REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(CRIMINAL DIVISION)

CRIMINAL APPEAL NUMBER 315 OF 2012

AMOS KINYUA KUGI……APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

(Being an appeal from the judgment of the Hon. T. Murigi (Chief Magistrate)

in

The Chief Magistrate's Court Makadara Cr.Case No.3668 of 2010

Delivered on 21/8/12)

JUDGMENT

The appellant Amos Kinyua Kugi was charged with defilement of a child contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 28th day of September 2010 at Kayole Estate in Nairobi East District within Nairobi Area Province, unlawfully and intentionally committed an act which caused penetration with his penis into the vagina of H A a child aged 12 years.

He was charged in the alternative with an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 Of 2006 and the particulars were that on the 28th day of September 2010, at Kayole estate in Nairobi East District within Nairobi Area Province, unlawfully and intentionally had an indecent act with H A child aged 12 years by touching her private parts.

The appellant was convicted in the main charge and was sentenced to serve the minimum sentence of twenty years imprisonment.

He was dissatisfied with both the conviction and the sentence and submitted amended grounds of appeal which are condensed as follows;

a) That there was no positive identification

b) That the complainant's evidence lacked integrity,credibility and was contrary to Section 124 of The Evidence Act, Cap 80, Laws of Kenya.

c) That the learned magistrate relied on the prosecution'sevidence which was full of contradictions.

d) That a DNA test was never conducted to establish whether or not the appellant was the actual perpetrator of the offence contrary to Section 122 A (1), (2)(a) and (b) of the Penal Code, Cap 63, Laws of Kenya as read with Section 36(1) of The Sexual Offences Act No. 3 Of 2006.

e) That the prosecution did not prove its case beyond reasonable doubt.

f) That the learned magistrate rejected the appellant's defense.

The appellant relied on his submissions which were presented to court at the hearing of the appeal.

In summary, regarding the ground of identification, he submitted that PW3 did not have ample time to observe the suspect during the crime especially since the complainant had told the court that her neck was grabbed from behind by a man who she met on the road after which she lost consciousness.He submitted that the appellant did not inform the court the length of time during which she had the appellant under observation.He also submitted that since the complainant told court that she did not know him before the incident, it weakened the evidence of identification against him. He referred to the complainant's evidence where she stated that when she regained consciousness at the scene of the crime, she found the appellant naked, standing beside her and then raised an alarm which attracted people who chased and arrested him. In light of the same, the appellant submitted that there was no explanation given by the complainant as to whether he was chased naked or whether he wore his clothes before the chase by the members of the public. The appellant also referred to the evidence given by the complainant where she stated that she was threatened with a knife. He stated that no knife was found on his person nor recovered at the scene of crime.

The appellant submitted that the complainant did not inform the court whether she was the one who identified him to the members of the public who chased and arrested him.

He submitted that the complainant's mother, PW4 stated in her evidence that there was an eye witness by the name of Enock Musumba who was never called in court by the prosecution which he found to be prejudicial.

In his oral submissions, the appellant stated thatthere were contradictions in the evidence given by Pw3 and Pw4 in that Pw4 stated in her evidence that she found himdressed at the scene of the crime whereas PW3 testified that the appellant was naked.

He further stated that the trial court did not give regard to the fact that there was contradiction regarding the date of arrest and the date he was taken to hospital since the medical report from Maria Maternity & Nursing Home indicated that he was taken to the facility on 27/09/2010 whereas the charge sheet indicated that the offence was committed on 28/9/2010.

The state opposed the appeal.

Learned State Counsel M/S Ndombi submitted that the incident took place at 6:45 a.m. and that the appellant was positively identified. She submitted that the appellant attacked the complainant from behind. When she regained consciousness she found the appellant naked and was standing beside her. Learned state counsel submitted that PW5 produced an Immunization Card which indicated that the complainant was born on 5/10/1997 and that she was then 12 years. He further submitted that PW1, Doctor Thuo produced a medical report which was positive. In addition PW2 produced the P3 form which showed that Pw3 was strangled and that there was vaginal organ bleeding. Learned State Counsel submitted that PW4 confirmed having sent PW3 to buy *Mandazi*. She heard commotion going on outside and she found people giving first aid to her. In cross examination, she stated that Pw3 did not have her skirt and blouse on. Regarding the appellant's defense, the learned state counsel submitted that the same was considered and that the conviction and sentence was proper.

From the foregoing, I summarize the issues for determination to be;

a) Whether the appellant was properly identified as the culprit.

b) Whether the prosecution proved the offence of defilement as required by the law.

c) Whether the prosecution's evidence was corroborated.

d) Whether a DNA test was necessary to establish that the appellant committed the offence.

This being the first appellate court, it'sduty is to re-evaluate the evidence and come up with independent conclusions. See the case of **PANDYA V REPUBLIC [1957] E.A 336, RUWULLA V REPUBLIC [1957] EA 570, NJOROGE V REPUBLIC [1987] KLR 19,OKENO V REPUBLIC [1972 EA 32, KARUIKIKARANJA V REPUBLIC [1986] KLR 109.**

In total, prosecution had 5 witnesses.

PW1, Doctor David Thuoof Nairobi Women's Hospital produced the medical report of the complainant H A prepared by Doctor Liku on the 28thSeptember 2010. (It is noted that typed proceedings show the date as 28th September 2011). The same showed that the victim was born in 1997 and presented herself with a history of sexual assault.She had been referred to the facility from Kayole Hospital and she allegedshe had been assaulted by a person known to her at Kayole Maria Estate on the same date at 6:45 a.m. as she was on her way to the shop to buy mandazi. The perpetrator took her to a house under construction where he defiled her. On examination she was bleeding from her vagina and the valve was red. The hymen had been torn. HIV, pregnancy, syphilis and hepatitis tests were negative. The urine had no infection. Vaginal swab revealed blood and the conclusion diagnosis was defilement.

PW2, Doctor Z. Kamau testified that on 30th of September 2010(it is noted that typed proceedings show the date as 20th September 2010), he examined the complainant HAW with a history of defilement. She had been treated at Kayole Hospital and Nairobi Women's Hospital. She had scratches on her neck, her vagina was bleeding, her hymen was torn.The injuries were two days old and he assessed the degree of injury as harm.

On the same date he examined the appellant who had allegedly been subjected to mob justice. He had a stitched wound on the head which was caused by a blunt object; He had been treated at Maria Nursing Hospital. The male organ was normal. The injuries were two days old. He assessed the degree of injury as harm. He produced P3 forms in respect of both the complainant and the appellant.

PW3, H A W, the complaint, was then aged thirteen years old. After a voire dire examination, she gave asworn statement of evidence. She testified that she was born on 2nd August 1997 and lived with her mother I N. She was then in standard 7. Her testimony was that on the material date at about 6:45 a.m. her mother sent her to buy mandazi for breakfast before going to school. That is when she met a man who grabbed her neck from behind and strangulated her. As she tried to scream she lost consciousness. When she came to she found herself in a building underconstruction and the appellant was standing beside her naked. Her pants had been removed and thrown away. Her skirt had also been thrown away and was blood stained.She screamed and people headed to her call of distress who chased and arrested the appellant. The appellant was handed over to the police and PW3 was taken to MariaHospital from where she was referred to Kayole Hospital where she was treated and discharged. The police visited her and took her for further examination at Nairobi Women's Hospital. She wasalso examined by a police surgeon. She was issued with a P3 form and was given treatment notes atNairobi Women's Hospital. During the ordeal, she lost her pants, slippers, and Ksh. 100/=. She testified that the appellant was not known to her before the incident and that he accosted her with a small knife and threatened her with death if she raised alarm. She stated that she identified the appellant at the scene before he was arrested by the members of the public.

PW4, I N and the mother to Pw3 confirmed that Pw3 was born in 1997 and she identified her immunization card in proof thereof. She confirmed she had sent Pw3 to the shop to buy *mandazi* on the morning of 28thSeptember 2010 at about 6.00 a.m. with Ksh.100/=. After sometime she heard commotion outside and ongoing to check what was happening she found several women offering first aid to her daughter, PW3. The women told her that the appellant had been arrested while defiling her daughter. She found Pw3 naked. Members of the public helped to take her to hospital where she was treated and discharged. Thereafter police visited her and took her for further medical examination at the Nairobi Women's Hospital. She was issued with a P3 form which she identified in court. It was her further testimony that the appellant was not known to her although she learnt that he was her neighbour.

PW5, Police Constable Wilfred Makori of Kayole Police Station investigated the case. He summed up the evidence of Pw1, 2, 3 and 4 and in all respects corroborated the same.

After the testimonies of the five prosecution witnesses the court ruled that the appellant had a case to answer and he was put on his defence. He gave an unsworn statement of defence in which he denied having committedthe offence.He stated that he was arrested on 27/9/10 on suspicion of defiling the complainant. He stated that on the date of arrest he had gone to the bus stage to take a matatu to Umoja to repair a motor vehicle. He figured that he had forgotten the ignition keys and therefore decided to go back to his house to pick the keys. He passed through a short cut to save on time. He stated that he passed through an abandoned building where he met a person who attacked him and shouted**,"he is the one! He is the one!**"His neighbour went to the scene and told members of the public not to assault him.Hewas then taken to Maria Hospital where he was treated. He further stated that he was not given any medical documents but that the investigating officer later availed his treatment note dated 27/9/10 which was produced in court.

On the issue of identification, the only identifying witness was PW3, the complainant.Whereas the court is aware that where in a criminal case involving a sexual offence the only incriminating evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth. **See section 124 of the evidence act**. That being the case, the court must be satisfied that the child was clearly able to identify the assailant and did not mistake him for someone else.

To that effect, Pw3 the complainant stated in her evidencethat as she was going to the shop to buy *mandazi*, she met a man who on passing him grabbed her neck from behind and strangulated her. She stated that she tried to scream but she lost consciousness and thatshe did not know the attacker before the incident. Her evidence was that when she gained consciousness, the appellant was standing beside her naked and she raised an alarm which attracted members of the public who gave chase and arrested him.

PW4, the mother of pw3 in her evidence testified that on the material date, she was in the house when she heard commotion outside. She went outside the house where she found several women offering first aid to PW3. She stated that on enquiry, she was told the accused had been arrested while defiling PW3. She stated that the appellant was not known to her. During cross examination, she stated that she arrived at the scene soon after the incident andshe found PW3 unconscious. She stated that Pw3 regained consciousness at the hospital.

This creates a contrast between the evidence given by the two witnesses because whereas Pw3 stated that she regained consciousness at the scene, Pw4 stated that she regained consciousness at the hospital. This then leaves the court asking at what point the appellant was identified and who identified him to the arresting members of the public as the perpetrator of the offence.

Whereas **Section 143 Of The Evidence Act** states that "**no particular number of witnesses shall, in the absence of any provision of the law to the contrary, be required for the proof of any fact",** it was necessary that other witnesses who were at the scene testified as to how the appellant was arrested. They would have shed light on whether the appellant was arrested at the scene in action, or whether he was naked,or they gave him time to dress up, or it is the complainant who identified him to them.The

contradiction between the evidence of Pw3 and Pw4 weakensthe identification evidence of PW3 and since it is not the duty of the court to fill the gaps of the prosecution, in the instant case, the prosecution ought to have called one of the arresting members of the public to confirm that the appellant was the actual perpetrator of the offence as alleged.

In the case of **Bukenya and Others Vs Uganda Cr. Appeal No.68 Of 1972 EACA 549** court held that;

1) The prosecution must make available all witnesses to establish the truth, even if their evidence may be inconsistent.

2) When the evidence called is inadequate the court may infer that the evidence of uncalled witnesses would tend to be adverse to prosecution.

Further, the Court of Appeal in **Evans KaloCallos V Republic Criminal Appeal Number 360 of 2012,** held that:- "**the case of Bukenya and Others cited to us by counsel for the appellant stands for the proposition that though the prosecution has a discretion to decide who are the material witnesses and whom to call, there is a duty on the prosecution to call or make available all witnesses necessary to establish the truth even though their evidence may be inconsistent. The court itself has a duty to call any person whose evidence appears essential to the just decision of the case and if the prosecution calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled to draw an inference that the evidence of those witnesses, if called would have been or would have tended to be adverse to the prosecution."**

In my view then, the failure to call the crucial witnesses meant that the prosecution failed to demonstrate that the appellant is the man who actually grabbed her from the back and subsequently defiled her. It was not disclosed why those crucial witnesses were not called and as was held in the **Bukenyacase,** probably their evidence would have been adverse to the prosecution's case.

On whether the prosecution tendered sufficient evidence,it required to prove critical ingredients for the offense of defilement of the child in question, which are;

i. **That the victim was a child aged between twelve and fifteen years of age.**
ii. **That there was proof of penetration with the child victim.**
iii. **That it is the appellant who penetrated the victim.**

The first ingredient was proved and it was established that the complainant was born on 5/10/1997 as per her Immunization Card produced in court by Pw5, who was the investigating officer.

The second ingredient was proved by the medical examination report which was adduced by Pw1. In the report,it was stated that Pw3, the complainant had no underpants at the time of examination, she was bleeding from the vagina and the hymen had been torn. In cross examination, Pw1 stated that the redness of the vagina could have been caused by anything penetrative.

Regarding the third ingredient,the evidence of the complainant created gaps which did not answer questions such as, at what particular moment was the appellant identified and who identified him to the arresting persons? Since the only identification evidence available was that given by the complainant, yet at some point she lost consciousness after being grabbed bya man from behind, in the circumstances there was a possibility that she made a mistake by identifying the wrong person.

Whereas PW4, the mother of the complainant stated in cross examination that there was an eye witness by the name of Enock Musumba, that witness was never called in court to give evidence. She also stated that when she arrived at the scene of the incident she found the appellant arrested and the complainant being given first aid by the members of the public. She did not mention who did the arresting.

PW5, the investigation officer stated in his evidence that he was called at 7.00a.m.and informed that there was a girl who had been defiled next to Maria Hospital, Kayole. He and other officers proceeded to the

scene near the hospital where they found a crowd and the appellant had been detained at the hospital by members of the public. However, the members of public who arrested the appellant were not produced in court to give a proper account of the incident and also to inform the court of the actual purpose of the arrest.

I emphasize that the duty of proving a case is always on the prosecution and must do so beyond all reasonable doubts. This duty does not and can never shift on the accused. Although the appellant gave an unsworn statement of defense, whose veracity could not be tested, the facts of this case are that the prosecution did not discharge its burden.

Although I have found that the evidence against the appellant falls far short of proving the case to the required standard, it is important that I comment on the issue of the DNA test. The appellant submitted that he ought to have been taken for the test so that the prosecution would rule out that no otherperson other than himself defiled Pw3. Under **Section 36(1) of the Sexual Offenses Act No. 3 of 2006**, a forensic DNA test is not mandatory unless the court directs that the same be conducted where circumstances demand so. In the present case given the weak evidence on identification and the glaring contradictions on the evidence of Pw3 and 4 it is my view that a DNA test would have sufficed as a concrete hummer to nail the appellant. However this was not done and as earlier noted, doubts abounded as to whether it is indeed the appellant who committed that offense. There is no doubt that Pw3 was defiled in very unfortunate circumstances. This is a case which justice ought to be served particularly for the victim who was left injured and traumatized. It is also a situation which the court empathizes with but again justice must balance for all the parties.

For the foregoing reasons, I cast doubts whether the appellant committed the offense. In lieu thereof the prosecution failed to discharge its burden to the required standard. It is a case that was riddled with poor investigations where the police failed to put their minds into the nitty gritty aspects of investigations, ultimately rendering a fatal blow to their case.

In the result, this appeal must succeed. I quash the conviction, set aside the sentence and order that the appellant be and is hereby forthwith set free unless otherwise lawfully held.

DATED and **DELIVERED**at **NAIROBI** this 8th day of June 2015.

G.W.NGENYE – MACHARIA

JUDGE

In the presence of:-

1. The appellant in person.

2. M/s Nyauncho, for the respondent.