



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: AZANGALALA, OTIENO-ODEK & KANTAI JJ.A.)

CRIMINAL APPEAL NO. 194 OF 2012

BETWEEN

ELIPHAS MUHANJI MUTSOTSO ALIAS KIZITO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from Judgment of the High Court at Kakamega

(Chitembwe J.) delivered on 3rd May 2012

in

H.C.CR. Appeal No. 127 of 2011)

JUDGMENT OF THE COURT

1. **ELIPHAS MUHANJI MUTSOTSO** alias **KIZITO** was charged with the offence of defilement of a girl contrary to Section 8 (1) as read with **Section 8 (2)** of the Sexual Offences Act No. 3 of 2006. The Information is that on the 29th day of July, 2010 at [particulars withheld] trading centre in Kakamega East District within the then Western Province, he unlawfully and intentionally inserted his genital organ namely penis into the genital organ namely vagina of L A a girl aged 11 years. The appellant faced an alternative count of indecent act with a child contrary to **Section 11 (1)** of the Sexual Offences Act No. 3 of 2006.
2. Upon hearing the prosecution and defence case, the trial magistrate convicted the appellant and sentenced him to serve a term of 20 years imprisonment. His appeal to the High Court was dismissed. Aggrieved by the dismissal, he has lodged a second appeal to this Court.
3. In his memorandum of appeal dated 2nd September 2014, the appellant raises three grounds of appeal as follows:
 - a. the learned Judge erred in law in finding that there was corroboration of the evidence of the complainant when there was none;
 - b. the learned Judge erred in law in dismissing the appellant's defence of alibi and shifting the burden of proof on him and in failing to consider the appellant's defence fully; and
 - c. the learned Judge erred in law in finding that the trial magistrate had complied with the provisions of Section 169 of the Criminal Procedure Code.

4. At the hearing of this appeal, learned counsel Mr. **S.B.A.Mukabwa** appeared for the appellant while the State was represented by the Principal Prosecution Counsel Mr. L.K. Sirtuy.
5. The evidence in support of the prosecution case was given by the complainant (**PW1**) **L A** who testified after the trial court satisfied itself that the minor was intelligent enough to give evidence. PW 1 testified as follows:

“I am L A. I am 11 years old. I come from [particulars withheld] Estate in Kakamega. I go to [particulars withheld] Primary School. I am in standard six. I go to [particulars withheld] Church in Kakamega. I do not know the purpose of oath. I know the importance of telling the truth. I know that if somebody does not tell the truth he will be arrested. I will tell the court the truth. I recall on 29th July 2010 at 7.30 pm. I was from [particulars withheld] market. I went to a toilet at home. I left K and his wife standing at the gate. Kizito followed me. As I wanted to pass through the upper door to return to the market Kizito told me we pass another route passing behind the library. Kizito is the one in the dock. I agreed and we went. When we approached near the library, he grabbed me on the neck and took me behind the library. He removed my pant and produced a knife. He threw me down and threatened to kill me if I screamed. He opened the zip of his short, removed his penis and pushed into my vagina three times. When I felt I was bleeding he stood up and told me to pick my pant and go away. He told me if I told my mother he will remove me from the house at night and kill me. He left me. I wore my pant and went to the market. I did not find my mother. I found help. Shortly my mother came and asked me why I had taken long and told her it was because my stomach was aching. I went to bed and slept. The following day I found blood on my beddings. As I was cleaning, my mother saw the blood and asked me about it. I did not tell her. As she was going to the market, another lady told her what had happened. She confronted me with the truth and I told her the truth. She then took me to Kakamega Provincial General Hospital. At first I had not told my mother the truth because of the threats I had received from Kizito. At the Provincial Hospital, I was examined and treated. ...We went back to the Hospital and filled P3 Forms....We returned to the Police Station and recorded statements. Later Kizito was arrested. Kizito was our neighbour at [particulars withheld]. I knew him well. I have a baptism card to prove my age.... After the defilement, I do not have HIV and I am not pregnant. I was born on 10th August 1998.”

6. **PW 2 J A O** testified that she is the mother to the complainant; that on 29th July, 2010 she was with PW1, the complainant, at [particulars withheld] market. That PW1 told her she was going home for a call; that she waited upto 7.45 pm and PW1 had not returned; she went home and did not find her; she asked the wife to the appellant if she had seen PW1 and she stated PW1 had passed her and her husband at the gate; that she returned to the market and found PW1 seated there; PW1 told her she had taken long because of stomach-ache; PW1 appeared worried. PW2 stated she closed her business and they went home arriving at 8.30 pm. That at home, PW 1 jumped into bed; the following morning she woke up at 6.00 am and found PW1 had soaked clothes outside and she was washing. PW2 testified she noticed blood stains in the water and asked PW1 why the water had blood; she picked the underpants and saw it had blood. That as appellant's wife was near, PW2 asked her if the complainant could have started her menstrual period; as they were talking, a colleague called V who operates a shop at [particulars withheld] market came and told PW2 that the previous evening she saw her neighbour dragging PW1 behind the [particulars withheld] library. That when she asked PW1 what had happened she said that Kizito had dragged her behind the library and defiled her after which he threatened to kill her if she told anybody. She took PW1 to Kakamega General Hospital for treatment.
7. **PW 3 F W**, a clinical officer who previously worked at the Kakamega Provincial Hospital testified as follows:

“I have a P3 Form for L A a patient I treated on 30th July 2010. Her OP No. is 107/10. She was 11 years old. She arrived at the hospital in a torn panty white in colour which had blood stains. I examined the patient. She had a swelling on the vulva and a bruise on the anterior aspect of the neck. She also had swelling and bruises on the labia majora. She was also bleeding from the vagina. I did vagina swap and the analysis revealed the presence of

epithelial cells and spermatazoa. I also took blood for HIV and it was negative. The patient arrived after twelve hours and six days at the time of filling the P3 Form. Probable weapons were penis and hands. I graded the injuries as bodily harm and defilement. I signed the P3 Form on 6th August and I wish to produce the same as an exhibit in this case. I did not establish where the epithelial cells and the sperms came from. I did not examine the accused.”

8. The trial magistrate in convicting the appellant stated as follows:

“Although the accused denied defiling the minor, the minor candidly narrated what happened on that day. The accused was a person known to her and trusted him when he suggested on the route they should follow. I find the testimony of the accused and his witnesses to be mere denial only calculated to discredit the evidence of J A the minor's mother. If the accused did not defile the minor, where did the spermatazoa come from? The minor said the accused grabbed her neck and dragged her behind the library where he threatened her before he inserted his penis into her vagina and pushed three times and when he realized she was bleeding, he stood up and told her to collect her clothes and go home. The medical examination revealed swelling and bruises on the minor's neck and on the labia major. The minor said it was the accused who inflicted the injuries and defiled her. The evidence against the accused is overwhelming. The accused defence is a mere denial which cannot stand against the strength of the prosecution case.”

9. The High Court (S.Chitembwe J.) in upholding the conviction and sentence of the appellant stated as follows:

“The prosecution evidence does establish that PW1 was defiled. The medical evidence contained in the medical treatment notes, the P3 Form and the post rape form does show that the complainant was defiled. The main issue is whether it was the appellant who defiled her. According to both the prosecution evidence and that of the defence, the complainant is a neighbour to the appellant. The two parties lived in the same compound. The complainant's testimony is that as she had finished her call of nature and was going back to [particulars withheld] market, the appellant convinced her to use another route that passed behind the library. The complainant further states that the appellant removed a knife and threatened to kill her if she were to scream or inform her mother until when her mother found out. She was scared and that is why she did not inform her mother until when her mother found out. ... From the prosecution evidence, I am satisfied that it was the appellant who defiled the complainant. There is no good reason as to why the complainant could falsely alleged to have been defiled. The medical evidence proves that PW1 was defiled. PW1 knew the appellant. The defence evidence confirms that the appellant was at home that evening and that was not a mere coincidence. There is no evidence of alibi by the appellant to show that at the time of the alleged offence he was far away from the scene.”

10. At the hearing of this appeal, learned counsel **Mr. Mukabwa** for the appellant, reiterated the grounds of appeal. He submitted that the thrust of the appellant's case is that the High Court erred in finding that the testimony of PW1, who was a minor, did not require corroboration; that the trial court erred in finding that the medical evidence corroborated the testimony of PW1. It was submitted that there was no corroborative evidence on record and it was an error on the part of the trial court to state that the fact that there was spermatazoa seen in the vaginal swap, is evidence enough that the minor was defiled. Counsel stated that the High Court erred in holding that under Section 124 of the Evidence Act, there is no requirement for corroborative evidence in sexual offences. It was submitted that there are requirements that a trial court must comply with before the proviso in Section 124 of the Evidence Act can be invoked. The requirements are that the trial court must give reasons why it does not require corroboration and second the court must warn itself on the dangers of relying on uncorroborated evidence. In the instant case, it was submitted that the trial court neither warned itself nor gave reasons why corroborative evidence was not necessary. The appellant cited the case of *Nyanamba- v- R (1983) KLR 599* in support of the

- submission. Counsel submitted that the trial court fell in error as it did not remember what is corroboration and the High Court erred as it did not check what is corroboration. Counsel submitted that evidence requiring corroboration cannot corroborate another evidence that requires corroboration;
11. Counsel for the appellant further submitted that the two courts below did not consider the alibi defence put forward by the appellant; that the appellant had no obligation to prove the alibi and it was the duty of the prosecution to prove that the alibi was wrong. Counsel cited the case of ***Macharia - v- R (2001) KLR 155*** in support. It was submitted that by requiring the appellant to prove the alibi, the two courts below shifted the burden of proof of the alibi to the appellant. That the High Court erred when it stated that "that the appellant, once put on his defence, had a duty to discredit the prosecution case or exercise his right to keep quiet." Counsel finally submitted that the trial court fell into error as the provisions of Section 169 (2) of the Criminal Procedure Act were not complied with. The appellant further submitted that a witness by the name **V** who was mentioned by PW2 was not called to testify and the trial court could not test the veracity of PW1's testimony to the effect that it was the appellant who had dragged PW1 towards the [particulars withheld] library and defiled her.
 12. The State, in opposing the appeal, urged this Court to find that the prosecution proved its case to the required standard; that the provisions of Section 124 of the Evidence Act dispenses with the requirement of corroboration in sexual offences; that although the appellant gave evidence to the effect that he was not present at the scene of crime, the issue was considered by the two courts below and found not to displace the prosecution case. It was submitted that this is a second appeal and this Court should not delve into matters of fact as these have been established by the two courts below. On the case of ***Nyanamba- v- R (1983) KLR 599*** cited by the appellant, the State submitted that this is a 1983 decision which was delivered before Section 124 of the Evidence Act came into being.
 13. We have considered the grounds of appeal and submissions by the appellant and the State. This Court has severally stated that it will not normally interfere with findings of facts by the trial court unless they are based on no evidence or misapprehension of the evidence, or the trial court is shown demonstrably to have acted on wrong principles in reaching the decision (see ***Chemagong vs Republic, (1984) KLR 611*** and ***Kiarie vs Republic, (1984) KLR 739***).
 14. As correctly submitted by the State, this is a second appeal which must be confined to points of law. In ***Gabriel Kamau Njoroge - v- R (1982-88) 1 KAR 1134 at 1136***, this Court expressed itself as follows as to what is a point of law:

“As this Court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect. If the High Court has not carried out its task, it becomes a matter of law on second appeal whether there was any evidence to support conviction, Certainly, misdirection and non-directions on material points are matter of law.”

15. In the instant case, the appellant faced charge of defilement of a child. The offence is one of strict liability as to age. The age of the child at the date of the alleged defilement must strictly be proved. (See ***Bellis {1991} 6 Cr. App. R 283; Blackstone's Criminal Practice 2000 at page 200 B3.40***). In ***Jon Gardon Wagner – v- R, eKLR 2010*** it was stated that in a case of defilement, it is essential to prove the age of the complainant either by way of medical evidence or through other evidence since the ***Sexual Offences Act*** has different categories of offences and sentences for different ages. In the present case, before the trial court and the High Court, the appellant alleged that the age of the complainant had not been established. The trial court noted that PW2 who is the mother to the complainant testified that she was born on 10th August 1998 and thus the apparent age of PW1 was 11 years but less than 12 years. As the age of the complainant was not pursued further in this appeal, we adopt the findings of the two courts below that the age of PW1 was proved to be eleven years, 11 months and 19 days at the time of the alleged offence.
16. In ***R-v- Baskerville, (1916) 2 KB 658***, Lord Denning explained the meaning of the term

corroboration. He stated that corroboration must be independent testimony which affects the accused by connecting him or tending to connect him with the crime. In other words, it must be evidence which implicates the accused with the crime and which confirms in some material particular not only the evidence that the crime has been committed but that the prisoner committed it. In the present case, the thrust of the appellant's case is that there was no corroboration of the testimony of PW1. In **Mohamed - v- R Criminal Appeal No. 210 of 2003**, this Court had an opportunity to consider the requirement of corroboration in sexual offences. The Court expressed itself as follows:

*“This appeal relates to a question which has engaged this Court in the past. The past practice followed by courts required corroboration in all cases where women and girls were complainants in sexual offences. This practice appears to have been inspired by the case of **Maina - v- R 1970 EA 370**. The case of **Maina - v- R 1970 EA 370** was overruled in **Mukunga - v- R (2002)2 EA 482** in which this Court held that the requirement for corroboration in sexual offences was unconstitutional to the extent that it discriminated against women and girls and was an infringement of Section 82 of the Constitution of Kenya. By Legal Notice No. 5 of 2003, Parliament drastically qualified Section 124 of the Evidence Act to enable a court to convict on the sole evidence of a child in a sexual offence case if it is satisfied that the child is telling the truth, so that corroboration is no longer required as a matter of law.”*

17. It is our considered view that the High Court correctly cited the proviso to Section 124 of the Evidence Act and properly held that the testimony of PW1 did not require corroboration. The proviso to Section 124 of the Evidence Act states as follows:

“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.”

18. We have examined the record of appeal and observed that on two occasions, the trial magistrate was satisfied that PW1 was telling the truth; first on 23/3/2010 after *voire dire* examination the trial court was satisfied that PW1 was intelligent enough and had promised to tell the truth. In the judgment, the trial court found that PW1 candidly narrated what happened on that day; the court also found that the medical report supported PW1's testimony that she had been defiled. The High Court held that there was no good reason as to why the complainant could falsely allege to have been defiled; that PW1 knew the appellant and that there was no evidence of alibi to show that at the time of the alleged offence, the appellant was far away from the scene of crime. We are convinced that the two courts below duly recorded in the proceedings the reasons why they were satisfied that PW1, as the victim, was telling the truth. We see no reason to fault the findings and concurrent conclusions by the two courts below that PW1 was telling the truth. We are also convinced that the two courts below correctly interpreted and applied the proviso to Section 124 of the Evidence Act. We hold that the testimony of PW1 did not require corroboration pursuant to the proviso in Section 124 of the Evidence Act and as guided by the dicta in **Mohamed -v- R, Criminal Appeal No. 210 of 2003.**

19. On the alibi raised by the appellant, we are of the considered view that the alibi did not displace the evidence of PW1 who candidly stated that it was the appellant who defiled her. The Court of Appeal in **Uganda -v- Sebyala & others [1969] EA 204** adopted a decision made in the same year by Georges, CJ in **Tanzania Criminal Appeal, 12 at 68** thus:-

“The accused does not have to establish that his alibi is reasonably true. All he has to do is create doubt as to the strength of the case for the prosecution.”

20. The evidence on record shows that PW1 knew the appellant who was a neighbour and they were living in the same plot. PW1 also knew the appellant by his alias name of “Kizito”; there is no question of mistaken identity. PW1 identified the appellant through recognition. We agree with the

appellant's submission that the defence never has the burden to prove an alibi. We agree with the submission that the High Court erred in stating that "that the appellant, once put on his defence, had a duty to discredit the prosecution case or exercise his right to keep quiet." We reiterate that the appellant or any accused person has no duty to prove an alibi. The right to silence is a constitutional right and no negative inference should be drawn if an accused person exercises the right to silence in a criminal trial. The prosecution must prove its case beyond reasonable doubt and subject to any express statutory provision, at no stage does the accused person have the burden to discredit the prosecution case.

21. Despite the error by the High Court as foretasted, we are satisfied that the evidence on record shows that prosecution proved its case beyond reasonable doubt. The appellant in his defence alleged that the case against him was fabricated by PW2, the mother to the complainant, who sought to have an affair with him. The issue is not whether PW2 sought to have an affair with appellant; the critical question is whether it was the appellant who defiled PW1. We are satisfied that it was the appellant who defiled PW1. The appellant raised the ground that the trial court erred in not complying with Section 169(2) of the Criminal Procedure Act. We have considered this ground and find it has no merit. The upshot is that we find this appeal has no merit and is hereby dismissed.

Dated and delivered at Kisumu this 13th day of November, 2014.

FESTUS AZANGALALA

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

SANKALE Ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR