REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 1 OF 2016

(CORAM: J.A. MAKAU – J)

MAURICE O. WANGAROU ……..……. APPLICANT

VERSUS

REPUBLIC …… RESPONDENT

(Being an appeal against both the conviction and the sentence dated 23rd December, 2015, in Criminal Case No. 77 of 2015 in UKWALA Law Court before Hon. R.M. OANDA – S.R.M.)

JUDGMENT

1. The Appellant **MAURICE OUMA WAKANGARUO** was charged with the offence of **defilement contrary** to **Section 8 (1) (4) of the Sexual Offences Act No. 3 of 2006.** The particulars of the offence are that on the 4th day of February, 2015 in Ugunja district within Siaya County, intentionally caused his penis to penetrate the vagina of MWO a child aged 16 years.

2. The Appellant was tried, found guilty, convicted and sentenced to serve 15 years imprisonment.

3. The Appellant aggrieved by conviction and sentence preferred this appeal setting out the following supplementary grounds of appeal:-

(a) That his fundamental rights and freedoms were violated under the provisions of the law.

(b) That the prosecution case was riddled with contradictions and inconsistences.

(c) That the Appellant's defence was not considered.

(d) That the prosecution did not prove their case to the required standards.

4. I am first appellate court and I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I had no opportunity to see and hear the witnesses and so I cannot comment on their demeanour. I have drawn my conclusions after due allowance. I am guided by the case of **Kiilu and Another V. R (2005) 1 KLR 174** where the court of Appeal held thus:

"an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own

conclusions."

It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding 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."

5. At the hearing of the appeal the appellant appeared in person and the whereas M/s. Mourine Odumba, Learned State Counsel, appeared for the State.

6. The Appellant relied on his written submission urging that the complainant did not state that she was defiled by the appellant, that the day the complainant stated appellant defiled her he was at Nairobi and that his defence of alibi was not considered.

7. M/s. Mourine Odumba, Learned State Counsel, opposed the appeal in its entirety urging the prosecution proved the ingredients of the offence of defilement, thus penetration, age of the victim, and identification of the assailant. She urged the appellant's defence of alibi was an afterthought as it was not raised early enough and was only raised during the time of the defence. She urged the conviction and sentence was proper and prayed that the appeal be dismissed.

8. The facts of the prosecution case are as follows:- MWO a student at [Particulars Withheld] Secondary School, in form III was on 4.2.2015 send home as she had lost a school text book, on arrival at home she changed the school uniform and her mother gave her KSh.750/= to go and purchase the school text book. On her way to Ugunja she met the appellant, who offered her a lift on his motorcycle and on arrival at Ugjunja he offered to buy her a soda. The appellant ordered Fanta (soft drink) for the complainant and also gave her KShs.100/= to pay for the soda. That after paying the complainant came back and took the soda. That after taking the soda the complainant did not know what followed, but found herself at Sigomere in a room and could not tell how she got there. That when she woke up she found KShs.50/= beside the bed. She noted that she was bleeding from her private parts. She wiped herself with a tissue paper and took a motorcycle home. She did not tell anyone, as she was afraid. That on the following day 9.2.2015 she went to school and met the appellant who threatened her, that if she revealed the matter to anyone her family and herself would be in trouble. That the bleeding took some days, she got sick and had to be rushed to a dispensary at Rambula. Later while in class she fainted twice. She was taken to the hospital and then she informed her aunt what had happened. The complainant fainted in court and had to be taken to the hospital again. That the matter happened again before court on 11.3.2015. The complainant aunt on receiving full information from the complainant reported the matter to Ugunja Police Station. Complainant recorded her statement. She was examined at Ambira hospital, and P3 form filled. She stated that she is now 16 years old, as she was born in 1998 on a date and month of birth she did not know. PW1 identified her birth certificate MFI-P2 indicating she was born on 10.1998. PW1 stated her perpetrator is the accused in the Court who was known to her as he was a family friend and a customer who used to buy Napier grass for PW1's family home. The Appellant was subsequently arrested and charged with this offence.

9. The Appellant gave unsworn statement denying the offence and giving a defence of alibi urging that on 2nd February 2015, he had gone to Nairobi, returning on 5.2.2015. He produced bus fare receipt Exhibit P.1. and urging he had a dispute with PW2.

10. The Appellant in this Appeal contends that his constitutional rights were violated in that the charge sheet indicated the prosecutions had listed seven (7) witnesses, but during trial they only called Six (6) witnesses and the one who had not been called had also recorded his statement. That the failure to call that one intended witness prejudiced the Appellant's rights and breached his rights. The Appellant also urged that he was held in custody for 2 days without being taken to Court within 24 hours from the time of his arrest. That no reasons was given for the delay.

11. The issues coming from the above is **whether the Appellant had a fair trial and whether his Constitutional rights were violated by his failure to be arraigned in Court within the stipulated**

period of 24 hours from the time of arrest? Article 50 (2) of the Constitution 2010, provides:-

Section 50 (2) (a) (b) (c) (d) (e) (f) and (i) of the Constitution of Kenya 2010 provides:-

(2) Every accused person has the right to a fair trial, which includes the right—

(a) to be presumed innocent until the contrary is proved;

(b) to be informed of the charge, with sufficient detail to answer it;

(c) to have adequate time and facilities to prepare a defence;

(d) to a public trial before a court established under this Constitution;

(e) to have the trial begin and conclude without unreasonable delay;

(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(i) to remain silent, and not to testify during the proceedings;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

(k) to adduce and challenge evidence;

(l) to refuse to give self-incriminating evidence;

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

(n) not to be convicted for an act or omission that at the time it was committed or omitted was not —

(i) an offence in Kenya; or

(ii) a crime under international law;

(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

12. The Appellant has not mentioned any of the above rights having been violated in any way. The failure to call a certain witnesses in a case do not in my view amount to violation of any constitutional rights. Under **Section 143 of the Evidence Act it** is provided:

"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."

This therefore means it is at the discretion of the prosecution to call the witnesses who they deem fit and necessary in support of their case. The failure to call a particular witness where there is sufficient evidence from witnesses who have been called to sustain a conviction do not justify the drawing of an inference that the failure to call the witness was because the witness would not give a favourable evidence to the prosecution case and would prejudice their case. In this case the Appellant has not stated that the failure to call the witness was because his evidence was not favourable to the prosecution case and at any rate the Appellant who was represented by a Counsel did not apply for such witness to be summoned to give evidence on his behalf. I find that failure to call all prosecution witnesses listed in the charge sheet did not amount to a violation of the constitutional rights of the Appellant's rights to a fair trial.

13. **Whether the Appellant's Constitutional rights were violated by being detained for 2 days**? The Appellant was as per the charge sheet arrested on 21.2.2015 and arraigned before Court on 23.2.2015, thus after 2 days. **Article 49 (1) (f) (i) (ii) of the Constitution** provides:

"49. (1) An arrested person has the right —

(a) to be informed promptly, in language that the person understands, of—

(i) the reason for the arrest;

(ii) the right to remain silent; and

(iii) the consequences of not remaining silent;

(f) to be brought before a court as soon as reasonably possible, but not

later than—

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

14. I have checked on the 2015 calendar and it reveals that 21.2.2015 was on a Saturday, meaning that the 24 hours ended outside ordinary Court hours and a day that was not an ordinary court day and that the Appellant was arraigned before Court on the following Monday being an ordinary Court day and in compliance with **Article 49 (1) (f) (ii) of the Constitution.** I therefore find and hold that the Appellant's constitutional rights were not violated or breached as he urged. I find no merits in this ground of appeal.

15. **Whether the prosecution proved their case against the Appellant beyond any reasonable doubt?** The Appellant faced a charge of defilement. It is the duty of the prosecution to prove the three ingredients of an offence of defilement, thus, penetration, age of the victim and identification of the assailant. In this case the prosecution produced Birth Certificate of the complainant. PW1 identified her Birth Certificate MFI – P2 showing that she was born on 10.7.1998 and stated she was at the time of the commission of the offence aged 16 years. PW3 the Investigating Officer testified that his investigation revealed that PW1 was aged 16 years and produced her Birth Certificate as exhibit P2. On the issue of penetration PW1 testified that after the Appellant bought sodas for her and upon taking it she found herself at Sigomere in a room and could not tell how she got there. She woke up to find herself bleeding from her private parts. PW2 testified that PW1's aunt (PW5) after taking PW1 for counselling she reported back to her PW1 had been defiled by a person known to her. PW5 testified when PW1 opened up. She told her that on 4.2.2015 she had been defiled by the Appellant; who on 11.2.2015 threatened her against reporting the incident to anyone. PW6 a Clinical Officer at Ambira-Sub District Hospital who examined PW1 MWO aged 16 years on 21.2.2015, noted she had normal external genitalia with tender wall, hymen was non-intact and that there was forced earlier vaginal penetration. He filled the P3 form and post-rape care form. He produced the P3 form as exhibit P1 and post rape care form as exhibit P2. I have perused both exhibits and note that the complainant's hymen was not intact thus confirming there was penetration. PW1 stated the mattress on the bed, where she had been taken were soaked with blood. PW4 confirmed seeing the accused and a young girl going to the room hired by the appellant. PW3 testified that he visited the scene of the crime and recovered a mattress which had blood stains. He also went to the home of the Appellant and recorded the statement and stated that the Appellant was having the motor cycle which the Appellant used on the material day of the commission of the offence. He produced the mattress as exhibit P4, motor cycle as exhibit P5, Kitenge shirt exhibit P6. The evidence of PW3 and PW4 corroborated the evidence of PW1 as regards her being defiled at an hotel by the appellant.

16. On recognition of the Appellant, PW1 testified that the Appellant was well known to her and stated as follows:-

> ***"Accused is present in court. I am not confusing him with anybody else. He was a family friend and a customer who used to buy Napier grass from our home"***

PW1 stated further on the material date the Appellant gave her a lift to Ugunja, bought her soda and after taking it, she lost consciousness and later found herself bleeding in a lodging. The Appellant was therefore well known to the complainant and he was the last person to be with her before she was taken to lodging and defiled. PW1 gave the name of her assailant to PW3 and PW5. I therefore find that PW1 recognized her assailant the Appellant, who gave her lift, had conversations with him and even bought her soda. The offence was committed during day time and the complainant before she was given soda which caused her to become unconscious had placed the Appellant at the scene. I therefore find and hold

the prosecution proved all the ingredients of an offence of defilement. I find no merits on this ground of appeal.

17. **Whether the Appellant's defence was considered?** The appellant denied commission of the offence and gave a defence of alibi. The Appellant in his unsworn statement stated that he had gone to Nairobi on 2nd February 2015 and returned on 5th February 2015. He produced a receipt D1. The Appellant denied the offence, however he admitted that on 2.2.2015 he had gone to take measurements of a certain house within the family of the complainant and PW2 told him to stop working but he refused. He urged the case was brought up because of refusal to stop what he was doing. The trial Court considered the Appellant's defence and found the same to be an afterthought.

18. In a case where a defence of alibi is raised the accused person does not assume the burden of proving the defence of alibi. In criminal cases the burden lies squarely on the prosecution except in those cases where the Section creating the offences specifically places some evidential burden on the accused to establish a fact or rebut a presumption or prove a defence of an particular kind. It is the duty of the prosecution to disapprove of alibi defence an accused puts forward unless it appears to the court that the alibi cannot be sustained or was raised at a time which did not give room for the prosecution to check it out and disapprove it (**see Njuki and 4 Others V R (2002) 1KLR 771).**

19. I have very carefully perused the lower Court's proceedings and evaluated the Appellant's defence of alibi. The Appellant's defence is unsworn and could not be tested through cross examination. The unsworn testimony is no evidence as it cannot be tested through cross-examination. I note the Appellant did not during cross-examination of the prosecution witnesses and even the victim put forward his defence of alibi through cross-examination, but raised it in his unsworn testimony. It appears to me therefore the alibi cannot be sustained and was not raised at the time that could have given the prosecution room to check it out and futher more the Appellant gave unsworn statement which could not be challenged through cross-examination. The evidence of PW1 and PW4 put the Appellant at the scene of crime and they dislodged the Appellant's defence. I therefore find the Appellant's defence was considered and rightly rejected. I find the appellant's defence to be an afterthought and reject the same.

20. **The Upshot is that the appeal is without merits. I Accordingly uphold the conviction and confirm the sentence**.

DATED AT SIAYA THIS 25TH DAY OF JANAURY, 2017.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN PRESENCE OF:

APPELLANTS IN PERSON – PRESENT

M/S. ODUMBA FOR STATE.

C.A.

1. **Patience Beryl Ochieng**
2. **Leonida Atika**
3. **Sarah Ooro**

J. A. MAKAU

JUDGE