWE

JUDGE