IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MAKHANDIA & KANTAI, JJ.A.)

CRIMINAL APPEAL NO. 121 OF 2019

BETWEEN

SAMUEL CHEGE KIHIKA ……. APPELLANT

AND

REPUBLIC ……..…..RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi (L.A. Achode, J.) dated 31st October, 2012.

in

HC. CR. A. No. 302 of 2010)

****

JUDGMENT OF THE COURT

This is a second appeal from the original conviction of the appellant, **Samuel Chege Kihika** by the Magistrate's court and confirmed by the High Court on first appeal. Our mandate in an appeal like this one is donated by **Section 361 (1) (a) Criminal Procedure Code**. We are to consider only issues of law if we find any in the appeal but not consider the facts of the case as found by the trial court and re-evaluated on first appeal as the two courts are required to do – See this Court's pronouncement in the case of **M'Irungi v Republic [1983] KLR 455** where it was stated:

> ***" ...where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and it should not interfere with the decision of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."***

We shall consider the record to satisfy ourselves whether the two said courts below carried out their mandates as required by law.

The appellant was charged before the Chief Magistrate's court at Thika on four counts each relating to the offence of "Unnatural Offence" contrary to **Section 162 (a)** of the **Penal Code.** Particulars in each count being that on 26th day of June, 2009; 27th June, 2009; 29th June 2009 and 1st July, 2009 at Jacaranda Estate in Thika he had carnal knowledge of **"SM"** against the order of nature. He denied all the counts and a trial was conducted by L. Wachira, Resident Magistrate. "SM" – (PW1 – the minor), a boy aged 7 years, testified how on the evening of 26th June, 2009, on his way home from school he met the appellant, a man he knew very well as a neighbour, who beckoned him and they went to his house. In his own words:

> ***"… He told me to remove the short. I removed. He took my short and then told me to get hold of the arm chair and bend with legs apart. He removed his thing for urinating and put in my buttocks. I felt pain …."***

Further, that this had happened before on 5 different occasions including a day when the minor was walking home after watching football and that on that occasion the appellant gave him Kshs.5 to buy a cake and warned him not to inform his mother about the incident. He named another occasion which took place on a Wednesday when he (the minor) had fetched water and the appellant took him to his house when sodomy took place on a chair. This time he was given a mango. This was the last time it happened and because he felt like crying, he decided to inform his mother who took him to a police station and then to hospital. According to the minor every time they went to the appellant's house:

> ***"… I did not find his wife or child. He has a child called Waweru…."***

The minor's mother, **("MWG" – PW2)** narrated how on a Wednesday evening when she had come from work she decided to give a pep-talk to her children on issues of sex and, while doing so she noticed that the minor was "shy". The minor informed her how the appellant had been molesting him and she decided to report the matter to the minor's teacher. The minor narrated to that teacher the various incidents that had happened and it was then decided to report the matter to the police leading to the appellant's arrest. PW2 confirmed that the appellant was their neighbour; that she and the minor visited Ruiru Health Centre where the minor was treated and a treatment card issued as was a P3 form.

PC Rosemary Makena of Ruiru Police Station received report of sodomy on 3rd July, 2009 and booked the same. She took statements and issued a P3 form and the next day arrested the appellant who was identified to her by the minor and his mother.

Dr. Jane Njoki Githuku of Ruiru Sub-District Hospital examined the minor and found grievous injury. The minor could not control stool; there was reduced sphincter and the anus was loose. She produced the P3 form and treatment note as exhibits.

That was the evidence put forth by the prosecution and, upon consideration, the trial Magistrate placed the appellant on his defence.

In sworn testimony the appellant denied each of the 4 counts narrating how on 26th June, 2009 he was at ACK Church, Kiambaa from 10 a.m. to 2.30 p.m. on the whole night of that day he was on guard duties. The next day of 27th June, 2009, he was at home and did not meet the minor. On 1st July, 2009, he was at work the whole day and produced a duty roaster to that effect. He confirmed that he knew the minor and his mother as his neighbours.

The appellant called 3 witnesses - **Simon Njoroge Ndungu (Ndungu), Jane Wangari Chege (Wangari)** and **Nelson Njenga (Njenga).** Ndungu was a Supervisor at a Coffee Research Foundation where the appellant worked as a guard. He stated that on 26th June, 2009 the appellant was on night shift; on 27th June, 2009 he was off-duty; on 29th June, 2009 he was on the day shift and on 1st July, 2009 he was on day shift.

In cross-examination he confirmed that the appellant had a house within the Foundation.

Wangari was the appellant's wife who denied that the appellant had committed the offences he faced in court.

Njenga was the appellant's brother and colleague (guard). He testified that they attended a family gathering on 27th June, 2009 which ended at 2 p.m.

At the close of the defence case the trial Magistrate evaluated the evidence tendered by both sides and in a Judgment delivered on 13th May, 2010 the Magistrate found that there was overwhelming evidence that the appellant committed the acts in question on several occasions, and convicted the appellant on Counts 1 and 4, finding that Counts 2 and 3 were not proved to the required standard. The appellant was sentenced to 10 years' imprisonment each of Count 1 and 4. The sentences were ordered to run consecutively.

L.A. Achode, J, heard the first appeal by the appellant in the High Court and in a Judgment delivered on 31st October, 2012 the learned Judge did not find any merit in the appeal which she dismissed. Those orders provoked this appeal which is premised on a homegrown "Grounds of Appeal" filed on 21st December, 2002. In sum, the appellant complains that the Judge did not re-evaluate the evidence as she was required to do; that the Judge should have found that the case was not proved to the required standard; that the Judge erred by:

> ***"… creating theories of his own while considering the evidence of my alibi defence failing to observe that pursuant to the provisions Section 169(1) of the C.P.C. he was duty bound to give his points of determination only."***

Finally, that the Judge should have found that the evidence was not enough to found a conviction.

Are there issues of law raised in this appeal calling for our consideration?

Whether or not the High Court on first appeal re-evaluated the evidence is an issue of law. So is the issue of alibi defence raised by the appellant. We shall consider both issues together.

We have perused the whole record. The learned Judge went through each part of the prosecution case and the defence case. The Judge found evidence tendered by the minor, his mother, the police officer and the doctor consistent and the minor had been taken through cross-examination but his testimony remained unshaken. Of the alibi defence the Judge considered that the appellant was off duty during the day on 26th June, 2009 and had a free day where he had opportunity to commit the offence. She made similar findings for the other days and in the end dismissed the alibi defence offered by the appellant.

Upon our consideration we are of the same view. There was cogent evidence that the appellant sodomized the minor on various occasions and in particular on 26th June, 2009 (Count 1) and 1st July, 2009 (Count 4) where he had the opportunity to do so. The minor identified the appellant, a neighbour, as the person who committed the acts. The Judge reached the correct findings. The appeal has no merit and it is hereby dismissed.

Dated and delivered at Nairobi this 24th day of July, 2020.

R.N. NAMBUYE

…….……..

JUDGE OF APPEAL

ASIKE-MAKHANDIA

……..……..

JUDGE OF APPEAL

S. ole KANTAI

……..……..

JUDGE OF APPEAL

I certify that this is a true

copy of the original

Signed

DEPUTY REGISTRAR