REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 25 OF 2013

E M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Sentence and Conviction of J.P. NANDI Senior Resident Magistrate Runyenjes in Criminal Case No. 85 of 2013 on 29th May, 2013)

J U D G M E N T

The appellant was convicted by Runyenjes Ag. Senior Resident Magistrate of the offence of defilement contrary to Section 8(1) of the Sexual Offences Act and sentenced to 20 years imprisonment. Being dissatisfied with the judgment, he lodged this appeal.

The petition of appeal contains five grounds which can be precisely stated:-

1. *That the prosecution's evidence was inconsistent and uncorroborated;*
2. *That the appellant was denied adequate time to prepare for his defence;*
3. *That the police refused to produce his defence witness who was remanded in custody;*
4. *That he was framed in this case by the complainant;*
5. *That his defence was disregarded without an explanation.*

The appeal was opposed by the Director of Public Prosecutions. Ms. Matere argued that there was sufficient corroboration of the complainant's evidence from PW2 and PW3 and by the medical evidence. The appellant was accorded a fair hearing and that his so called defence witness had been released from police custody by the time he applied for him to be produced. The prosecution proved the offence beyond reasonable doubt according to the State.

This being a first appeal, the duty of this court is to evaluate, re-assess and re-analyze the evidence on record and determine whether the conclusion reached by the trial court were correct. It was held in the case of

OKENO VS REPUBLIC [1972] EA 23:-

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vrs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vrs. Republic (1957) EA. 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 finding and conclusion; it must make its own findings and draw its own conclusions. Only then

can it decide whether the magistrate's 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 Vrs Sunday Post [1958] E.A 424."

The complainant PW1 testified that on the 5/2/2013 around 8.30 p.m he was at Runyenjes police station cells with other prisoners including the appellant and one C and G. The appellant instructed G and C to hold the complainant and remove his clothes. C complied with the instructions and the appellant proceeded to have anal knowledge with the complainant. The appellant penetrated the anal carnal of PW1 using his penis several times.

The following morning when cleaning up was being done the appellant threatened to stab the complainant with a knife if he dared return to the cells. This caused the complainant to attempt an escape but was arrested. He was escorted to Runyenjes District Hospital where he was treated and P3 form filled.

The evidence of PW2 and PW3 was that on the material evening they were at Runyenjes police station in the children cells sleeping. They saw one G and V hold the complainant and remove his clothes. The appellant then had anal knowledge with the complainant. In the morning, V went to fetch water for cleaning and he was threatened by the appellant not to return to the cells. The complainant attempted to escape but was arrested.

PC Serem Choge PW4 testified that on 6/2/2013 around 6.00 a.m he was on duty at Runyenjes police station when an alarm was raised due to an escape from custody by two juvenile prisoners. The escapees were pursued by officers from the station and arrested. The complainant was among them and he reported that he had been sodomized in the cells the night before his attempted escape. The appellant was in the same cell with the complainant and other juveniles. PW4 also received a report that two other juveniles had been sodomized a few days earlier. The officer escorted the complainant to hospital for treatment. PW5 a clinical officer attached Runyenjes District hospital examined the complainant and produced the P3 form containing his findings.

In his defence, the appellant denied the offence saying he had been framed because the complainant escaped from custody. The appellant complained that he was not given adequate time to prepare for his case.

The record shows that the witnesses in this case were children on transit to the court to attend their cases and had to be returned to the children Remand Home without delay. The prosecution made a request to the court to have the case heard on priority basis. The appellant did not object to the application which was allowed when asked to respond to the application he said:-

> *"I am ready to proceed with the case today without statements".*

Infact, the case did not commence on that day. The court adjourned to be heard in one week's time to give the police time to have the age assessment report of PW1 prepared. The court went further to order that the appellant be supplied with the witness statements. During the next hearing date on 15/2/2013 the age assessment report was ready. The appellant said before the first witness was called to give evidence:-

> *"I am ready to proceed."*

The two remaining witnesses testified on 18/3/2013 and on 25/3/2013. The appellant on both occasions expressed his readiness to proceed with the case.

The appellant gave his defence on 9/4/2013. The court had granted his request earlier and issued summons to his witnesses whom he said were in police custody. The witnesses were not available for bonding and when the court was informed, the appellant said:-

> *"If that is the position then I will close my case".*

It is therefore clear from the record that the accused was always ready to proceed during all the four hearing dates when the matter came up. He never at any one time asked for adjournment to prepare his case. When he was informed that his witnesses had long left police custody, he understood and said he would close his case. It was indeed his duty to get defence witnesses and not the responsibility of the police. The allegations that the appellant was not accorded a fair trial has no basis.

PW1 said it was the appellant who ordered two other boys to undress him which they did and that the appellant had canal knowledge of the appellant through his anus causing him to cry. This was done in presence of PW2 and PW3 who also testified in corroboration of PW1's evidence. The following morning PW1 was forced to escape from the police station due to threats made to him by the appellant that he would harm the complainant with a knife. PW3 testified that he saw the appellant giving the knife to his mother at the station. Medical evidence produced by PW5 was to the effect that the complainant had bruises in his anal carnal which were caused by an object inserted in the anus.

I have carefully perused the evidence of the complainant and that of the two key witnesses PW2 and PW3. Contrary to what the appellant alleges I do not find any inconsistencies. PW1 gave a detailed account on what happened to him in the children's cells at Runyenjes police station. He was undressed by two other prisoners on instructions of the appellant. The appellant then penetrated his anal carnal using his penis. This was in full view of the other children remandees in the cells. PW2 and PW3 were present and they testified on each and every detail of the incident corroborating the complainant's evidence. The evidence of defilement and threats made by the appellant to PW1 the following morning was also corroborated. The appellant may have wanted PW1 to leave the station so that he does not report the matter to the authorities. Unfortunately for him, PW1 escaped but was chased and arrested. This is when PW1 told of his shocking experience in the cells the previous night to PW4 leading to investigations.

There was sufficient medical evidence produced by PW5 that on examination he found PW1's anal carnal bruised. PW5 explained that this was evidence of penetration thus corroborating the evidence of PW1, PW2 and PW3. The complainant's age was assessed as 11-12 years and report produced in evidence. The age of the appellant was assessed as 18 years. The gender of the appellant in question and the complainant were not in question.

The defence of the appellant was just a mere denial and it was considered and rejected by the trial court in view of the overwhelming evidence of the prosecution. The appellant's allegation of framing the case was not backed by any evidence. It was a one sentence statement to the effect that he was framed because there were escapes from custody. Like the trial court, I find no substance in the defence and in my opinion it doe not diminish the strong and direct evidence of the prosecution.

I come to the conclusion that the case against the appellant was proved beyond any reasonable doubt. He was convicted on cogent evidence. The sentence meted out was lawful.

I find no merit in the appeal and I dismiss it accordingly. The conviction and the sentence are hereby upheld.

It is hereby so ordered.

DELIVERED, SIGNED AND DATED AT EMBU THIS 3RD DAY OF DECEMBER, 2014.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Matere for State

The Appellant

F. MUCHEMI

JUDGE