REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL APPEAL NO. 1 OF 2019

STEPHEN MUSYOKI.....APPELLANT

VERSUS

REPUBIC.....RESPONDENT

(An appeal from original conviction and sentence (Hon. Okuche, SRM),

delivered on 20th December, 2018 in Loitokitok Criminal Case No. 4 of 2018)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to Section 8(1) (3) of the Sexual Offences Act No. 3 of 2006. Particulars were that on the 7th day of April, 2018 at Oloposare, Loitokitok Sub County in Kajiado County, intentionally caused his genital organ to penetrate the genital organ of KM, a child aged 14 years.

2. The appellant denied the charge and after a trial in which the prosecution called 5 witnesses and the appellant's defence, the trial court convicted him on the alternative to count 2 and sentenced him to twenty years imprisonment. The appellant was however acquitted in the first count, its alternative count and count 2.

3. The appellant was aggrieved by both conviction and sentence and lodged this appeal and raised the following grounds of appeal, namely;

> ***1. The learned trial magistrate erred in law and fact in finding the complainant evidence believable and truthful and failing to record the reason for so finding though the evidence was punctuated by glaring falsehoods and in consistencies.***
>
> ***2. The learned magistrate erred in law and fact in rejecting the appellant's defence as not plausible and disregarding the same as an afterthought whereas the defence was plausible and unshaken or unrebutted by the prosecution.***
>
> ***3. The learned Magistrate erred in law in finding that the prosecution had proved its case beyond reasonable doubt when there existed gaps, holes, inconstancies and doubts which should have been resolved in his favour.***
>
> ***4. The learned Magistrate erred in law in rendering a guilty verdict against the appellant against the weight of evidence.***
>
> ***5. The learned Magistrate erred in law in reaching a guilty verdict against the appellant without any direct evidence connecting the appellant to the offence and or based on very weak circumstantial evidence.***

4. The appellant filed amended grounds of appeal stating that the learned Magistrate erred in law by not finding that, one of the ingredients of the offence, namely: identification, was not conclusively proved; that voire dire examination was not properly conducted; that the trial court shifted the burden of proof to him and that the trial court did not consider his defence on the presence of a grudge between him and PW2.

5. During the hearing, the appellant who was unrepresented, relied on his grounds of appeal and submissions and urged the court to allow the appeal. In the written submissions, the appellant argued that the prosecution did not prove the ingredient of identification of the attacker.

6. According to the appellant, the prosecution did not prove conclusively that he was the person responsible for the commission of the offence. Referring to the evidence of PW1, the appellant argued that the witness told the trial court that she was defiled by a person she had not seen before and that he was arrested her mother identified him. The appellant argued that PW1 could not have told PW2 that it was him who defiled her if she did not know him. He also submitted that PW2 had a grudge with him and, therefore, they framed him as the person

who had committed the offence.

7. He relied on ***Charles Wamukoya v Republic*** (Criminal Appeal No. 72 of 2013) for the submission that positive identification of the attacker is necessary and that wrongful convictions are terrible and irreparable impact on innocent persons sent to prison; their families and future victims who find themselves in jail yet the real perpetrators remain at large.

8. The appellant further argued that the voire dire examination was not properly conducted on PW1 in that the questions asked were simple and elementary. He relied on ***Republic v Lal Khan*** [1981] 73 Cr. Appeal No. 19 for the submission that questions put to the child must appear on the short hand notes so that the cause and the procedure taken in the lower court could be seen.

9. According to the appellant, whether a child will be sworn or not would depend on whether the child has sufficient appreciation of the solemnly of the occasion and the responsibility to tell the truth which involved an oath over and above the duty to tell the truth which is an ordinary duty of normal social conduct.

10. Next, the appellant argued that the trial court shifted the burden of proof to him. He referred to the trial court's judgment at page 19 lines 23 – 26 where the court opined that the appellant did not call clan elders to prove his claim of existence of grudge between him and PW2. In his view, this shows that the trial court shifted the burden of proof to him. He relied on ***Longinus Komba v Republic*** [1973] LRT 127 for the proposition that an accused person ought to be convicted on the strength of the prosecution's case and not on the weakness of his defence as the burden of proof in criminal cases lies on the state to establish its case beyond reasonable doubt.

11. The appellant further argued that the trial court failed to consider his defence in the course of determining the case. He contended that he raised the issue of a grudge with PW2 and therefore it was wrong for the trial court to state that the he did not raise a grudge. He relied on the case of ***Republic v J.P*** [2014 NSCA 29 for the submission that resolution of a criminal charge depends on the views taken by a trial Judge about the weight of evidence he or she has heard. By weight it is included both on assessment of the reliability and the credibility of the prosecution evidence and the evidence by the accused. The appellant concluded that the prosecution did not prove its case beyond reasonable doubt and urged the court to allow his appeal.

12. Mr. Meroka, learned Principal Prosecution counsel, opposed the appeal and supported conviction and sentence. According to counsel, the prosecution proved its case against the appellant beyond reasonable doubt. He submitted that the prosecution proved the three essential ingredients of the offence, namely; age – that the victim was 14 years through medical evidence – age assessment - PEX 6 and PW2's testimony that PW1 was 14 years old. He also argued that the prosecution proved that there was penetration through the evidence of PW1, the victim, and the fact that there were blood stains, - PEX 1 and 2 as well as the evidence of PW4 the doctor who confirmed that there was penetration.

13. He also submitted that the appellant was identified as the perpetrator of the crime; that he was known to the victim, PW1 and her mother PW2. He further submitted that the offence was committed during the day and, therefore, there was no likelihood of mistaken identity. He urged the court to dismiss the appeal, uphold the conviction and affirm the sentence.

14. I have considered this appeal, submissions by the appellant and the respondent as well as the authorities relied on. This being a first appeal, it is the duty of this court, as the first appellate court, to reconsider, reevaluate and reanalyze the evidence afresh and come to its own conclusion on that evidence. The court must however remain alive to the fact that it neither saw nor heard the witnesses testify and give due allowance for it.

15. In ***Okeno v Republic*** [1973] EA 32 the court held;

> ***"An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v Republic [1957] EA 336) and to 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 v. Republic [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 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, (See Peters v. Sunday Post, [1958] EA 424.)"***

16. PW1, a minor aged 14 years, testified on oath and told the court that she was a standard 6 pupil at. She testified that on 7th April, 2018 at 6 p.m. she was in the farm with her mother, (PW2). Her mother sent her to get soap for her. On the way she met the appellant who ordered her to stop but she declined. He grabbed her hand, tripped her down; touched her breasts, removed her biker and pants; removed his cloths put on a condom and defiled her. Although she raised an alarm, there was no response. He left her and went home. She told the court that the the person was putting on a short. She then went home; picked soap and on the way back, she again met the person and he demanded to have sex with her again. She ran away to the farm using a different route.

17. She testified that she bled when she was defiled. She informed her mother what had happened and her mother went looking for the appellant and informed the appellant's father what had happened. They reported the matter at Loitokitok Police Station ; issued a P3 form and thereafter she was taken to hospital. She identified the cloths she was wearing in court. She told the court that she had not seen the appellant before; that this was the first time she had intercourse and that it was her mother who identified the appellant.

18. PW2, J M mother to PW1, testified that on 7th April, 2018 she was in the farm when she sent PW1 to bring soap. She told the court that although she brought the soap, she overstayed. PW1 started crying and told her what had happened to her and that the appellant had defiled her. She had blood in her private parts and her biker was blood stained. She reported the matter to the village elder and also informed her husband. The matter was reported to the police and PW1 was taken to hospital. The appellant was arrested after she identified him. She denied that she had a grudge against the appellant. In cross-examination, PW2 told the court that the incident took place on the road and that

although there is a hospital nearby they could not access it because the area was flooded.

19. PW3 No. 1952046082 AP Sgt. Julius Kigen the Administration Police officer in-Charge testified that on 7th April, 2018 at about 6 p.m. he got a report from PW2 that her daughter (PW1) had been defiled. He advised PW2 to go and report the matter but she could not manage because the area was flooded. He latter arrested the appellant who was trying to run away after PW2 showed identified the appellant. He took the appellant to their camp and later to Lotokitok Police Station. He was with both PW1 and PW2. He handed over the appellant to the Police and recorded his statement. In cross-examination, he told the court that he got the report on 8th April, 2018 but denied that they framed the appellant.

20. PW4 Francis Naana, a Clinical officer based at Loitokitok Hospital, testified that he examined PW1 who was taken to the hospital with a history of defilement. She had pants that were blood stained; her Labia Majora had bruises and the hymen was broken. The approximate age of injuries was six days. He assessed the degree of injury as harm. PW1 was treated and put on antibiotics. He filled and signed the P3 form, and produced it a PEX 4. He also filled PRC form and produced it as PEX 3. They did lab tests and assessment of PW1's age. He produced them as PEX 5 and 6 respectively. Age assessment shows the age to be 14 years.

21. PW5 No. 1061956 –PC Janet Mpayembwa, a police officer attached to Loitokitok police station, testified that on 12th April, 2018 she escorted PW1 and the appellant to hospital for examination and that she issued PW1 with a P3 form which was filled at the hospital that; she was given PW1's pants which were torn and that she also recovered a biker which was blood stained and the school uniform she was putting on was muddy. She produced them as PEX 1, 2 and 3. In cross-examination, the witness testified that the incident was not reported immediately because the area had been blooded.

22. When put on his defence, the appellant testified that in the month of April, he had a problem with PW2 after her goats went into his farm and ate his tomatoes. The issue was handled by elders and PW2 was directed to compensate him but she was unhappy with the decision. She later went to his farm and harvested his vegetables. After two days, he was arrested and it was only when he reached the police station that he was informed that he had defiled PW1. He told the court that he was pressed by the complainant's parents to sort out the matter but he declined because he did not commit the offence.

23. After considering the evidence, the trial court believed the prosecution's evidence; convicted the appellant and sentenced him to 20 years imprisonment. The court analyzed the evidence of both the prosecution and defence and concluded that there was sufficient evidence to prove that PW1 was defiled. Regarding age, the trial concluded that the prosecution's evidence showed that PW1's age was assessed and she was found to be 14 years. the court was also satisfied that the prosecution had proved that there was penetration and therefore the two ingredients were proved.

24. I have on my part reviewed the evidence on the two ingredients. On age, there is medical evidence through age assessment report which put PW1's age at 14 years. There was no any other evidence to contradict or rebut this evidence. The appellant did not also argue otherwise. In the circumstance, I am satisfied that this ingredient was sufficiently proved.

25. Regarding penetration, PW1 testified that she was defiled and that that was the first time she had sexual intercourse and that her cloths were blood stained. PW2 also told the court that PW1's private parts had blood. PW5, the clinical officer also confirmed that there were bruises in PW1's private parts and that the hymen was broken, signs that there was penetration. This evidence is also contained in the P3 and PRC forms. There was therefore, cogent and medical evidence to prove this ingredient of the offence since the ingredient is proved when there is either partial or complete penetration.

26. The trial court then turned to consider the most crucial ingredient of the offence in so far as this appeal is concerned that is; who the perpetrator was. The trial court stated on this;

> ***"The accused person has denied having sexual intercourse with the minor. The minor on the other hand states that it is the accused person who defiled her. This was on her way home to pick a soap which she had been sent by her mother. The accused person claimed in court that he had a grudge with PW2 over tomatoes which had been destroyed by PW2's goats. The accused person states that the same was settled by clan elders….The accused person did not call these clan elders to prove the essence of this grudge with the complainant. The complainant gave the evidence in court and on oath. The minor struck the court as very truthful witness. <u>There was no other eyewitness at the incident apart from the complainant. The court has warned itself on relying on her evidence alone but as the court has observed above she was very truthful.</u>"***

27. The court then concluded:

> ***"The prosecution has proved that there was penetration into the minor's private parts. They have also proved that the minor was 14 years old and the accused person is well placed at the scent of the incident."***

28. I have considered the evidence on record and the conclusion reached by the trial court that the prosecution proved this ingredient. With great respect I do not agree with that conclusion. I will explain.

29. The trial court correctly found that there was no other person who witnessed the incident except PW1. The evidence before the trial court was therefore that of the victim alone, a single witness. The trial court properly warned itself on the dangers of convicting on the basis of evidence of PW1 alone. Having done so, the court went ahead to convict the appellant on the basis that "***<u>she was very truthful.</u>"***

30. Section 124 of the Evidence Act requires corroboration in criminal cases but allows the court to convict in sexual offfences without corroboration if it has reason to believe the evidence of the victim. The section provides;

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is 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 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 reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth***." (emphasis.)

31. PW1 in her testimony did not mention the name of the person who defiled her. She did not even give any description of the person except that he was putting on black shorts. What is even more telling is that PW1 testified that she had not seen that person before. That means she was defiled by a stranger. Her testimony as far, as is material, went like this;

> ***"On 7th April, 2018 at 6.00 pm on Saturday I was in the farm with my mother, she sent me to go and get her a soap. On the way I met the accused. He ordered me to stop but I declined. He grabbed my hand, he tripped me down, he touched my breast, he removed my biker and pant. He removed my clothes. The accused person put on condom, he then inserted his penis into my vagina. I then raised alarm. There was no response. The accused person left me alone and I went home. The accused person was putting on a short. He lowered his short. He then unzipped. I went home picked a soap. On the way back I met the accused person, he demanded sex again, I ran and used another road to the farm. I was putting on pink pant, white biker and blue dress. The dress, biker and pant are before court. I bled when he defiled me. It is the accused person who tore the bike….I found my mother at the farm, it is when I disclosed to her what had happened. My mother went looking for accused person. We found the father of the accused person at the farm. My mother told his father of the incident, we reported the matter at Loitoktok police station. I was taken to Loitoktok hospital. I was issued with a P3 form….The pant and the biker is blood stained. I bled during the intercourse. The accused person was arrested at their farm. It is my mother who identified the accused person. I had not had an intercourse before this incident. I had not seen the accused person before the incident. From where he was arrested is next to our home. The accused person is before the court."***

32. On her part, PW2's evidence as recorded by the trial court was as follows;

> ***"On 7th April, 2018 I was in the farm. I sent PW1 to get me a soap at home she brought me the soap, but she overstayed. She stayed for over 30 minutes. It takes only 10 minutes to and from the farm. PW1 then started crying as I was washing one of her siblings. She told me that on the way home she met the accused person, she told me that the accused person defiled her. I never cleaned her private parts. I called her father. I saw blood stains in the private parts. The biker was blood stained. She was putting on school uniform, a pink pant and white biker I reported the matter to the Balozi. He is called Jeremiah he reported the matter after four days because it had flooded. We went to Lotoktok hospital. We were given two police officers who escorted us to the hospital. The accused person was arrested at the farm by APS. It is me who showed them the accused person. I knew the accused before the incident, he is a farmer like me. I don't have any grudge with the accused person. He is before the court."***

33. It is clear from the testimony of PW1that she had not seen the appellant before that incident and, therefore, what can be inferred from her testimony is that she did not know the person who defiled her. She did not tell the court that she knew his home either although she said that his home was not far from their home. How could she have known her attacker's home if she had not seen him before?

34. On the other hand, PW2 did not tell the court that PW1 gave a description or the name of the person who defiled her. The evidence of PW2 was as if PW1 knew her attacker which was not the case from her own testimony. The question that remained unanswered and which the trial court did not address its mind to was how PW2 knew that the appellant was the person who defiled PW1 given that it was PW2 who identified the appellant for purposes of his arrest.

35. It is also noteworthy, that when PW1 reported the incident to PW2 she never mentioned the appellant by name or give any description that enabled PW2 identify or recognize the appellant as the attacker. This raises doubt on the prosecution's case that PW1 and PW2 identified or recognizes the appellant as the person who had defiled PW1 which enabled PW2 identify him for purposes of his arrest. The evidence of these two witnesses should only have been relied on as the basis for the appellant's conviction after a critical and careful scrutiny to eliminate the possibility of error.

36. In ***Mohamed Elibite Hibuya & Another v. R***. (Criminal Appeal No. 22 of 1996),the Court of Appeal was clear that:

> ***"[I]t is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone and particularly to the police at the first opportunity. Both the investigating officer and the prosecutor have to ensure that such information is recorded during investigations and elicited in court during evidence. Omission of evidence of this nature at investigation stage or at the time of presentation in court has, depending on the particular circumstances of a case, proved fatal – this being a proven reliable way of testing the power of observation, and accuracy of memory of a witness and the degree of consistency in his evidence."***

37. And as the court stated in***Muiruri Njoroge v Republic*** Criminal Appeal No. 115 of 1982, it is a well-established rule of practice that a court of law does not act on mere assertions not unless such assertions are proved by evidence beyond doubt.

38. The law is therefore clear that the prosecution must prove its case against the accused beyond reasonable doubt. It bears the burden of proof and that burden never shifts to the accused. As to what proof beyond reasonable doubt means, **Lord Denning** stated in ***Miller v Minister of Pensions*** [1947] 2 All ER 372 that:

> ***"Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man 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."***

39. In ***Bakare v State (***1987) 1 NWLR (PT 52) 579, ***Oputa, JSC,*** of the Supreme Court of Nigeria stated that:

> ***"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".***

40. The court must therefore convict only where the prosecution has proved its case against the accused beyond reasonable doubt. The court should never allow itself to be swayed by plausible possibilities that the accused may have committed the offence he is charged with. It must be satisfied beyond reasonable doubt that the accused committed the offence. It was for that reason that the Court of Appeal observed in ***Pius Arap Maina v Republic*** [2013] eKLR, 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.

41. I have considered this appeal, reviewed the evidence on record and reanalysed it myself. It is clear to me that the trial court did not consider critical material that would have enabled it determine whether the appellant was the person who defiled PW1. The trial court overlooked the fact that there was no mention of the name of the person who defiled PW1, the person was not known to her and she had not seen him before. She did not even describe the person to PW2 or to any other person. Had the trial court critically considered this evidence, the conclusion would, without doubt, have been different even without the appellant's defence that there was a grudge between him and PW2.

42. From the above discourse, the conclusion I come to is that the prosecution did not prove the ingredient of who the defiler was and, therefore, it did not prove its case against the appellant beyond reasonable doubt. For the above reasons I am satisfied that this appeal has merit and must succeed.

43. Consequently, this appeal is allowed, conviction quashed and the sentence set aside. The appellant is hereby set at liberty unless otherwise lawfully held.

Dated Signed and Delivered at Kajiado this 13th Day of December 2019.

E C MWITA

JUDGE