REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO.74 OF 2013

BETWEEN

FREDERICK ISIAHO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against both conviction and sentence in Hamisi CMCR. Case No.286 of 2011 delivered on 16/04/2013 by Hon. J.K Ngarngar SPM)

J U D G M E N T

Background

1. The appellant FREDRICK ISIAHO was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual offences Act No.3 of 2006 Laws of Kenya (the SOA).

2. The particulars of the offence are that on the 3rd day of July 2011 within Vihiga County the appellant intentionally caused his penis to penetrate the anus of VI a child aged 5 years.

3. The appellant pleaded not guilty to the charge and the case proceeded to full hearing. The prosecution called four (4) witnesses. The appellant gave an unsworn statement. He called no witnesses.

4. The trial Court after hearing both the prosecution and defence cases and after analysing the parties' submissions found that the prosecution had proved the charge against the appellant beyond reasonable doubt and accordingly convicted him and sentenced him to serve life imprisonment.

The Appeal

5. Being aggrieved by both conviction and sentence, the appellant brought this appeal which is premised on seven (7) grounds as per the Petition of appeal filed herein. The appellant faults the trial Magistrate's Court for relying on an inconclusive Medical report, for relying on hearsay evidence, for failing to consider the appellant's alibi defence; for failing to appreciate that a grudge existed between the complainant's family and that of the appellant; for failing to notice glaring contradictions in the prosecution's case, for failing to notice that crucial witnesses for the prosecution were not called and for generally failing to make a finding that the prosecution had not proved its case against the appellant beyond reasonable doubt. The appellant prays that the appeal be allowed the conviction quashed and the sentence set aside.

6. This being a first appeal, this Court is under a duty to reconsider and evaluate the evidence afresh with a view to determining whether the conclusions reached by the learned trial Magistrate can stand, only remembering that it does not have the opportunity of seeing and hearing the witnesses. See the case of **Okeno –vs Republic [1972] EA 32**. In the case of **Ngui –vs Republic [1984] KLR 729**, the Court of Appeal held that the reason why the first appellate Court must reconsider the evidence and evaluate it afresh is in order for the Court to satisfy itself that there was no failure of justice, and in this regard, the appellate Court must satisfy itself that there was sufficient evidence to support the conviction. Also generally see **Pandya vs Rex [1957] EA 336** and **Kariuki Karanja –vs Republic [1986] KLR 190**.

The Submissions

7. The appellant's written submissions are to the effect that the case against him was a fabrication. That the age of the complainant was not proved; that there was no medical evidence to support the alleged defilement of the complainant and that the complainant's mother's failure to appear in Court and testify was a big blow to the prosecution case, and that her failure to testify could only support the appellant's

contention that the prosecution's case was a lie and that the same should be rejected so that he is set free.

8. Mr. Omwenga, Prosecution Counsel in opposing the appeal submitted that the medical evidence was conclusive that the complainant had been defiled and that there was penetration. He also submitted that the appellant's alibi defence was clearly displaced by the strong evidence tendered by the prosecution that he was seen running away from the scene of crime. Counsel also submitted that the appellant's contention that there was a grudge between his family and the family of the complainant was an afterthought since it had been raised by the appellant only on appeal. Counsel urged this Court to dismiss the appeal on both conviction and sentence.

The Prosecution Case

9. The prosecution case was that at about 8.00p.m on 3rd July 2011, the complainant was in the house when he was defiled. It is not clear where the appellant came from or how he entered the house where the complainant was but it was stated that the complainant's mother had left him in the house and gone to the shops when the incident occurred. During the ordeal, the complainant screamed. The screams reached the ears of a neighbour who alerted Aggrey Kakai Luseno, PW1. Immediately, PW1 received the alert, he went out of his house which was only 3 metres away from where the incident was taking place. As he approached the door of that house the appellant came out naked, as he tried to flee. In the process, PW1 was knocked down. PW1 got up and went into the house where the complainant was found crying. PW1 and the complainant were joined by the child's mother and thereafter the incident was reported to the Assistant Chief, the Chief and later to Cheptulu Police Station. The appellant was chased by members of the public while the clothes he had abandoned in the house were recovered by the complainant's mother and subsequently handed over to No.64394 Police Constable Ali Kisiji of Cheptulu Police Station on 4th July 2011. PC Kisiji who testified as PW3 was the Investigating officer who after carrying out investigations into the incident charged the appellant. He produced as Pexhibits 1,2,3 and 4, a long trouser, a black T-shirt a black inner pant and a vest, being clothes allegedly left behind at the scene of crime when the appellant fled for his life.

10. Meantime, the complainant was taken to Friend's Hospital Kaimosi where he was examined and treated by Josephine Omanga a medical officer at the hospital who testified as PW4. PW4 stated that on examination of the complainant, she established that the complainant's anus was bruised and was looking reddish and swollen. There was dirt on both thighs. On examination of the complainant, he was found to be HIV positive. PW4 filled the P3 form for the complainant. The same was produced as PExhibit 5.

The Defence Case

11. At the close of the defence case, the trial Court found the appellant had a case to answer and put him on his defence. The appellant gave a brief unsworn statement in which he denied committing the offence. He stated that on 3rd July 2011 he arrived at his rural home from Mombasa and on 4th July he was arrested after rumours doing the rounds in the neighbourhood pointed a finger at him alleging that he had defiled the complainant. He said he saw the complainant in the cells at Cheptulu Police Station.

Determination

12. This Court has diligently gone through both the hand written and typed proceedings. There are many typographical errors noted which this Court has to clarify especially as to the date of the P3 form and that the appellant (according to the typed record) was found to be HIV positive. The position is that it is the child who was said to be HIV positive and not the appellant and the date of the P3 form is 4 th July 2011 and not 1st July 2011.

13. Having clarified those important points the pertinent issues raised by the appellant which this Court should determine are as follows:-

1. Whether the medical report relied upon by the trial Magistrate was inconclusive.

2. Whether the appellant was properly identified as the culprit in this case.

3. Whether there was a grudge between the appellant and the complainant.

4. Whether there were glaring contradictions in the evidence by the prosecution and whether prime prosecution witnesses had no concern with the case.

5. Whether there were sufficient grounds to warrant conviction namely whether the appellant was properly identified and whether there was penetration.

Issue One

14. This Court has already clarified and corrected the typographical errors in the typed proceedings. The date of the P3 Form is confirmed to be 4th July 2011. Secondly, it is the complainant who was found to be HIV positive. From the record, the appellant was not taken for any medical examinations and even if he had been taken for the examination, it could not be concluded that the complainant's positive HIV status was the work of the appellant in the absence of other evidence showing a history of sexual relationship between the appellant and the complainant over time. The only relevant piece of evidence from the P3 form is that the complainant was defiled by a person known to the complainant's mother. The complainant testified that he did not know the appellant before.

Issue Two

15. Out of the 4 prosecution witnesses, two of them are said to have been eye witnesses. PW1 responded to a distress call by the complainant

after he was notified by a neighbour that a child was being defiled. PW1 stated that as he approached the room where the complainant was, he saw the appellant running out naked.

The appellant pushed him and he (PW1) fell down. PW1 also stated that the appellant had a blue jeans trouser, a black shirt, black inner pant and a white vest. During cross examination, PW1 stated that there was darkness, though he said that he used a torch.

16. The issue of identification remains at the centre of any case where the prosecution case depends on the identification of an assailant by one or more witnesses. In the case of **Nzaro –vs Republic [1991] 2 KAR 212**, the Court of Appeal held, inter alia, that "before accepting visual identification as a basis for conviction the Court had a duty to warn itself of the inherit dangers of such evidence" and further that "a careful direction regarding the conditions prevailing at the time of the identification and the length of time for which the witness had the accused person under observation, together with the need to exclude the possibility of error, was essential". Also see **Republic –vs-Turnbull [1976] 3All ER 549**.

17. PW1 testified that he knew the appellant and that the clothes that the appellant left behind as he fled the scene were the same clothes PW1 had seen the appellant dressed in during the day. This is what PW1 stated in part of his evidence in cross examination.

> "You passed me as you escaped. I fell down in the process. There was darkness. I used my torch. I had also seen your clothes during the day."

And in re-examination, PW1 stated this:-

> "It was 8.00pm. I had a torch. Accused told him to stop. The door had been locked from outside. He broke and entered. I met the accused at the door as he was escaping. He was naked."

18. From the evidence on record, the only evidence on identification of the appellant is that of PW1. I am acutely aware of the dangers inherent in such evidence and as was held in the case of **Wendo – vs Rex (1953) 20 EACA 166,** evidence of a single witness linking the appellant to the offence must be handled with caution because such evidence can sometimes lead to miscarriage of justice.

19. I am satisfied from the evidence of PW1 that the identification of the appellant was not and is not in doubt. PW1 saw him face to face as he (appellant) came out of the house where the complainant was and had been defiled. The appellant was naked and PW1 shone his torch at the appellant and identified him. PW1 also identified the clothes left behind by the appellant as the very same clothes the appellant had been seen dressed in earlier in the day.

Issues Three and Four

20. The record is clear that the appellant did not raise the issue of there being a grudge between his family and the family of the complainant. I agree with respondents Counsel that this was an afterthought on the part of the appellant. I accordingly dismiss that ground of appeal.

21. Concerning issue number four, I do not find any merit in the appellant's complaint that there were glaring contradictions in the prosecution's case. The key witness in this case is PW1. His evidence, both in examination in chief and in cross examination and re-examination is that he met with the appellant escaped from the house where he had defiled the complainant. By the time the appellant knocked down PW1, PW1 had already shone his torch at the appellant. The issue of PW1 having identified the appellant was fortified by the fact that the appellant's clothes were right there in the house where the offence had been committed.

Issue Number 5

22. Having reached the conclusions above stated on issues 1 – 4, I have no doubt in my mind that there was sufficient evidence upon which the trial Court could found a conviction. I am of the same considered view and accordingly find no merit in the appellant's complaint.

Conclusion

23. In conclusion I am in agreement with Counsel for the prosecution that this appeal has no merit. The same is hereby dismissed on both conviction and sentence.

24. Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 7th day of September 2016.

RUTH N. SITATI

J U D G E

In the presence of:

present in court for Appellant

Mr. Ng’etich (present) for Respondent

Mr. Lagat Court Assistant