REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.132 OF 2017

(Appeal Originating from Nyahururu CM's Court Cr.No.,308 of 2013 by: Hon. V. Ochanda– R.M.)

TGC.....APPELLANT

- V E R S U S –

REPUBLIC.....RESPONDENT

J U D G M E N T

TGC was convicted for the offence of defilement contrary to section 8(1) as read with Section 8(2) of the Sexual Offences Act.

The particulars of the charge are that on 23rd, 24th and 25th June, 2014 in Nyahururu Town, intentionally and unlawfully caused his penis to penetrate the anus of CMW a male child aged 11 years.

He was sentenced to serve life imprisonment.

Aggrieved by the conviction and sentence, the appellant filed this appeal on 4/1/2017 and further grounds were filed by Mr. Waichungo Advocate on 11/5/2017. The grounds can be summarized as follows:

(1) That the court erred in finding that the appellant was properly identified;

(2) That the prosecution failed to call crucial witnesses namely Soledad, the Motor Cycle rider and arresting officer;

(3) That the court erred in not reconciling the discrepancies in the appellant's age;

(4) The court erred by shifting the burden of proof to the appellant;

(5) That the court erred by dismissing the appellant's alibi;

(6) That the prosecution evidence was too weak to found a conviction;

(7) That the appellant was charged under a non existent provision;

(8) That the court imposed the wrong sentence on the appellant who was the only 17 years old.

The appellant therefore prays that the appeal be allowed, conviction quashed and sentence set aside.

This being the first appellate court, the court have the duty to re-examine all the evidence tendered before the trial court afresh, analyze it and arrive at its own determination but bearing in mind that this court did not have the advantage of seeing or hearing all the witnesses. *See* ***Okeno v Republic (1972) E.A. 32***.

EMW a minor aged 13 years testified that on 23/6/2014 at about 8.00 p.m. he escorted the mother to the road on her way to work; that the mother gave him Kshs.30/= to buy Sukuma Wiki (Kale) and on the way back home, he met three young men. When cooking and watching Television, he heard a knock and assumed it was his brother coming home as the door was not locked. The three boys he had met earlier entered and demanded for money; that one boy covered his mouth while one removed his pant and one lay on him. They told him to lie on his stomach; a second boy slept on his back and put his organ for urinating into his buttocks to which he pointed; that they sodomized him for about 30 minutes and left but threatened to kill him if he told anybody. He did not tell anybody. The boys came back the next day and did the same and left. On the 3rd day, he was outside playing in the morning, his mother was asleep and they came and took him to a nearby

toilet and after they finished with him, asked for money. They asked him to steal if he did not have. He went to Mama Soledad's house to steal and when the lady asked what he wanted, he told her he wanted money. The lady threatened to take him to police station and it is then he disclosed to them what was happening; that lady told his mother and they went to report at the police station. PW1 did not know the 3 boys but identified the appellant whom he used to see at [particulars withheld] and he used to come to the neighbour's house.

PW1 said that it is the appellant who sodomized him. PW1 did not scream because one boy had a knife; that in the toilet, one watched outside while two entered. He was told to bend over, one held him as the other engaged in the act.

PW2 E M, PW1's mother used to work in a hotel at night and that PW1 is her 4th son; that a lady stopped him and informed him that PW1 had tried to steal from him and that some boys were doing something to him. In the evening, PW2 asked PW1 what was happening to him but he did not respond and she beat him. A motor cycle rider who found PW2 beating PW1 talked to PW1 and informed PW3 that PW1 had been defiled and should be taken to hospital. PW2 took PW1 to hospital and PW1 explained what had been happening to him and the matter was reported to the police. Later PW1 identified the appellant who was arrested. PW2 knew the appellant as a friend of her son who goes to University.

Dr. Joseph Kinyua (PW3) of Nyahururu County Hospital produced a P3 form that had been filed by Dr. Chesire on 3/7/2014. On examination, PW1 was found to have bruises and minor injuries to the anus and his urine had deposits of pus cells.

PW4 Beatrice Chepkemboi was the investigating officer in this case. PW4 issued the complainant with a P3 form and later arrested the appellant on 5/7/2014.

In his unsworn defence, the appellant stated that on 23rd, 24th and 25th June, he was in school and was sent home for fees on Friday 4th and was arrested on 5th.

DW2 J N C told the court that she lives in [particulars withheld] with the appellant; that the appellant was sent home for fees on 4th and was arrested on 5th.

The appellant applied to this court to be allowed to adduce further evidence which application was granted. DW2 the appellant's mother told the court that when the appellant was charged on 11/7/2017 he was a student at [particulars withheld] High School in Form III and was 17 years old having been born on 28/11/1997 and produced a birth certificate to that effect.

DW3 MNK a teacher at [particulars withheld] High School testified that in February, 2014, he was working at the said school and that the appellant was one of the students; that he was the class teacher and he prepared the attendance register which is filled twice daily in the morning and afternoon at 2.00p.m. D.Ex.No.2. That an X means one was present but 0 means one is absent. DW3 denied that there was no report of sneaking from the school as there is a watchman in school.

I have considered the grounds of appeal and all the evidence on record. PW1's birth certificate was produced in evidence. He was born on 8/8/2002. The offence was committed between 23rd to 25/7/2014. The complainant was therefore 12 years old. I do agree that the complainant was a child and a *voire dire* examination should have been conducted to determine whether or not the complainant understood the meaning of the oath and was intelligent enough to understand the proceedings and therefore be sworn. That was a serious error on the part of the court as it offended Section 19(1) of the oaths and Statutory Declarations Act. The court was referred to the case of ***Kibagendi v Republic (1959) EA 92*** which cited by ***Musyoka Mwasya v Republic H.Cr.A.50/2013*** where the court said:

> ***"The investigation (voire dire examination) should precede the swearing and the evidence and should be directed to the particular question whether the child understands the nature of an oath rather than to the question of his general intelligence.***
>
> ***Since the evidence of the two boys was so vital a nature we cannot say that the learned judge's failure to comply with the requirements of Section 19(1) was one which can have occasioned no miscarriage of justice and upon this ground alone the appeal must be allowed."***

A *voire dire* examination serves to determine whether the child understands the meaning and solemnity of an oath and secondly, it tests the competence of the child. Whether the child intelligent enough is to understand the proceedings. In this instance, PW1 was the key witness and I believe that failure to comply with Section 19(1) of the Oaths and Statutory Declaration Act occasioned a miscarriage of justice.

PW1 is the only witness to the offence. He explained how he met three boys after escorting his mother and that the boys followed him to the house. Unfortunately the court was not told whether there was any or what kind of light was in the house on those two nights. The court should have enquired into the issue of lighting because the incident occurred at night. Were they electric lights, lanterns or did PW1 use the light from the television to see the assailants. That question was not answered. The 3rd incident occurred at day time and it is possible that PW1 may have identified his assailants. However, PW1 denied having known the boys who attacked him before but recognized one whom he used to see in the area and also used to visit his neighbour; that on the 3rd day he recognized two. Whereas I appreciate that on the 3rd day the incident occurred during the day and PW1 may have seen the assailants well, yet PW1 did not report the incident to the mother or police but related it to one 'Mama Solidad' who was not called as a witness to tell the court exactly what PW1 informed her. In cross examination, PW1 said one of the boys said he was Ken. It is not clear whether it is the appellant who was referred to as Ken. If so, no evidence has been led by the prosecution to establish that the appellant had an alias name of K. PW1 also said that he had seen the appellant go to the neighbour but the name of the neighbour was not disclosed nor was the neighbour's house called to confirm that they knew the appellant.

From the record, PW1 never described the boy he purportedly identified to anybody. It is therefore not clear how the appellant was arrested because PW1 was not present during the arrest. PW2 and 4 merely said the appellant was arrested but never said who pointed him out before arrest.

The fact that PW1 was not present during the arrest, the police should have mounted an identification parade to establish whether PW1 was able to identify his assailant. Dock identification has been held to be of very little probative value. *See* ***Josephine Ogutu v Republic C.A.229/2003 (unreported)***.

The appellant raised an alibi in his defence, that he was in school on the days he is alleged to have committed the offence namely 23 rd, 24th and 25th June, 2014. At the hearing, the appellant did not produce any evidence to that effect but after conviction and upon application, this court allowed adduction of more evidence; school register has been produced and indicating that the appellant was in school on the 3 days; that the school is Boarding and there was no report that the appellant ever escaped from the boarding facility although escaping from the school by the appellant cannot be ruled out, however, having raised an alibi, the appellant does not assume any duty to prove the truthfulness of his alibi. The onus still rests upon the prosecution to prove its case beyond any reasonable doubt. The Court of Appeal in ***Kiarie v Republic Cr.A.93/1983*** had this to say of a defence alibi:

> ***"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…"***

In my view, the alibi raised by the appellant did raise a doubt in the prosecution case as to whether or not the appellant was identified as the culprit.

When the appellant appeared in court for plea on 11/7/2018, he was treated as a minor and called a subject. It means the court recognized that the appellant was a minor. The court should have sought to have the appellant's age determined by an expert. If he was found to be a child, then the prosecution of the appellant should have been in accordance with the Children's Act, to protect the child by holding proceedings in camera. That did not happen. The trial was conducted as though the appellant was an adult, the appellant was convicted and was sentenced as an adult but if he was a child, he should have been sentenced pursuant to Section 191(1) of the Children's Act which provides the different types of sentences to be meted upon a child convicted of an offence. The sentences include: Discharge of the offender under Section 35(1) of the Penal Code, Probation Order, Fine, Compensation, Committal to Borstal Institution, placement under care of counselor or Community Service Order, e.t.c.

On being allowed to adduce more evidence the appellant produced a birth certificate which indicates that he was born on 28/11/1997 meaning that he was 17 years as of 11/7/2014 when he took plea. Though its questionable why the appellant never produced the birth certificate during the trial, yet by the fact that the court recognized that he was a child but failed to enquire or send the appellant for age assessment, the court committed a serious miscarriage of justice by sentencing a minor to life imprisonment.

Having considered all the above, I am satisfied that the identity of the appellant was not full proof; the trial court committed serious errors by failing to conduct a *voire dire* examination of PW1 and trying the appellant as an adult. The conviction is unsafe and cannot be allowed to stand.

I hereby quash the conviction and set aside the sentence. The appellant is set at liberty forthwith unless otherwise lawfully held.

Dated, Signed and Delivered at NYAHURURU this 20th day of July, 2018.

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R.P.V. Wendoh

JUDGE

Present:

Ms Rugut for State

Mr. Waichungo for appellant

Soi Court assistant

Present - appellant