REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 14 OF 2017

C K G…..…..…….APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

(Appeal against Conviction and Sentence imposed in Othaya Criminal Case No. 496 of 2015 by Hon. B.M.Ekhubi, SRM on 7.3.17)

JUDGMENT

The Trial

The Appellant herein **C K G** has filed this appeal against conviction and sentence on a charge of defilement contrary to section 8(1) as read with Section 8(2) of the Sexual Offences Act. The particulars of the offence were that:-

> ***On 30.7.15 at about 17.00 hrs in Nyeri South Sub- County within Nyeri County intentionally caused his penis to penetrate the vagina of JWW a child aged 10 years***

The prosecution called a total of six (6) witnesses in support of their case. The complainant ***CWW*** said she was 10 years old and in class 2 at [particulars withheld] Primary School. She recalled that on the material date at about 5.00 pm; she was fetching firewood when appellant who had once visited her ailing uncle found her and defiled her. That she reported the matter to her teacher, Mrs. Kanyiri on 3.8.15 and was taken to hospital and later to Othaya Police Station where she reported the matter.

PW2 P K, a teacher at [particulars withheld] Primary School said she noticed complainant walking with difficulties on 3.8.15. That complainant said that she was having stomach ache was found to have been defiled when she was taken to hospital.

PW3 L W, complainant's mother told court that complainant was born on 15.3.05. She stated that she did not know complainant had been defiled until 3.8.15 when she was summoned to complainant's school. That complainant told her it was K that defiled her and she reported the matter to police and complainant was treated at Othaya Hospital and was issued with a P3 form.

PW4 Ian Ngumo, a clinical officer examined the complainant on 30.7.15 and produced her P3 form as PEXH. 1 which shows that complainant had an old hymen perforation with no tear or laceration. He confirmed that complainant was examined 3 days after the alleged defilement and it was hard to ascertain when the hymen was broken.

PW5 PC Florence Ngina, the investigating officer testified that after receiving information that appellant

had defiled the complainant; he caused him to be arrested and charged. She produced complainant's age assessment form PEXH. 4 which shows that she was between 8 to 10 years old.

PW6 CI Henry Simiyu recalled that on 4.8.15; he conducted an identification parade in which appellant was identified by the complainant as the person that defiled her. He produced the identification parade form as PEXH. 5. In cross-examination by Ms. Mwangi for the appellant, the witness confirmed that only the appellant was in school uniform when the parade was conduct.

At the close of the prosecution case, the appellant was ruled to have a case to answer and was placed on his defence. He gave sworn defence in which he denied the charges. He stated that he was at home when the alleged offence was committed and that he did not know the complainant before the date of his arrest. He also stated that he travelled to police station in the same vehicle with the complainant who later purported to identify him in an identification parade. DW2 Silas Kingori said he left school with the appellant at 5.00 pm on the material date and parted at about 5.50 pm when appellant reached his home which was near the school. DW3 Diana Wanjiku testified that appellant used to stay at her home and that on the material daye, he arrived home at about 6.00 pm and did not leave until the following morning when he went to school.

The learned trial magistrate considered the evidence, dismissed the defence and sentenced appellant to serve life imprisonment.

The appeal

Aggrieved by this decision, the appellant lodged the instant appeal. In his Amended Petition of Appeal filed on 13th April 2017, the appellant set out 4 grounds of appeal to wit:-

> ***1. The trial magistrate erred in law and fact by convicting the appellant on insufficient, inconsistent and contradictory evidence***
>
> ***2. The trial magistrate erred in law and fact in convicting the appellant when the provisions of Section 19(1) of the Oaths and Statutory Declarations Act were not complied with***
>
> ***3. The trial magistrate erred in law and fact in delivering a judgment that did not conform with section 124 of the Evidence Act***
>
> ***4. The trial magistrate lost direction in misdirecting himself on the test to be applied on the defence of alibi advanced by the appellant and his witnesses***

Mr. Kimani, learned counsel for the appellant faulted the trial magistrate for directing that complainant give sworn evidence without ascertain that she understood the meaning of an oath. He relied on ***HCCR.A 176/12 James Githiri Kiago v Republic***. He further submitted that complainant's evidence that she had been sent to collect firewood when she was defiled was full of contradictions and that the trial magistrate was faulted for not considering appellant's alibi. To this end, he relied on ***Geoffrey Maina Ndungu v Republic [2017] eKLR.*** It was further submitted that medical evidence was inconclusive since complainant who was examined 3 days after the alleged offence did not have any lacerations. It was additionally submitted that the trial court failed to comply with section 124 of the Evidence Act and to this end counsel cited ***Fuad Dumila Mohammed -V- Republic Criminal Appeal 210 of 2003 (Mombasa).***

Mr. Nyamache, learned counsel for the state submitted that court complied with Section 124 of the Evidence Act and found that the complainant was telling the truth. He also submitted that court conducted *voire dire* examination and found that complainant understood the importance of telling the truth. He additionally submitted that the evidence on record was consistent and that the medical evidence supported complainant's case that she had been defiled. It was further submitted that the alibi defence was considered and rejected on the basis that the prosecution had presented a strong case.

Analysis and Determination

This being a court of first appeal, I am guided by the ruling of the Court of Appeal in the case of ***OKENO VS. REPUBLIC [1972] E.A.32***. The trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and this court is in dealing with this appeal obligated to give allowance for that.

In dealing with this appeal, I will separately consider the grounds of appeal as follows:-

1. Section 19 of the Oath and Statutory Declaration Act and Section 124 of the Evidence Act

I have considered the provisions of **Section 124** of the Evidence Act Cap 80 Laws of Kenya which provides that:

> ***notwithstanding the provision of section 19 of the Oath and Statutory Declaration Act, where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in a proceeding against any person for an offence, the accused person shall not be liable to conviction of such evidence unless it is corroborated with other material therefore implicating him.***

Further; Section 124 of the Evidence Act Cap 80 Laws of Kenya provides that:

> ***Provided that in criminal cases involving a sexual 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.***
>
> ***In light of section 19 of the Oath and Statutory Declaration Act, if the court is receiving the evidence of a child of tender age, it must be of the opinion that she/he possessed of sufficient intelligence to understand the duty of speaking the truth. If such a child willfully gives false evidence on oath he/she will be guilty of perjury.***

In the *voire dire* of PW1, the trial court concluded that the child possessed sufficient intelligent to understand the importance of telling the truth and ruled that she gives evidence on oath. From the foregoing; I find that the trial magistrate complied with Section **19** of the **Oath and Statutory Declaration Act and Section 124** of the Evidence Act and did establish that the child understood the nature of an oath and duty of telling the truth.

2. Complainant's evidence

Complainant stated that she was defiled by appellant whom she had seen once when he had visited his sick uncle. She confirmed that she did not know appellant's name before she was defiled and that it was her uncle J M who told her that appellant was called K. She confirmed that her mother's cousin was also known as K.

Complainant first reported the incident to her teacher P K but did not disclose the name of the person that defiled her. Complainant did not tell her mother or her siblings what she alleged the appellant did to her. Indeed the mother confirmed before the trial court that she was summoned to complainant's school on 3.8.15 and it was then that complainant told her that he had been defiled by one K. From the evidence on record, it is apparent that the complainant did not know the person that defiled her until her uncle told her that it was K. This fact is reinforced by the fact that the investigating officer opted to conduct an identification parade but the parade was of no probative value since it was conducted after the complainant had had a chance to see appellant after his arrest. Complainant's uncle who is alleged to have told complainant that the name of the person that defiled her was called K was not called to confirm if appellant had indeed visited him and whether the complainant had had a chance to see him in order to recognize him as the one that defiled her. Failure to call complainant's uncle leads to adverse influence that his evidence would not have been unfavourable to the prosecution.

Complainant's evidence raises reasonable doubt as to the identity of the person that defiled her and such doubt ought to have been given to the appellant.

3. Was the defence considered?

On alibi evidence, the Court of Appeal in the case of ***Kiarie v Republic [1984] KLR*** held:-

> ***"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 a court a doubt that is not unreasonable. The judge had erred in accepting the trial magistrate's finding on the alibi because the finding was not supported by any reasons".***

The prosecution in the case before me did not apply to the court to obtain evidence for the purpose of rebutting the alibi of the appellant. This puts the case of the prosecution in doubt considering that the evidence tendered by complainant cannot be said to be overwhelming. I have considered the judgment of the trial court and I find that the appellant's defence of alibi was not appropriately considered. I am of the considered opinion that the learned trial magistrate ought to have given the appellant the benefit of the doubt.

Decision

In the end; I hereby reach a conclusion that the case against the appellant was not proved beyond any reasonable doubt rendering the conviction unsafe. Accordingly, the conviction is hereby quashed and the sentence set aside. The appellant is set at liberty unless otherwise lawfully held. It is hereby so ordered.

DATED THIS *13th* **DAY OF** *July***, 2017**

T. W. CHERERE

JUDGE

DELIVERED ON THIS 19TH DAY OF JULY 2017

BY: - Mshila

JUDGE

In the presence of-

Court Assistant -

Appellant -

For the State -