



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & SICHALE JJA)

CRIMINAL APPEAL NO. 11 OF 2018

BETWEEN

YUSUF SHIUNZI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Mombasa (Ongeri, J.) dated 27th February, 2017

in

HCCRA. NO. 143 OF 2016

JUDGMENT OF THE COURT

On 18th November 2016, **Yusuf Shiunzi Kunani**, the appellant herein was found guilty of the offence of defilement contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act**. The particulars of the charge were that between 4th November 2012 and 7th November 2012 at Mwembe Tayari Location of the then Mombasa district unlawfully and intentionally caused his penis to penetrate the vagina of **MN** a child aged 16 years. The sentence meted out to the appellant by **I. Ruguru, Esq.**, the then S.R.M Mombasa was 15 years. The appellant was dissatisfied with the outcome of the trial and filed an appeal at the High Court. On 27th February 2017 **Ongeri, J** dismissed the appellant's appeal.

Undeterred the appellant filed this appeal which came before us for hearing on 5th November 2018. Learned counsel **Mr. Hayanga** appearing for the appellant abandoned the appellant's homegrown grounds of appeal and relied on a memorandum of appeal filed on 12th March 2018 as well as supplementary grounds of appeal filed on 8th May 2018. However, in urging the appeal counsel abandoned all the grounds in the memorandum of appeal save grounds 1 and 2. These were that the appellate court failed to re-evaluate the evidence tendered in the trial court and secondly that the trial judge erred in placing the burden of proof of alibi on the appellant. On the supplementary grounds, only one ground was urged to the effect that the trial court and the 1st appellate court erred in admitting evidence of a "**confession**" made to a large group of people.

In urging the appeal, counsel contended that the evidence of the prosecution witnesses was fraught with discrepancies which the two courts below failed to address. He submitted that the complainant (she testified as PW3) disappeared from her aunt's place (PW1) **RMB** without saying where she was going to; that PW3 lied to her mother (PW2 M.S) that she was at her aunt's place when she was not; that it was as a result of being slapped by her aunt (PW1) that PW3 confessed to having been with the appellant and that although the doctor, (PW4) **Dr. Ngone** found that the complainant's hymen had been perforated before, the High Court found that it had been "**recently**" perforated.

On alibi, it was counsels contention that the appellant had raised the defence of alibi even before being arraigned in court and hence the appellant's defence of alibi was not an afterthought; that the appellant was not legally bound to prove the alibi; that the appellant's defence was not considered; that the complainant's mother (PW2) had a school business and there was business rivalry between her and the appellant who was a school teacher. Finally, counsel faulted the two courts below for relying on an alleged written note by the appellant to the effect that he would marry the complainant, as the same did not qualify to be a confession.

In opposing the appeal **Mr. Isaboke**, the learned Senior Prosecution Counsel (SPC) contended that the note written by the appellant was used as further evidence and not as a confession. It was his view that the defence of alibi was not raised at the earliest opportunity. He urged us to affirm the decision of the 1st appellate court.

We have considered the record, the rival oral submissions made before us, the authorities cited on behalf of the appellant and the law.

The appeal before us is a second appeal. Being a second appeal we are limited to considering points of law. In **DZOMBO MATAZA V. REPUBLIC 2014 eKLR** this court stated:

“As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the appellate court. see Okeno v. Republic [1972] EA 32. By dint of the provisions of section 361(1)(9) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong.”

On our part, we do not discern any such misgivings herein. PW3 was a school girl and the appellant was her teacher. According to the doctor (PW4), the age of PW3 as per her birth certificate was 16 years old. PW3 lived with her aunt PW1. On 4th November 2012, she disappeared from home only to re-surface on 7th November 2012. PW3 narrated how the appellant called her on phone and he led her to a lodging at Kalama Guest House. They spent a night there. On the following day the appellant left her in the room and went to his home as he had been called by his wife. He returned later and continued to stay with PW3 at Kalama Guest House. When eventually PW3 went back home, the appellant was called by a group of women who included PW1 and PW2. The appellant in apparent admission of having spent several nights with PW3, opted to indicate in writing that he would marry PW3. His offer made in writing was a form of proposition to have PW3's hand in marriage.

Unfortunately for the appellant, PW3 was under the age of majority and the Sexual Offences Act frowns upon a male having sex with a girl below the age of 18 years. In our view, the note written by the appellant offering to marry PW3 was not a confession but was further evidence of the defilement, the appellant under the misguided notion that an offer of marriage would absolve him of criminality. In dismissing the appeal the learned judge stated:

“The court relied on the testimony of the complainant that she was defiled. There is evidence that the Appellant had bought the complainant a mobile phone and that they had been in a relationship before the incident. The written admission by the appellant was not the basis of the conviction.”

We agree. The note by the appellant admitting to have stayed with the PW3 at Kalama Guest House was not the basis for the conviction. PW3 knew the appellant. The appellant was her teacher. PW3 disappeared from her aunt's place (PW1's) and spent several nights in a lodging with the appellant. When she went back home she told her aunt (PW1) and her mother PW2 where she had been. The appellant was summoned and thinking that if he offered to marry PW3, he would be absolved of wrong doing, brought the note. The note was not a confession but it was further evidence of the appellant's wrong doing.

As for the contention that the 1st appellate court found that the perforation of PW3's hymen was “**recent**” (as opposed to what the doctor found that it was not recent), we find that nothing turns on this. For the purposes of the offence of defilement, it does not matter that the victim has had sexual intercourse before the alleged act of defilement.

On alibi, the defence contended that the trial court and the 1st appellate court placed the burden of proof on the appellant. Learned counsel for the appellant relied on the decision of **SSENTALE V. UGANDA 1968 EA 365** wherein it was held:

“An accused person who puts forward an alibi as an answer to a charge does not assume any burden of proving that answer; and it is a misdirection to refer to any burden testing on the accused in such a case.”

On our part, we do not agree with the appellant's assertion that the trial court and the 1st appellate court placed the burden on him (the appellant) to prove his defence of alibi. The fact of the matter is that the alibi was easily dislodged. PW3 knew the appellant as he was her teacher. PW3 narrated in great details how a meeting was arranged until she was taken to a lodging where they spent several nights. In **JUSTUS KIRUTHU MWANGI VS REPUBLIC NYERI CRIMINAL APPEAL NO. 70 OF 2015**, this court stated:

“The role of the court when it comes to the determination as to the admissibility or otherwise of an alibi defences is to weigh such a defence(s) against the totality of the prosecution's evidence to determine whether it is dislodged or not.”

The totality of the evidence herein is such that the appellant's defence of alibi did not dislodge the evidence of the prosecution. We find that the trial magistrate and the 1st appellate court analyzed and re-evaluated the evidence and came to the conclusion, rightly so in our view, that the guilt of the appellant was proved beyond any reasonable doubt and this being the case, we find no reason to interfere with their findings. The appeal has no merit. It is hereby dismissed.

Dated and delivered at Mombasa this 14th day of February, 2019

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR