IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GITHINJI, KARANJA & MWILU, JJ.A

CRIMINAL APPEAL NO. 169 OF 2014

MOSES NATO RAPHAEL.....APPELLANT

VERSUS

REPUBLIC….....RESPONDENT

(Being an appeal from judgment of the High Court of Kenya at Nairobi (Achode J.) dated 19th December, 2013 in

HC.CR.A.NO. 24 OF 2009)

****

JUDGMENT OF THE COURT

MOSES NATO RAPHAEL, (**appellant**)**,** was charged and tried before the Chief Magistrate's Court at Thika with the offence of defilement of a girl contrary to Section 8

(1) as read with subsection (2) of the Sexual Offences Act, No. 3 of 2006. The particulars of the offence were that:-

> ***"On the 5th day of September 2007, at [particulars withheld] estate within Thika District of the Central Province intentionally and unlawfully committed an act which caused penetration with his genital organ with M W a girl under the age of eleven years."***

In the alternative, he was charged with the offence of compelled indecent act contrary to Section 6 (a) as read with section 11(6) of the Sexual Offences Act No. 3 of 2006 whose particulars were as follows:

> ***"On the 5th day of September 2007 at [particulars withheld] estate within Thika District of the Central Province intentionally and unlawfully compelled M W to engage in an indecent act with him by touching her private parts."***

He pleaded not guilty on both the main and the alternative charges and the matter proceeded to full trial with the prosecution calling five witnesses in support of its case. On his part, the appellant in his defence rendered unsworn evidence and presented three other witnesses. The brief facts of the case were that **M.W. (PW1),** was a child aged about 10 years. She gave her evidence on oath after a preliminary examination (*voire dire*) by the court found her fit to do so.

She testified that on 5th September, 2007 she left school at about 1.00 pm for her home in ***[particulars withheld***]. On arrival she changed from her school uniform and went to the toilet. It was her evidence that while in the toilet, the appellant entered and found her with her underwear removed. She stated that he lifted her as she was squatting, laid her by the side of the toilet; removed his trouser and inserted his penis inside her private parts and proceeded to defile her. Thereafter, the appellant threatened to kill her with a panga if she disclosed what had happened.

Before he left, the appellant warned her to lay the blame on an unnamed "boda boda" operator in case anybody found out what had happened to her. She testified that she went to her mother and told her what had happened and her mother took her to hospital. The child further stated that the appellant lived near her home and she used to see him often. On cross examination she stated that she screamed and one S came to her aid. She stated that it was her mother who washed and took her to hospital. They went to the Police station and were told to go back the next day. **M.W.** and **E W (PW2)** her elder sister confirmed that they knew the appellant before as he used to have meals in their house and that he would sometimes spend nights there.

B W M (PW3), the child's mother testified that **M.W.** informed her of the incident, and on checking her, she saw the child's dress had blood on the front part. She also noticed that the child was bleeding. She immediately carried the dress and took the child to Thika District Hospital from where they went to Juja police station where they reported the matter. At the police station the child was reluctant to tell the police what had happened, and the identity of the person who had defiled her.

E W, (aged 12 years) testified on oath that after persistently asking **M.W** who had defiled her, she refused to disclose until 2 weeks later when she disclosed that it was the appellant who she said had told her to blame the act on a *boda boda* operator. Upon this disclosure the child's mother reported the appellant to his supervisor and then called the police who went to the estate and arrested the appellant.

P.C No. 62568 Monicah Njeri (PW4), the investigating officer testified that she had received the defilement report from the child's mother, and a dress that the child wore at the time of the incident. She issued her with a P3 form and referred them to hospital for treatment. She further testified that the child had stated that she knew the person who had defiled her and was able to identify the Appellant as the assailant when he was arrested at the office of the Estate.

According to the P3 form produced in evidence by **Dr. Mary Igamba (PW5)**, the complainant had a broken hymen but no other visible external injuries were seen. She also had a mild body discharge. The high vaginal swab indicated presence of puss cells and some trichoma vaginalis or bacterial infection and some blood. There were no spermatozoa detected. The doctor's professional opinion was that the child had been defiled.

In his defence, the appellant rendered unsworn evidence where he stated that he was working at Benvar Estate as on 5th September, 2007, which is the date the child was defiled, but he denied having defiled her. He stated that the charge against him was a frame-up by the child's mother who he claimed used to be his wife. He stated that on the date of the incident he was at Nairobi while the incident took place at [particulars withheld]. It was only on 24th September, 2007 on his arrival at his place of work that he learned of the allegations that he defiled a child.

His witnesses, **Aden Omar Hussein, (DW2)**, **Stephen Mwangi Waweru, (DW3),** and **M A T, (DW4),** were his workmates at Benvar Estate. Their evidence was almost the same. The relevant part was that the appellant and **PW3** were not strangers and that they used to live together as man and wife, but were separated as at the time of the alleged incident. They all testified that the two had disagreed and their relationship had become acrimonious and the child's mother could therefore have framed the appellant. It is worth noting however that none of these witnesses claimed to have been with the appellant on the date and time when the child was defiled.

Upon considering the evidence before it the trial court found the appellant guilty as charged, convicted him, and sentenced him to life imprisonment. Aggrieved by the decision of the trial court, the appellant

moved to the High Court on appeal. The High Court (Achode, J) re-evaluated the evidence tendered by the prosecution and the defence. With regard to the proof of criminal culpability based on the totality of the evidence on record, the learned Judge arrived at the following conclusion;

> ***"I am satisfied that, whereas there may have been some falling out between the appellant and PW3 over a love affair gone bad, PW3 did not on her own pin the offence on the appellant. PW1 herself through the persuasion of PW2 revealed who the culprit was. I also observed that PW1 and PW2 who were both minors gave evidence that flowed, both in examination in chief and in cross examination. This would have been difficult if they had been coached."***

Further, the learned Judge expressed doubt as to the veracity of the appellant's defence in the following terms;

> ***"The alibi defence was itself doubtful since the appellant said he was in Nairobi, while DW3 M AT testified that the appellant had spent his day in [particulars withheld]."***

We note that this statement is not correct as **DW3** only said what he had been told by the appellant and could not therefore ascertain the truthfulness of that statement.

Persuaded by the prosecution's case beyond reasonable doubt the High Court found the appeal to be lacking in merit; upheld the conviction and sentence against the appellant and dismissed the appeal. This decision provoked the second appeal before us where the appellant filed the following grounds of appeal on 31st March, 2014:-

> ***" 1. That the High Court made an error in law by failing to re-evaluate the entire evidence on record as was duty bound and as a result reached at*** *(sic)* ***a decision which was insupportable having regard to the evidence on record.***

2. ***That the High Court made an error in law by failing to observe that during trial the case for the prosecution was not proved to the required standard of beyond reasonable doubt.***

3. ***That the High Court made an error in law by failing to observe that my defence case was not properly considered in the light of section 169(1) of the Criminal Procedure Act."***

The appellant further filed a Supplementary Memorandum, Grounds of Appeal and brief submissions filed on 12th February, 2015, with the leave of the court. He informed the Court that he was relying on his written submissions. By way of summary, his submission was that the conviction was manifestly unsafe because the trial proceeded on a defective charge; that the particulars of the charge sheet were at variance with the offence stipulated in Section 3(1) (a) of the Sexual Offences Act and the evidence before the court; and that the burden of proof on the prosecution was not discharged as required in law. He illustrated several discrepancies in the evidence adduced that would raise doubt and urged us to allow his appeal.

Opposing the appeal, the learned Senior Assistant Director of Public Prosecutions, Ms. G.W. Murungi, contended that there was overwhelming evidence that the appellant committed the offence as charged. She urged that the charge was not defective although the particulars thereof did not mention the genitalia. The evidence on record was clear and stated that there was penetration in the genital organs and the hymen was broken. On the issue of age, she argued that although the complainant said she was 10 years old, the court should rely on the evidence of the mother who stated that the complainant was six years old. In addition it was the same age indicated by the doctor who examined the complainant.

She contended that the evidence was overwhelming in pinning liability on the appellant. She stated that **W, M.W's** elder sister, after 3 weeks from the time of the incident was able to obtain the information that the appellant was the one who had defiled **M.W.** She further submitted that the appellant is a person the complainant knew well before and had only failed to disclose her assailant because she had been threatened with death; as a result of the fear instilled in her she told her mother and those around her

as she had been directed to do by the appellant, that is, that she was defiled by a *"boda boda"* operator.

She further submitted that although it was said there was a grudge between the appellant and the child's mother, the child did not mention the appellant's name immediately but only after she opened up to her sister **W,** after 3 weeks of cajoling. She submitted that this Court can convict on the evidence of the complainant only under **Section 124 Evidence Act, Cap 63, Laws of Kenya**, if satisfied that she was telling the truth. She contested the alibi defence, and supported the trial court that the alibi defence placed the appellant at the scene of the offence. She therefore urged the court to dismiss the appeal.

In reply, the appellant reiterated that the child's mother was his wife of one and a half years, and that he left her after catching her in adulterous union with another man. As a result she bore a grudge against him.

By dint of **Section 361(1)** of the **Criminal Procedure Act,** (Cap 75 Laws of Kenya), our duty is restricted to points of law only. This Court has restated that in legion judgments. See for instance **Dzombo Mataza v Republic [2014] eKLR (Criminal Appeal No 22 of 2013)** where we expressed ourselves in the following terms**;**

> ***"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 first appellate court…. By dint of the provisions of section 361(1) (a) 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."***

Having considered the evidence and the submissions on record, we are of the view that the issues for determination can be summarised as follows:

1. *Whether the High Court properly re- evaluated the evidence adduced before the trial court before arriving at its decision as enjoined by law. Attendant to this is the issue as to whether the prosecution discharged the burden of proof to the standard required under the law; that is, beyond any reasonable doubt?*

2. *Whether the appellant's alibi defence was considered and whether it creates doubt, whose benefit would benefit the appellant.*

We shall tackle these two issues together.

The principle of law to the effect that the burden of proof in criminal matters lies with the prosecution is now old hat. There are of course, a few instances where the law provides for the converse, and shifts this duty to the accused, but that is not the case here. This Principle is well captured in the time honored English case of **Woolmington v. DPP (1935) A. C 462** where the court stated:-

> ***"Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt, subject*** [to the qualification involving the defence of insanity and to any statutory exception***].If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [***the offence was committed by him***], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained ."***

See also this Court's decision in **Festus Mukati Murwa v. R, (2013) eKLR.**

On the first issue, looking at the judgment of the learned judge, it is evident that she re-evaluated the

evidence adduced before the trial court in detail and arrived at the ultimate conclusion that the prosecution had indeed proved its case beyond reasonable doubt. We cannot fault her on that issue. We would nonetheless like to point out that, when it came to the analysis of the defence case, the learned Judge in considering the appellant's alibi said that she found the same "*doubtful"*.

In our view this was not a decisive pronouncement and it could be interpreted to mean that there was a scintilla of doubt cast on the prosecution case. The learned Judge did not say whether this doubt was significant enough to water down the standard of proof to one below what is anticipated in criminal law. This being a point of law, it is our duty to deal with it and determine whether it would have affected the outcome of the appeal before the learned Judge. This brings us back to the standard of proof. Was that slight doubt expressed by the learned Judge sufficient to negate the rest of the evidence?

What then amounts to reasonable doubt?

This issue was addressed by Lord Denning in **Miller v. Ministry of Pensions, [1947] 2 ALL ER 372** where he stated:-

> ***"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."***

In this case we need to consider whether the rest of the evidence was watertight. As far as the facts are concerned, we find that both courts below were satisfied that the child had been defiled. There was ample evidence to that effect. The P3 form offered corroboration to prove that fact. We have no reason to interfere with those concurrent findings of fact.

On the appellant's ground that the charge was defective, we note that the particulars of the charge failed to name the organ that was penetrated. We nonetheless agree with the learned Counsel for the State that the evidence called by the prosecution, including the P3 form was clear on the child's organ that was penetrated. There was therefore no prejudice occasioned to the appellant, and that omission is in our view curable under **section 382 of the Criminal Procedure code**. Nothing much therefore turns on that issue.

On whether the prosecution had proved its case beyond reasonable doubt, we fall back on the **Miller v. Ministry of Pensions,** (supra) and conclude that the doubt created by the learned Judge's failure to conclusively state whether the alibi defence had been proved or not was nothing more than a scintilla, a whiff which could not in any way dislodge or otherwise dent the prosecution case. We would like to emphasise however, that the burden of disproving the alibi is always on the shoulders of the prosecution. See **Ssentale v. Uganda [1968] E.A. 365.** In **Victor Mwendwa Mulinge v. R, *[2014] eKLR*** this Court stated the following on the issue of alibi:

> ***"It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see Karanja v.R, [1983] KLR 501 … this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought."***
>
> It is our finding that the prosecution did place the appellant right at the scene through the testimony of the complainant, whose evidence was taken and admitted under ***Section 19 of the Oaths and Statutory Declarations Act, (Cap. 15, Laws of Kenya)*** which provides**:-**

> ***"Where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person understand the nature of an oath, his evidence may be received, though not on oath, if in the opinion of the court or such a person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced in writing in accordance with Section 233 of the Criminal Procedure Code shall be deemed to be a deposition within the meaning of that Section."***

In view of our earlier analysis of the appellant's defence, we hold the view that the appellant's alibi ought to have been for an outright dismissal.

As to whether the sole evidence of the child was sufficient to found a conviction, the law on this issue is well settled. **Section 124 of the Evidence Act, Cap 80, Laws of Kenya** provides a proviso that permits admission of evidence from a victim without corroboration in sexual offences cases only. **Section 124 of the Evidence Act** provides as follows;

> ***"Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that Section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:***
>
> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."*** *(emphasis ours)*

All the Court needed to do was warn itself of the danger of convicting on the evidence of a single witness, who is also a minor. The learned Judge did this in her re-evaluation of the evidence and was satisfied that the child knew the appellant very well before and she could not have mistaken him for another person.

In his written submissions, the appellant has challenged the complainant's veracity because of the time taken before she disclosed the appellant's identity to her sister, mother and subsequently to the police. In our view this delay in naming the appellant as her defiler cannot be used against her, considering her age, the threat of death from the appellant who was a neighbour and the trauma from the incident. This Court faced with a similar situation in the case of **Elmada Omollo Owaga v Republic [2011] eKLR**

(**Criminal Appeal No. 282 Of 2009)** accepted the evidence of a 7 years old female who had been defiled and failed to disclose the assailant at the first instance. The court admitted her evidence and stated as follows:-

> ***"We have anxiously considered these submissions and have come to the conclusion that the complainant was a credible and truthful witness and we find no reason to impeach her evidence. The fact that she did not immediately disclose the name of the assailant to the first persons she met - her grandmother and mother - was explicable by her age and the trauma inflicted on her by the assailant. We also accept as the two courts below did, that she disclosed the identity of the assailant to her doctor who also examined the appellant and the police who subsequently managed to arrest him"***

We have no cause to depart from the concurrent findings of the two courts below on that issue.

On the challenge posed by the uncertainty in the complainant's age, this Court had occasion to deal with a similar issue in **Tumaini Maasai Mwanya v. R**, **Mombasa CR.A. No. 364 of 2010**, where we held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is

under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability.

In sum, having considered the entire record before us, and the submissions of the appellant along with those of learned counsel for the state, we are satisfied that the conviction and sentence of the appellant by the trial court is well founded in law. We find no basis to interfere with the concurrent findings of the two courts below.

We find no merit in this appeal and consequently, the same is hereby dismissed.

Dated and delivered at Nairobi this 24th day of April, 2015.

E. M. GITHINJI

……

JUDGE OF APPEAL

W. KARANJA

……

JUDGE OF APPEAL

P. M. MWILU

……

JUDGE OF APPEAL

*I certify that this is a true copy of the original***.**

DEPUTY REGISTRAR