REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 134 OF 2009

JUSTIN NYAGA MUNGAI .. ...….....….....APPELLANT

VERSUS

REPUBLIC .....PROSECUTOR

From original conviction and sentence in Criminal Case No. 887 OF 2008 at Chief Magistrate's Court at Embu by Hon. F.W. MACHARIA – SRM on 1/7/2009

J U D G M E N T

JUSTIN NYAGA MUNGAI the Appellant herein was charged with the offence of Defilement of an imbecile contrary to section 7 of the Sexual Offences Act.

The particulars as stated in the charge sheet were as follows;

> **JUSTIN NYAGA MUNGAI: On the 19th day of June 2008, in Embu District of Eastern Province willfully and unlawfully had sexual intercourse with CK a child aged 15 years with mental disability.**

He also faced alternative count of **committing an indecent act with an imbecile contrary to section 7 of the Sexual Offences Amendment Act No.3 of 2006.**

The particulars as stated in the charge sheet were as follows;

> **JUSTIN NYAGA MUNGAI: On the 19th day of June 2008, in Embu District of Eastern Province committed an indecent act to CK a child aged 15 years with mental disability by touching her private parts.**

The matter proceeded to full hearing and the Appellant was convicted of the offence of defilement of an imbecile contrary to section 146 of the Penal Code and sentenced to ten (10) years imprisonment.

The Appellant being aggrieved by the Judgment filed this Appeal citing the following grounds;

1.That the learned trial Magistrate erred in both points of law and fact and misdirected himself by relying on the purported visual identification by PW1 and PW3 as a base to my conviction without first considering as to the following;

a. ***No descriptive evidence as to the identity of the alleged defiler by facial appearance was given to PW2 and PW4 by the above mentioned witnesses.***

b. ***Very crucial witnesses mentioned by PW2 i.e. Joy and Wanjiru/Mama Gathogo were never summoned to testify before the Court.***

c. ***Both parties (PW1 and PW3 and the alleged defiler) were strangers to each other.***
d. ***Identification by clothes is not an absolute prove to positive identification as people do dress alike.***
e. ***None of the alleged clothes were collected from the Appellant's house and tendered in evidence as a prove to their claim.***

f. ***That their identification evidence was mere dock identification as they were shown the Appellant upon his apprehension. NB: The Appellant wishes to rely on the case authorities of;***

SIMUYU & ANOTHER -VS- REPUBLIC [2005] KLR 192, WALTER AMOLO -VS- REPUBLIC [1988-1993] KAR 254, REGINA -VS- TURN BULL [1976] ALLER.

2) That the trial Magistrate erred in law and fact by relying on PW5's evidence (medical examination report) as a prove to penetration whereas his evidence was in contravention to section 77(1) (2) of the Evidence Act Cap. 80 Laws of Kenya hence inadmissible.

3) That the learned trial Magistrate erred in both law and fact and misdirected herself by convicting the Appellant on a defective charge by curing it in her Judgment whereas during the trial section 214 of the Criminal Procedure Code was not applied hence notapplicable on the Judgment delivery date thus causing gross miscarriage of justice. Further no medical evidence was tendered in evidence to prove that PW1 was an imbecile.

4) That the learned trial Magistrate erred in law and facts in failing to note and acknowledge that the proceedings in criminal case No.887 of 2008 were illegal, null and void as the Appellant's fundamental constitutional rights as enshrined by section 72(3) (b) of the repealed constitution as well as under section 36 of the Criminal Procedure Code. The Appellant's content the prosecution was manufacturing its evidence against him within the four (4) days incarceration.

5 That the learned trial Magistrate erred in law and facts by

passing a sentence of ten (10) years imprisonment not

supported by appropriate legal findings on the evidence

tendered before Court. The age of PW1 was not established.

The Prosecution case is that the Complainant was left by her mother locked up in the house on 19/6/2006. When the mother (PW2) returned she found PW1 having been defiled. PW1 is disabled in the legs and is an imbecile but the learned trial Magistrate said she understands and speaks well.

PW1 and her sister (PW3) did not know the man who entered the house and defiled PW1. But the description they gave was that the person was wearing a white T-shirt, white turban, black trouser and shoes. PW2 went around asking about a man wearing the clothes explained to her by the daughter (PW3). Finally they landed in the house of the Appellant. She was with PW4. The Appellant was then arrested. Dr. Mischeck Maina (PW5) produced the P3 on behalf of Dr. Salim. He confirmed that PW1 had been defiled. The Appellant in his unsworn statement of defence denied the charges. He stated that on 19/6/2008 he went to Gachoka to get his identity card, which was given to him at 4.30pm. He arrived in his house at Kimangaru at 6.30pm. He was arrested at 9.30pm and taken to Itabua police station. He produced his waiting card for the identification (DEXB1) which he had gone for at Gachoka. He indicated that at the time of the offence he was at the D.O's office.

When the Appeal came for hearing the Appellant presented the Court with written submissions. He has raised issues with identification and the production of the P3 form by one who was not its maker. He has

also raised issue with the provision of the law under which he was convicted. The learned State Counsel opposed the appeal saying the evidence was overwhelming.

This being a first appeal this Court is enjoined to re-evaluate and re-consider the evidence adduced and come to its own conclusion. I am minded to give an allowance for the fact that I did not see nor hear the witnesses. I stand guided by the Court of Appeal in the case of ***NGUI -V- REPUBLIC [1984]KLR 729*** where the Court stated as follows;

> ***"The first appellate Court must reconsider the evidence, evaluate it itself and draw its own conclusions in order to satisfy itself that there was no failure of justice, it is not sufficient for it to merely scrutinize the evidence to see if there was some evidence to support the trial Court's findings and conclusions".***

I have carefully considered the submissions by both the Appellant and the State. I have also re-evaluated the evidence adduced.

The Appellant has raised five (5) amended grounds of Appeal.I will combine ground 2 and 3. The evidence on record confirms that PW1 was paralysed (lame). The feet were weak. The doctor (PW5) said the paralysis was due to Meningitis. He did not state whether the girl had any mental retardation. And there was no report produced to confirm that she was an imbecile. Her physical challenge mentioned did not qualify her to be referred to as an imbecile. Secondly PW5 was not the Doctor who had examined the girl. There was no basis laid by the Prosecution for the production of the P3 by another witness other than the maker contrary to section 33 of the Evidence Act. The Appellant was also not given an opportunity to raise any objection he may have had to its production. This was unprocedural. Under ground four (4) he states that the proceedings were a nullity because he was kept in custody for more than 24 hours. The charge sheet shows he was arrested on 19/6/2008 and was arraigned in Court on 23/6/2008. There was no explanation sought from the Court over the delay. Yes it is true the case of ***ALBANUS MWASIA AND OTHERS*** held that such violation would lead to the case being a mistrial. But later jurisprudence calls upon the Court to consider all the circumstances of the case including the rights of the complainant. And also whether the Appellant can be compensated for the violation. The circumstances of this case are such that it would be an injustice to declare the trial a nullity just because the Appellant overstayed in Prison by four (4) days.

Although the Appellant was not charged under section 146 of the Penal Code, it was all clear from the charge, particulars and evidence that the charge that he faced was an offence under section 146 Penal Code and not section 7 of the Sexual Offences Act. The learned trial Magistrate after listening to all the evidence clearly indicated why she convicted him under the correct provision of the Law. The Appellant was not prejudiced. He knew the charge facing him. The sentence provided for under the law for this kind of offence is liable for imprisonment with hard labour for fourteen (14) years.

Even though the procedure in admitting the medical was not proper I do find that PW1 was actually defiled. The evidence by PW1 and PW2 is very clear on this. The next issue for determination is whether the Appellant is the person who committed this offence. And this brings me to the 1st ground of the Appeal which is identification. PW1, PW2 and PW3 had not known the Appellant before the date of offence. PW2 who went to look for the culprit was not present during the occurrence of the incident. PW2 says she locked PW1 in the house as she went to town. PW1 has also confirmed that her mother locked her in the house.

PW1 stated at page 8 line 11,

> ***"When I screamed, Joy, Mama Mercy and Mama Joy came.They entered through the window".***

It is not clear how entry was gained as PW2 indicated that the defiler entered the house through the door. How was this person identified? It is PW3 who gave the description of the clothes the person wore. She states at page 13 lines 17-18 to page 14 lines 1-3;

"My mother came and I told her that a man had come to our house.I had not seen him before. He was wearing a white T-shirt, white, turban and black trouser and shoes".

Armed with this description and the fact that the defiler had a bicycle with a crate of soda strapped against it, she went out to look for this man. This is what she says at page 10 lines 4 -18'

"I went in search of the man. I went to a neighbouring woman, Irene Njeri and asked if she had seen a man riding a bicycle and wore a white T-shirt and white turban. She told me she didn't. I went back to the house and I changed the clothes C was wearing and the beddings. I went out to look for a motor vehicle. On reaching in the shopping centre, I asked some people if they had seen a man with my description who was riding a bicycle with a crate, they told me he had just left but lived in Kimangaru plot. I met Wanjiru/Mama Gathogo and asked her if she had met the man whom I described to her, she said she had served the man whom she knew as the son of Githegi who had relocated to Kimangaru plot. I called my cousin and her child and we went to Kimangaru village elder and I reported that there was a man who had defiled my child. I told him I was informed that it was Githegi's son who lives on Kimangaru plot. The village elder told us that the son who lived there was Nyaga. We went to his house at around 7pm".

And this was how the Appellant was arrested by the village elder (PW4) and tied with a rope and taken through PW2's home where PW1 & PW3 said he was the defiler.

From the above narrative it is clear PW2 did not have the description of the person she was looking for. She was looking for any man riding a bicycle strapped with a crate and wearing a white T-shirt, white turban and shoes. Therefore any man she found wearing the above items and riding a bicycle would be the culprit. There is no evidence that when they arrested the Appellant any search was conducted for recovery of the white T-shirt, white Turban and the rest of those things. Its also not indicated that when he was arrested he was found in those clothes and turban. The woman at the market and Mama Gathogo did not give evidence on how and when they identified the Appellant. Joy, Mama Joy and Mama Mercy too did not testify as its said its them who rushed to rescue PW1. Did they even see the culprit?

After the arrest of the Appellant he was tied with a rope and taken to PW2's home where PW1 & PW3 identified him among several people. How many of these several people had been tied with ropes? The proper procedure would have been to take the Appellant to the police station and a proper identification parade conducted for PW1 and PW3 to identify him. PW2 and PW4 took the law into their own hands. How many people wear white T-shirts, white turbans and shoes and ride bicycles? There are many people who would go by this kind of description.

There is evidence that PW2 left PW1 at home at 12.30pm and she returned at 4pm. What time did this incident occur? PW3 came from school at 1pm and changed into home clothes. Its then that she saw the man who came to their house.I could take it that the incident may have occurred around 1.30pm-2pm. PW2 came home at 4pm, got the report and started the hunt. If indeed the Appellant was the culprit would he still be hanging around the vicinity? The Appellant in his defence stated that he was at Gachoka to pick his identity card when the incident is said to have occurred. He produced his identity waiting card No.2247387396 issued at No.3E2 Gachoka Division Mbeere District on 19/06/08. In her Judgment at page 35 lines 10 -17;

"I find that the defence statement of the accused was a mere denial. He said he was at Gachoka D.O.'s office when he was given an identity waiting card which he produced as an exhibit. The alleged date of commission of offence was 19/6/2008. The waiting card is dated 19/6/2008. Its however not indicated at what time it was issued. <u>The burden of proving time was on the accused. He did not avail any witness to confirm that the time alleged, he was at still at D.O's office</u>. There is a high possibility that he committed the offence on his way back".

The Appellant told the Court that at the time of the alleged offence he was at Gachoka to get his identity waiting card which he even produced as DEXB1 bearing the same date as the date of the offence. He had

therefore raised an *alibi*. It was wrong for the Court to expect him to prove the time he was at the D.O.'s. It was the duty of the Prosecution to squarely place him at the scene at the alleged time. Even the Prosecution witnesses did not state in their evidence the clear indications as to the time of the occurrence of the offence. The remarks by the learned trial Magistrate that the Appellant had the burden to prove that he was at the D.O's Gachoka when the offence occurred was a very serious misdirection. He had even produced an identity waiting card issued to him on that day. It was the burden of the Prosecution to disapprove his defence.

See 1. ***NJUGUNA -V- REPUBLIC [1988] KLR 708***

2. ***MOGERE -V- REPUBLIC [1993] KLR 443***

And in ***OSIWA -V- REPUBLIC [1989] KLR 470*** the Court of appeal had this to say on the issue of burden of proof;

> ***"The trial Magistrate had ignored the Appellant's defence of alibi and the High Court had erroneously shifted the burden of proving the alibi to the Appellant. An accused person who pleads an alibi assumes no burden to prove it".***

After evaluating the evidence as a whole I do find that the Appellant had not been properly identified as the person who was wearing a white T-shirt, white turban, sh6oes and riding a bicycle strapped with a crate of soda. The identification of the Appellant was tainted. Secondly his defence was not considered by the learned trial Magistrate who shifted the burden of proving his innocence to him. Ref: ***MWENDA -V- REPUBLIC [1989] KLR 464.*** I therefore find his conviction to be unsafe. The result is that the appeal is allowed and the conviction quashed and the sentence set aside.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 4TH DAY OF JULY 2013.

H.I. ONG'UDI

J U D G E

In the presence of;

M/s Ing'ahizu for State

Appellant

Njue – C/c