



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL APPEAL NO. 10 OF 2016

JOHN GITAU NJOROGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The appellant John Gitau Njoroge was on 14th April, 2016 convicted of the offence of defilement contrary to section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006 and sentenced to life imprisonment. The brief particulars of the charge were that on the 29th August 2014 in Kajiado district within Kajiado County the appellant intentionally and unlawfully caused his penis (genital organ) to penetrate the anus of IM a child aged 6 years.

Being aggrieved of the conviction and sentence the appellant appealed to this court while being represented by learned counsel Mr. Nairi. The grounds of appeal as crafted by the appellant counsel are:

- 1. The learned Magistrate erred in law and facts by failing to take into consideration that the evidence brought forward by the prosecution was full of contradictions, discrepancies and inconsistencies hence unreliable.**
- 2. The learned trial Magistrate erred in law by disregarding the defence of the appellant herein and relied fully on the prosecution witness's testimonies alone.**
- 3. The Learned trial Magistrate erred in law and fact by concluding that the appellant herein was guilty of the offence; even though the prosecution did not produce the purported medical examination report as prove that the act was indeed committed by the appellant herein.**
- 4. The learned trial Magistrate himself in by shifting the onus of proof to the appellant contrary to the law and in sheer disregard of the rule of natural justice.**
- 5. The learned trial Magistrate erred in law by failing to appreciate that the prosecution had failed to prove its case beyond reasonable doubt.**

His prayer to this court was that the appeal be allowed by quashing the conviction and setting aside the sentence.

This is a first appeal and so both issues on facts and law fall to be decided. In doing so a fresh evaluation and appraisal of the evidence at the trial court has to be undertaken for one to come up with independent conclusions on whether there is merit on the appeal as stated in the grounds by the appellant.

These principles and guidelines on how the first appellate court exercises jurisdiction on the matter are clearly set out in the case of *Okeno v Republic 1973 EA 32*. In my view although the grounds of appeal in the petition have been broken down into six, I can safely deduce them into two broad thematic areas.

(a) Whether the prosecution proved its case beyond reasonable doubt before the trial court against the appellant to warrant this appellate court to affirm the judgement

(b) Whether the learned trial magistrate failed to comply with the provisions of Section 169 of the Criminal Procedure Code.

The analysis of the evidence as deduced from the record

In the present appeal the star witness was a minor aged 6 years herein-after referred to as IM. In his unsworn statement IM stated before court how he encountered the appellant who lured him to the river, undressed his clothes and thereafter defiled him. This incident was later to be reported to his father JK who testified as Pw2. It was the evidence of Pw2 that on 29th August 2014 he had sent for a torch from his wife. The complainant was the one tasked the duty of taking the spot light to the father Pw2. However it took long before Pw1 could deliver the spotlight and this raised concern as to his whereabouts. As Pw2 commenced the search of Pw1 he came face to face with the appellant carrying the complainant Pw1 on or about 11.00 p.m. After this Pw2 made an observation on Pw1 and he appeared to be having dust and was not able to talk. According to Pw2 he decided that he should take Pw1 to the hospital for a general examination and report to the police.

Pw3 Sgt John Karanja of KMQ Administration police post testified that on 28th August, 2014 he booked a report of a missing minor. In his advice the reportee was to continue looking within the neighbourhood to find out any leads which might assist in tracing him. Pw3 confirmed that at around 11.00 p.m. the reportee came back in company of other people, the appellant and the minor. In the testimony of Pw3 the appellant had been found with the minor whom they decided to effect arrest and treat him as a suspect of abduction.

Pw4 Pc Hellen Gathii the investigating officer took over the matter and the outcome of it revealed that the minor had been defiled. According to Pw4 the minor Pw1 was subjected to medical examination which was duly filled by Pw5 – Stephen Lekaiya. Further Pw4 stated that with statements from Pw1, Pw2 and Pw5 she arrived at a conclusion that an offence of defilement had been committed.

In the testimony of Pw5 the examination conducted against the minor child at Kajiado district hospital on 29th August, 2014 showed penetration of the anus of the complainant. Pw5 also stated that this was supported with evidence of swelling, tear and blood stained anus. The P3 and Post Rape Form were admitted in evidence as exhibit 1 and 3 respectively.

At the close of the prosecution case the appellant was placed on his defence. That appellant gave a sworn statement where he denied that he defiled the minor as alleged by the prosecution. The appellant went further to state that on 28th August, 2014 he was going about his normal duties at the home where he worked. According to the appellant he served some customers tea, but in the course they started to interrogate him about an incident involving the complainant. He however denied any knowledge but they ended up arresting him as a suspect for the offence which he did not commit.

It is critical at this stage to analyze the evidence in line with the principles indicated in the *Okeno v Republic* case to come up with my own conclusions as to whether the ingredients of the offence were proved beyond reasonable doubt by the prosecution.

Learned counsel Mr. Nairi submitted that the evidence by Pw1, and Pw2 was tainted with inconsistencies and contradictions rendering it unreliable. Learned counsel pointed out on the inconsistencies to be on the date and time the alleged offence is stated to have been committed. Further learned counsel argued and urged the court to find that between the testimonies of Pw1, Pw2, Pw3 and Pw4 there were contradictions as to the nature of events stated to have taken place on 28th, 29th and 30th August, 2014. These contradictions submitted learned counsel should have been resolved in favour of the appellant. From the narrative of the defence, learned counsel submitted that the appellant had raised an alibi defence of being at his place of work and not at the scene of the crime. In learned counsel contention it was quite apparent that the learned trial Magistrate did not factor in the alibi defence in his judgment, which made him arrive at a wrong conclusion.

In real terms learned counsel further submitted the elements of the offence which the appellant was convicted of and sentenced to life imprisonment were missing. In this instance learned counsel placed reliance on the following cases to guide the court to come to the conclusion that the offence of defilement against the appellant was not proved beyond reasonable doubt. (See, *Philip Muiruri Ndaruga v Republic [2016] eKLR*, *George Opondo Olunga v Republic [2016] eKLR*, *Joseph Ndung Kagiri v Republic [2016] eKLR*.)

Submissions by the state (Respondent)

Mr. Meroka, the Principal prosecution Counsel submitted on behalf of the state and vehemently opposed the appeal. The respondent counsel had conducted the appeal by way of written submissions invited the court to evaluate the entire case for the prosecution to satisfy itself that there is no doubt as to the commission of the offence. It was also submitted by Mr. Meroka that in so far as the state is concerned all the elements of the offence of defilement were clearly proved to warrant the trial magistrate to come to the only logical conclusion of guilty, conviction and sentence. Mr. Meroka urged this court to dismiss the appeal for lack of merit on all grounds.

Review and determination

The vexed question in this appeal is whether the offence of defilement as defined in the Sexual Offences Act was proved beyond reasonable doubt by the prosecution, incidentally an offence of defilement on indictment the state has to prove the following ingredients:

- (a) **Penetration of the genital organ of victim of the offence.**
- (b) **Age of the victim must be proved to be below 18 years.**
- (c) **That the appellant (accused) was positively identified and placed at the scene.**

As regards the first ingredient Section 2 of the Sexual Offences Act defines “*penetration as that partial or complete insertion of the genital organ of a person into the genital organs of another person*”. In law sexual penetration include penetration of the vagina and anus by the penis or other body part. As can be seen from the definition under Section 2 penetration would be considered to have taken place when the evidence show the penis entered the vulva or between the labia majora, which is the outer most part of the female genital organ (see *Article by James L. Rigel Jnr. what constitutes penetration in prosecution for Rape or Statutory Rape 76 ALR 30 163 (1977)*). The same author

further states that anal penetration under the law occurs, when the penis or other body part enters the anal opening.

It is trite that Sexual offences can be proved beyond reasonable doubt by the state based on the testimony of the single witness with no requirement of corroboration expressly stated in Section 124 of the Evidence Act. This Section governs aspects of corroboration in sexual offenses owing to the nature and discreet circumstances under which service take place pertinent introduced a proviso to Section 124 to enable the trial court commit an accused person on the single identifying witnesses. This means that once the trial court is satisfied that the child testimony implicating the accused is cogent and credible there will be no need for corroboration. The case of *Mukunga v Republic 2002 2 EA 482* revolutionized the element of corroboration in sexual offences in Kenya where the court held as follows:

***“The requirement for corroboration in sexual offences affecting adult woman and girls is unconstitutional to the extent that the requirement is against them to a woman or girls and is an infringement of Section 82 of the constitution of Kenya (read Article 27 of our current constitution of freedom from discretion and equality before the law) Decisions which held that corroboration is essential in sexual offences before a conviction are no longer good law as they conflict with Section 82 (read Article 27 of the constitution 2010).*”**

The duty of the trial court is to provide reasons and the basis of convicting the accused on uncorroborated evidence of the victim of sexual assault. The legal principle on this issue was succinctly state in the case of *Chila v republic 1967 EA 722-723* as follows:

“The judge should warn himself of the danger of relying on uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, that the conviction will honestly be set aside unless court is satisfied that there has been no failure of justice”

With regard to the scope of this appeal on analysis of the material evidence and the surrounding circumstances it reveals. Under the element on penetration the prosecution adduced evidence of Pw1 who gave an explanation of the incident, the location and the time where it took place.

Pw2 the father to Pw1 who was at his shop expecting Pw1 to take a spotlight to him from the house learnt that Pw1 was not at home. He had also not arrived at the shop. Pw2 testified that as they began to search the whereabouts of the complainant, the appellant emerged in company of Pw1 at about 11.00 pm. This caused suspicion to Pw2 upon observing his son Pw1 who appeared to be in a distress traumatic condition. In Pw1 evidence he stated to have been confronted by the appellant on his way to Pw2 shop to a nearby river and defiled through the anus. Pw5 who presented the P3 form and post rape form testified that on examination of the complainant Pw1 it positively indicated that he had a tear, injury to the outer anal presence of blood and tenderness. His evidence on medical examination concluded that the anus had been penetrated. The evidence from Pw1 was received and admitted as unsworn pursuant to Section 19 of the statutory oaths Act. The learned trial magistrate conducted a voire dire examination which placed the child in a category or witnesses who do not understand the nature of an oath or being possessed of knowledge to speak the truth. However, the evidence so received by the trial court was tested by the appellant through a rigorous cross-examination.

The appellant had a chance to cross examine the complainant as to the explanation given on how he was taken to a river by the appellant and defiled. Having considered and tested as required the testimony of Pw1, Pw2 and Pw5 on both direct and circumstantial evidence on penetration, it safely points to prove that the complainant anal canal suffered penetration. The reference of penetration in the definition under Section 2 of the Act on general Organ includes anus. I have carefully looked at this element and evidence by the state in support together with the defence by the appellant. I hold the view that not duly the prosecution evidence availed the key witness to the sexual assault but the subsequent testimonies of pw2, Pw3 and Pw5 corroborated the direct evidence of the complainant Pw1. I therefore find that looking at this ground from both sides it lacks merit to persuade this court to vitiate the appeal against the appellant. The appellant counsel identified certain inconsistencies and contradictions in the testimony of PW1, Pw2, Pw3 and Pw5. There is evidence in record that the complainant was sexually assaulted. The first respondent to the incident was his own father Pw2. It was during the search of Pw1 who was reported missing by his mother that brought the appellant in the matter. Pw2 stated to have the appellant when the complainant at about 11.00 p.m on the same day he was reported missing. The appellant complaints on contradictions and inconsistencies can be answered by holding in the case of *Twelangave Alfred v. Uganda CR. Appeal No. 139 of 2003 UGCA* where the court held:

“With regard to contradictions in the prosecution case, the law is set out in numerous authorities is that grave contradictions unless satisfactorily explained well usually by not necessarily lead to the evidence of a witness being referred. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case”

It is obvious from the above legal principles that the submissions on this issue by the appellant did not rise up to the threshold of grave inconsistencies. But even if I was to go along with Mr. Nairi submissions I would still retain the position that the contradictions and inconsistencies alluded to were of a minor incident that did not affect the substantial and probative value of the evidence of the witnesses. I agree with the submissions by Mr. Meroka on this issue that the state adduced sufficient evidence to proof penetration. This in line with the legal proposition in the case of *Anil v. Republic 2012 EKLR* where the court held:

“The fact of rape or defilement is not proved by way of DNA test but by way of evidence to give meaning to this essential ingredient in sexual assault offences the same court in Kassim Ali v Republic Cr. Appeal No. 84 of 2005 stated: The absence of medical evidence to support the fact of rape or defilement is not decisive as the fact of rape or defilement can be proved by the oral evidence of a victim of rape or defilement based on circumstantial evidence”

Secondly, on the issue of age the prosecution presented the crucial evidence from Pw1 the complainant, Pw2 the father to Pw1 and medical assessment report on age confirming Pw1 to be 6-7 years old. In essence the prosecution is required to proof either the child indeed was defiled is of a tender age or below the age of maturity. That is very crucial because of the provisions under the sexual offence act, which anchor the nature of sentence with the age of the victim. It therefore comes as of necessity to decide on the appropriate sentence of the

offender. In the offence of defilement parliament while enacting the legislature indeed in respect of sexual offences involving children brutally used the language of shall and mandatory minimum sentences. If the victim is below a certain age bracket like in the instant appeal the person accused of having carnal knowledge shall be sentenced to life imprisonment. I am satisfied from the record that the prosecution led sufficient evidence on this initial ingredient on the age of the victim Pw1.

In the light of the evidence I believe the trial magistrate was cognizant of the provisions of Section 124 of the evidence Act where the requirement for corroboration in sexual offences affecting children and women was hitherto complained under the proviso of the same Section. To this extent the trial court has only duty to evaluate the evidence adduced by the victim of sexual assault and case his or her decision on the veracity, credibility and reliability to the narration by the witness.

In this appeal the evidence starting from the complainant Pw1, Pw2 and Pw5 lays bare as a whole presence of corroboration against the appellant. On medical report the supreme court of Uganda in the case of *Bassira Hussein v Uganda, Criminal Appeal No. 35 of 1995* held inter alia:

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims own evidence and corroboration by the medical or other evidence: ……………”

The third element to be proven is that of placing the appellant at the scene. The law on recognition was laid down in *Anjoroni v Republic 1980 KLR 59* where the court held:

“Recognition of an assailant is mere satisfactory, mere assenting, and mere variable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other”

The identity of the person who defiled the complainant on 29th August, 2014 is reasonably found in her own testimony and that of her father Pw2. The record before me shows that Pw2 while on a search of the complainant came into contact of the appellant in company of Pw1.

It is pertinent to consider the evidence of the complainant who left the house to take a spotlight to the shop where Pw2 was waiting for it. Before Pw1 arrived at the shop of Pw2 he states to have been kind of kidnapped by the appellant and taken to a location deserted at a river where the defilement occurred. The sequence of events as narrated by Pw1 was that after accomplishing his mission, the appellant took back to the shop to buy for him ‘Ngumu’. Apparently, from Pw2 testimony that is when he met the appellant while searching for his son within the neighbourhood as adduced by the police Pw3. The circumstances in which Pw2 found and observed the complainant painted a picture of someone who had been traumatized because he was in panic mode and not able to talk. This was the trigger which led Pw2 to report the matter to the police and have Pw1 examined by a medical doctor to alleviate any fears of trauma.

The appellant on his part raised an alibi defence to the testimony of Pw1 and Pw2 indicating that at the prescribed time he was at his place of work. In defending this issue, I bear in mind that the appellant has no burden to prove his guilty as regards the offence of defilement against the complainant. The position in law on alibi is well settled way back in 1986 in *Sekitoleko v Uganda 1986 EA 531* where the court stated:

“It is not the duty of accused person to prove his alibi, it is up to the prosecution to destroy it by putting the accused person squarely at the scene of the crime and thereby proving that he is the one who committed the crime”

The defence of alibi in which an accused person relies on must indicate and specify the place at which he claims he was at the time the prosecution alleges he was at the scene. In my view proper disclosure of an alibi has to have two dimensions that is adequately and deception of the characteristics of the alibi and timeliness when it is raised by the defendant (accused).

It is important that courts guard against belated alibis only put together at the time of adducing evidence for the defence. However, the cogency of an alibi defence is not vitiated for reason that it was disclosed at the last minute when the accused took the witness stand.

In the instant appeal the evidence adduced by Pw1 indicates that he was defiled by the appellant who later was escorting him to the shop to buy him some sweets (Ngumu). Further the state had credible evidence of Pw2 who while moving around to find the whereabouts of the complainant he met him with the appellant. The overwhelming evidence as to the location and time Pw2 found the appellant with Pw1 rebuts the defence of alibi in respect of the offence. The alibi defence offered by the appellant when analyzed together with the evidence by the prosecution to me did not negatively impact the state case that he was somewhere else at the time the crime was committed. I am therefore satisfied that the defence of alibi as reported by the trial court as raised in this appeal lacks merit.

The last ground of importance to the appellant was non-compliance with Section 169(1) of the criminal procedure code. For one to appreciate the point of view being ventilated in this appeal it is worthwhile to restate the provisions in question. Under Section 169(1) of the Code it provides as follows:

“Every judgement shall except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it. In the case of a conviction, the judgement shall specify the offence grounds, and the Section of the Penal Code or other law under which the accused person is convicted, and the punishment to which he is sentenced in the case of an acquittal, the judgement shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty”

The complaint by which the appellant in regard to this provisions was that of the failure by the learned trial magistrate to comply with the mandatory elements of the Section while delivering his judgement.

In an elaborate reference towards decisions and legal text learned Judge and Author Kiage JA in his book Essentials of Criminal Procedure in Kenya Report 2012 Law Africa at Page 174 it is stated as follows:

1. **The judgement should contain a brief statement of the offence with which the accused is charged. Abbreviations should not be used. The opening paragraph should contain an accurate statement of precisely what offence the accused person is alleged to have committed.**
2. **It should contain a summary of the evidence of the prosecution. This should be in narrative form.**
3. **The judgement should contain a summary of the defence case. It should be clear where the defence case differs from that of the prosecution. The Magistrate must refer to the contested and uncontested elements of the charge. In *Okeithi Okale v Republic*, it was held that failure by a judge to consider the case for the defence constitutes a breach of the rules of natural justice and therefore sufficient to unsettle the judgement.**
4. **It should also contain the points of determination. Having related both sides of the case, the magistrate casts aside irrelevant considerations and goes to the crux of the matter. He must appreciate and evaluate the evidence.**
5. **Having made clear exactly what has to be decided, the magistrate then makes his decision, immediately followed by the reasons therefor. He can make reference to the demeanor of a witness and the manner in which a witness gave evidence if there is anything to be deduced from this.**
6. **A separate paragraph may be necessary in the judgment if there are some unusual features of evidence, procedure or criminal law that may have arisen in the course of the trial.**
7. **To allay all doubts, the concluding paragraph should contain a single sentence clearly stating whether the accused is found guilty and convicted or not guilty and acquitted of the offence with which he is charge.**

Pertaining to this ground all that Section 169(1) of the Code requires is a concise statement of the case for the prosecution and the defence. It is not a reproduction of the evidence on account of the evidence the trial judge should then proceed to set out issues arising from the case to incorporate the reasons for his or her decision.

The critical question is whether in making the informed judgement the trial magistrate appreciated the provisions of Section 169 of the Criminal Procedure Code.

In this appeal a reading of the lower court judgement provides insights that the learned trial magistrate set out the brief faces, evidence and reasons for determination giving rise to the decision. What the learned trial magistrate failed to do was to state the Section of the offence upon which the findings against the appellant were made on a verdict of guilty and conviction.

In terms of Section 215 of the Criminal Procedure Code in framing the decision it is of importance, the nature of the offence and ultimate appropriate section be clearly set out. In my view Section 215 of the Criminal Procedure Code under which the accused is to be convicted and sentenced does not take away the framing of the charge and the section of the offence material to the decision.

I have evaluated the impugned judgement in the context of Section 169 of the Criminal Procedure Code despite the omissions in reference to the actual section and the offence not provided by the trial court the irregularities are curable under Section 382 of the Criminal Procure Code. I find it unsafe to allow the appeal and set aside the conviction and sentence passed by the trial court because by that error there has been no failure of justice.

Taking all the facts into account, I find no reason to interfere with the findings and reasoning by the trial magistrate with regard to the judgement dated 31st March, 2016 on conviction and sentence against the appellant. The appeal is therefore disallowed.

Dated, signed and delivered in open court at Kajiado this 8th day of October, 2018.

.....

R. NYAKUNDI

JUDGE

In presence of:

Mr. Nairi for the appellant

Mr. Meroka for the DPP