REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

HIGH COURT CRIMINAL APPEAL NO. 5 OF 2015

(CORAM: J. A. MAKAU – J.)

D O O ..... APPELLANT

VERSUS

REPUBLIC …..... RESPONDENT

***(Being an appeal against both the conviction and the sentence in Criminal Case No. 448 of 2014 in Ukwala Law Court before Hon. R.M. Oanda – AG. P.M.*)**

JUDGMENT

1. The appellant **D O O** was charged with an 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 25th day of December, 2013 at Sigomere Sub-location, East Uholo Location, Ugunja District, within Siaya County, intentionally caused his penis to penetrate the vagina of **M A O** a child aged 17 years. The appellant also faced an alternative charge of **Committing An Indecent Act With A Child Contrary To Section II(I) Of The Sexual Offences Act No. 3 of 2006.** The particulars are that on the same date at the same place the appellant intentionally touched the vagina of **M O O** a child aged 17 years with his penis.

2. The complainant **M A O** gave evidence as PW1. She testified that on 24th December 2013 she went for prayers at 8.00 p.m. that by then she was a student at [Particulars Withheld] High School in form 4. That they prayed and left prayers at about 1.00 a.m. and at the same time they found some people in the Church. That on their way they saw 2 people behind them, thus the accused and another. That on reaching at the shopping centre, a torch was shone behind them. That PW1 and her team started running as they were being chased. Some of her team mates branched leaving PW1 with V and B. That the accused beat Victor and all ran away leaving PW1. That PW1 was forced to remove her clothes. She was carried and forced to lie on the ground D removed her pant and his trouser threatening to cut PW1 with a knife that he had. He then raped PW1 while his accomplices held her throat. PW1 screamed and some people from a near by home came to her and took her home. PW1 thereafter reported at Sigomere Police Station and recorded her statement and proceeded to Ambira Hospital for treatment. PW1 produced P.3. form as MFIP1. She identified D as the accused in the dock, stating she used to see him at the shopping Centre.

3. **PW2 P A A** testified that on 24th December 2013 PW1 M had gone to pray at the Catholic Church. That at around 1.00 a.m. PW2 was called by her neighbours and on opening her door the neighbours told

her they had saved PW1 from defilement. PW2 testified PW1 knew one of the assailant. PW2 received PW1 and confirmed she had been defiled. PW2 reported the matter next day at the Police and P.3. was subsequently filled. PW2 testified D disappeared till 20th August 2014. PW2 identified the appellant in dock stating she knew him by appearance before the incident.

4. **PW3 B O O** testified that on 25.12.2013 they went for vigil in Church. That they passed by a bush when they were attacked by 5 people, amongst whom he knew D who hit him and slapped him. That Duncan remained with 1 girl they were with. PW3 went home and informed his parents and on returning back they found her with other women. PW3 later recorded his statement at Sigomere Police Station. He stated he was with V, J, G, M and others PW3 testified that M told him she was raped. PW3 testified he knew D as they learnt in the same school. On Cross- Examination PW3 stated when he was hit he ran away.

5. **PW4 V O O** testified that on 25.12.2013 that in company of his brother and J were leaving church at around 1.30 a.m. That there were 5 boys and one D slapped him and took his Ksh.200/=. He also beat B while armed with a knife and threatened to kill PW4. PW4 stated when he arrived home he had J was raped. That PW4 then went and informed Ja's father. PW4 and another boy went and found the girl with some women who were assisting her near a forest. They reported the matter at Sigomere Police Station. He testified they were with M who said she was raped. PW4 testified he saw the person raping M. He stated accused used to study at [Particulars Withheld] Primary School. On cross-examination PW4 testified appellant raped M and he saw him do so and he called J's workers.

6. **PW5 Howord Okeyo** testified that he is a Clinical Officer at Ambira Hospital.

1. That on 3.1.2014 he examined Millicent with notes from Sigomere Health Centre for post rape care. She had bruises on *labia majora* and lacerations in vaginal walls, which indicated penetration. He produced P.3. form as exhibit P1.

7. **PW6 No. 43479 Jeremiah Moru** testified that on 25.12.2013 he was at Sigomere Police Station when M reported with her mother that at about 1.30 a.m. she was from the church in company of B (PW3) and V (PW4) and on approaching Awanga Forest they were confronted by some men. She identified D who was armed with knife as he threatened her. He demanded that she removes her clothes, forced her to the ground and removed her pants and raped her while others strangled her. She screamed and others ran away leaving D behind. A person nearby came to her rescue and escorted her home. She later reported to police. PW6 investigated the matter, recorded statements and issued P.3. form. The accused meanwhile had gone to hiding resurfacing on 24th August 2014 and was arrested and charged with this offence. PW6 stated the complainant reported to Police in company of her mother. PW6 stated the complainant was 17 years by then and in [Particulars Withheld] Form 4. PW6 testified he never knew accused before but identifying him as the person in the dock. PW6 was recalled on a different date to produce complainant's Birth Certificate which he claimed was given to him by M A O. Birth Certificate was produced as exhibit P.2.

8. Upon the appellant being put on his defence he opted to give sworn testimony and opted to call no witness. The appellant testified that he recalled that he was at Kangawol Club where there was a disco, and not at the church upto 3.00 a.m. That on 24.8.2014 he went to shopping center to do shopping and then to a barber shop. That on the way home he was arrested and taken to Police Station and later charged before Court with this offence. During Cross-Examination the appellant testified he went to the disco on 24.12.2013. He testified he knew the complainant by appearance but not by name and that he did not see her on 24.12.2013, but on 25.12.2013, during day time. He denied having hidden himself and wondered why he was not arrested earlier on as he used to pass near the Police Station. He stated he did not go to the church on 25.12.2013.

9. The trial Court after consideration of the prosecution's case and defence convicted the appellant with the main count of defilement contrary to **Section 8(1) (4) of the Sexual Offenes Act No. 3 of 2006** and sentenced him to some fifteen (15) years imprisonment.

10. Aggrieved by both the conviction and sentence the appellant lodged this appeal relying on the amended grounds of Appeal thus:-

a) That the trial Magistrate erroneously convicted the appellant by failing to find that he was not accorded a fair trial as envisaged in Article 50(2)(j) of the constitution of Kenya.

b) That the learned Magistrate erred in law and fact to convict the appellant on the basis of recognition without considering that the incident occurred at night/darkness hence conditions were not favourable for proper identification.

c) That the alleged birth certificate produced in Court was tainted with doubts hence the age factor was not exhaustively established beyond reasonable doubts.

d) That the learned trial magistrate erroneously convicted the appellant without considering that there was an irregularity in the trial records hence the judgment should be null and void.

e) That the trial Magistrate erroneously convicted the appellant without complying with Section 329 of the C.P.C.

f) That the trial Magistrate erroneously convicted the appellant without complying with Section 107 of the evidence Act and Section 169 (1) of the C.P.C.

11. When the appeal came up for hearing the appellant presented his written submission of which he relied on entirely, adding that there was no evidence that the complainant had been to Sigomere Dispensary.

12. The State was represented by Mr. Ombati Learned State Counsel. The State strongly opposed the appeal. On fair trial under Article 50 (2) (j) of the constitution of Kenya 2010, he urged the constitution was complied with as the appellant was given an opportunity to cross-examination witnesses adding that the appellant has not stated what was not done in support of his claim that he did not have a fair trial. The learned Counsel urged that throughout the proceedings the appellant never raised the issue of not having been supplied with the witness statements hence the presumption is that he was throughout ready to proceed with the case. On issue of identification raised on ground number 2 of the appeal he submitted PW1 stated Duncan removed her pant. PW3 testified he saw Duncan who he knew as they had learned in the same school.

On ground No. 4 of the appeal on the heading of the judgment in a name of a different party he urged that it is not fatal to the case as that was a typographical error. On ground No. 5 in which the appellant claimed his defence was not considered, he urged the defence was analyzed and considered. He submitted the appellant was given fair hearing and elements required to be considered in writing judgment were taken into account. He prayed that the appeal be dismissed as the conviction was safe and sentence in accordance with the provision of the law.

13. I am aware I am the first appellate Court and as expected of me, I have subjected the entire evidence adduced before the lower Court to a fresh evaluation and analysis bearing in mind that I neither saw nor heard any of the witnesses and have given due allowance. I have drawn my own conclusion guided by the Court of Appeal in the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga V. Republic Criminal Case No. 272 of 2005** as follows:-

"In the same way, a Court hearing a first appeal (i.e. a first appellate Court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial Court had the advantage of seeing the witnesses and observing their demeanor and o the first appellate Court would give allowance of the same. There are now a myriad of case law on this but the well-known case of OKENO -V- REPUBLIC (1972) EA 32 will suffice. In this case, the predecessor of this Court stated:-

"The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilala M. Ruwala V. Republic [1957] E.A. 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate findings 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 (See Peters V. Sundays Post, [1958] E.A. 424)"

14. The Appellant under ground No. 1 of his appeal urged that the learned trial Magistrate erred in law and fact by proceeding to convict him without having accorded him a fair trial as envisaged in **Article 50 (2) (j) of the Constitution. Article 50 (2) (j) of the Constitution 2010** provides:

"50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body.

2. ***Every accused person has the right to a fair trial, which includes the right -***

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

15. Accordingly, the trial Court is under Constitutional duty to ensure an accused person has a fair trial. A fair trial is a Constitutional right for any accused person which is guaranteed by the constitution. The Court is also supposed to be impartial in determining dispute and ensure level playing ground is laid down before commencement of the trial for both the prosecution and the accused. The fair trial includes the right to be informed of the charge, with sufficient detail to answer it, to have adequate time and facilities to prepare a defence, to choose, and be represented by an advocate, and to be informed of this right promptly, to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence. To avoid such lapses by trial Court, it is important and desirable for trial Court to inform the accused of such rights and ensure the prosecution complies with the provisions of **Article 50** before trial commences. It is in my view not enough to enquire whether accused is ready without going further to establish that **Article 50 (2) (b) (c) (g) and (j)** has been complied with and the accused is informed of the charge with sufficient detail to answer it, I have adequate time and facilities to prepare a defence, choose and be represented by advocate and even if he cannot choose one to be informed of the this right promptly and lastly to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence. This in my understanding means before a matter proceeds to hearing the prosecution is supposed to give opening remarks in which it is supposed to state the nature of the offence and how they are going to prove the same, the kind of witnesses and number to be called so that the accused at least remains informed in advance of the evidence the prosecution intends to rely on and be furnished with witness statements. It is important for the trial Court to note prompt and fair trial may not be achieved if an accused is not supplied in advance with witness statements and adequate time and facilities to prepare defence. Preparation includes getting a legal opinion as well.

16. The Appellant in his submissions stated that he was not supplied with witnesses statements nor was he given time to prepare his defence. I have perused the Court proceedings and note from the record that the appellant was arrested on 24th August, 2014, arraigned before Court on 25th August, 2015 when plea was taken. That after plea taking the Court recorded:

"Court: Plea of not guilty entered.

Prosecution: 2 witness ready to proceed."

Accused – I am ready"

17. It is clear from the Court proceedings, that the proceedings commenced immediately after taking of

the plea. The appellant was not supplied with a copy of the charge sheet, witness statements, he was not given adequate time and facilities to prepare his defence. The record reveals the appellant's unpreparedness from the way he was unable to put question to prosecution witness. Starting with PW1, PW2, PW3, PW4, PW5 and PW6. This supports his contention that he was not supplied with witnesses statements nor given time to prepare for his defence.

18. For reasons I have stated herein above, I find the trial violated **Article 50 of the constitution of Kenya 2010**, thereby making the proceedings a mistrial. Accordingly, I quash the conviction and set aside the sentence. I will deal with the issue as to whether I should order a retrial after dealing with other grounds of appeal raised by the appellant.

19. The appellant's second ground of appeal is that the conditions at the material time of commission of the offence were not favourable for conducive identification/recognition of the culprits.

20. The conviction of the appellant was based on evidence of recognition by PW1, PW3, PW4 and report made to PW6. It is very important in my view when assessing the evidence of recognition of the attacker/attackers for the Court to examine the conditions of lighting at the time of the recognition is made and the duration of the offence and distance of the attacker from the complainant amongst other factors to satisfy oneself that the conditions that prevailed at the time were conducive for positive recognition of the culprit or culprits.

21. The Court of Appeal in several judgments have set out what one has to look for in such evidence. In the case of **Cleophas Otieno Wamunge V. Republic (1989) KLR** Courts stated as follows:-

"1. The evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger whenever the case against the defence depends wholly or to a great extend on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before conviction. The defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification were succinctly dated by Lord Widgey C.J. In the well-known case R. Vs. Turnbull [1976] 3 All E.A. 549 at Pg. 552 where he said "Recognition may be more reliable than identification go on stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

22. My observation is that PW1's evidence is that as they were leaving the church at 1.00 a.m. they saw 2 people behind them, thus the appellant and another. That at Otieno Awange forest they caught up with them. Accused beat Victor and he ran away leaving PW1 with the men. They carried her, fell her to the ground, removed her clothes, then removed her pant. The complainant in her evidence did not tell the Court how she was able to see the two persons who according to her evidence included D, the appellant. She did not state, whether at the scene of crime there was any lighting. She did not state the source of light if any which enabled her to see her assailants. PW3 and PW4 claimed they saw 5 attackers among who they knew D who hit them. That they went home and told their parents. This attack took place at night at a forested area. PW3 and PW4 did not state what enabled them to see and recognize the persons they saw at the material night. They did not mention that there was any source of light. PW1, PW3 and PW4 also claimed to have known the appellant before but they did not state in their evidence they recognized the appellant by his voice. The trial Court in its judgment stated:-

"They were able to recognize D since they studied with him at [Particulars Withheld] Primary School ------ from the evidence it shows that the assailant was DO and no other person."

23. I find that the trial Court failed to investigate the distance of where the source of lighting (if any) was as regards to the scene of the attack, its intensity and its relation to where the attacker was. In the instant case it is of great significance to note the offence took place at night and none of the prosecution witnesses mentioned there being any lighting. Had the trial Magistrate taken that into account she would

not have found that the assailants at the material night were recognized by PW1, PW3 and PW4. I find that the trial Court fell into an error, when it failed to investigate on the source of lighting, its intensity, place and distance from where the attack took place from source of lighting and whether lightings was sufficient to enable the complainant and witnesses to see and recognize the attackers.

24. I am therefore, not satisfied that the learned trial Magistrate carefully evaluated the complaint's evidence, that of PW3 and PW4 in regard to the conditions of the light and what it was that enabled them to make recognition of the attacker.

25. In the instant case upon evaluation of the prosecution evidence I have no doubt an offence of defilement was committed. The evidence of PW1, PW2, PW3, PW4, PW5 and PW6 all points to the charge of defilement. I therefore find it is doubtful who committed this offence, as the offence was committed at night and conditions were not favourable for correct, reliable and proper recognition for identification of the assailant. I therefore give the appellant the benefit of doubt.

26. The Appellant's ground of Appeal No. 3 is that the age of the complainant was not proved. He urged the Birth Certificate of the complainant produced by PW6 was tainted with doubt as it was not identified by PW1 nor her parents or guardian. PW1 in her evidence in chief did not state her age nor did she identify the Birth Certificate exhibit P1 produced by PW6. PW6 testified he got the Birth certificate from the complainant PW1. In cases of defilement age assessment and/or proof of age is of great importance as charges and sentences **under the sexual offences Act No. 3 of 2006** are based on the victims age. The prosecution should ensure always victim's age is stated in the charge sheet and proved by documentary evidence and oral evidence by the victim, her parents or guardian or medical document and investigating officer. In the instant case the complainant did not state her age and this can only be blamed on laxity or lack of experience on part of the prosecution. That it is important where Birth Certificate is to be produced to be identified by the victim or victim's parents or guardian, but failure to do so and upon production without objection by the accused or defence is not fatal to the prosecution case. I therefore find and hold the victim's age, was properly proved by production of Birth Certificate by investigating officer notwithstanding, the same having not been identified by the victim so long as all particulars thereto relate to the complainant.

27. The Appellant in ground 4 of the appeal urged that the charge sheet's, particulars of the offence, the person charged with offence is **D O O**, whereas the heading of the judgment the accused is **Zephania Onyango Okoth** who is different from **D O O**. He urged that error which occurred in exchanging the names is fatal and incurable under **Section 382 of C.P.C.** rendering the whole trial null and void. I have very carefully perused the copy of the charge sheet, the proceedings and the judgment. That other than the error of inserting a name different from that of the accused in the heading of the judgment, the particulars in the judgment are clear as to who the accused is and whose judgment it is. The judgment thereto relates to one D O O. What I have noted in inserting a name of a different person is nothing more than a typographical error. I find the error is not fatal as the same is curable by virtue of **Section 382 of the Criminal Procedure Code** which provides:-

"Section 382 Subject to the provisions herein before contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice: Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the Court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

28. The appellant in ground No 5 urged that the trial Court erred in failing to give him opportunity to mitigate in terms of **Section 323 of Criminal Procedure Code** which provides:

" Section 323. If the judge convicts the accused person, or if the accused person pleads guilty, the Registrar or other officer of the Court shall ask him whether he has anything to say why sentence

should not be passed upon him according to law, but the omission so to ask him shall have no effect on the validity of the proceedings."

29. I note from the record that the appellant was not given an opportunity to mitigate. That was an error on part of the trial Court, but the appellant was not prejudiced as the Court gave him the minimum mandatory sentence but had this Court given a sentence beyond the minimum sentence, I would have found the appellant to have been prejudiced. It is my view nevertheless even where the mandatory sentence is prescribed by law that the accused, should always be accorded an opportunity to mitigate as justice is not only supposed to be done but to be seen to be done.

30. The Appellant in ground No. 6 urged that the trial Court erred in law and failed in to give due consideration to his defence. The appellant gave a sworn defence. The Appellant denied having been at the scene of the crime on the day the said offence was allegedly committed. He said he was at Kongarol Club and not at the church upto 3.00 a.m. In essence the appellant was raising a defence of alibi. The general rule of law is that the burden of proving the guilt of an accused person beyond reasonable doubt never shifts whether the defence set up is one of alibi or not. Ordinarily, for one to avail himself of the defence of alibi, he should raise it at the earliest instance possible so that the prosecution can have an opportunity to rebut it. In the case of **Karanja V. R [1983] KLR 501.** The Court of Appeal held:

"That word "alibi" is a Latin word meaning "elsewhere" or "at another place." Therefore where an accused person alleged he was at a place other than where the offence was committed at the time when the offence was committed and hence cannot be guilty, then it can be said that the accused has set up an alibi. The appellant's story in this case did not amount to an "alibi' as it was mentioned in passing when giving evidence and furthermore, it was not raised at the earliest convenience, i.e. when he was initially charged."

31. I note from the trial Court's judgment the appellant's defence was put down in the judgment but other than that the trial Court did analyse and evaluate the same. I have however in this appeal evaluated and analyzed the appellant's defence therefore, I find he won't be prejudiced by failure of the trial Court to do so. The appellant's defence was not raised early enough through cross-examination but was mentioned for the first time in his defence. I therefore find the defence to be an after thought. That notwithstanding the accused is not under any obligation to prove his innocence as it is for the prosecution to prove accused's guilty beyond any reasonable doubt. The Prosecution through the evidence of PW1, PW3 and PW4 in view of the unfavorable conditions at the time of commission of the offence failed to place the accused person at the scene of the crime to the required standard in criminal cases thus beyond any reasonable doubt.

32. The last issue for consideration is whether I should order a retrial. That none of the parties in this appeal rooted for a retrial. The principle which should guide the Court in this issue is not new as it has been settled long time ago by Court of Appeal. In the case of **Bernard Lolimo Ekimat V. Republic Criminal Appeal No. 151 of 2004** (unreported) where the Court expressed itself thus:-

"The Principle that has been accepted to Courts is that each case must depend on the particulars facts and circumstance of that case but an order for retrial should only be made where interest of justice require it."

33. The Court emphasized further the principle by enumerating some specific consideration which a Court should take into account in deciding whether a retrial should be considered. They include a determination:-

(1) Whether a retrial may occasion injustice or prejudice to the Appellant.

(2) Whether it will accord prosecution an opportunity to fill up gaps in its evidence in the first trial, and

(3) Whether upon consideration of the admissible or potentially admissible evidence a

conviction may result.

34. The trial in this matter commenced in 2014 and witnesses are likely to be available. Having considered the prosecution's evidence and gaps in the prosecutions case in first trial and on consideration of admissible evidence a conviction may not result. Further more if a retrial is ordered it will occasion injustice or prejudice to the Appellant. I therefrom decline to order a retrial of the case.

35. Having analyzed all the evidence on record and having considered the grounds raised by the appellant and all submissions, I am of the firm view that the prosecution failed to adduce sufficient evidence to found a conviction. The conviction in this case is not well founded. I accordingly find merit in this appeal, I quash the conviction and set aside the sentence. The Appellant should be set at liberty unless he is otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 3RD DAY OF DECEMBER, 2015.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT THIS 3RD DAY OF DECEMBER, 2015.

In the presence of**:**

M/s. Odumba State Counsel: holding brief – present

Appellant – Present

Court Clerk – Kevin Odhiambo

Court Clerk – Mohammed Akideh

J. A. MAKAU

JUDGE