REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 17 OF 2019

NGIDA KILORITI MEISEIKI ……..……APPELLANT

VERSUS

REPUBLIC ……..…….RESPONDENT

(Appeal from original conviction and sentence(Okuche SRM) dated 24th November 2017 in criminal case No. 12 of 2017 Loitokitok in Republic v Ngida Kiloriti Meisenieki)

JUDGMENT

1. The appellant was charged with two counts and two alternative counts. In count 1, he was charges with the offence of attempted defilement contrary to Section 9(1) (2) of the Sexual Offences Act No. 3 of 2006. Particulars were that on the 18th day of June, 2017 at [particulars withheld] village, Entarara Sub location within Kajiado South Sub-County in Kajiado County, he intentionally attempted to have his private organ penetrate the private organ of LN, a child aged 4 ½ years.

2. The alternative was of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars were that on the 18th day of June, 2017 at [particulars withheld] village, Entarara Sub-Location within Kajiado South Sub-County in Kajiado County, he intentionally touched private parts of LN, a child aged 4 ½ years.

3. The appellant faced count 2 for attempted defilement contrary to Section 9(1) (2) of the Sexual Offences Act No. 3 of 2006. Particulars were that on the 18th day of June, 2017 at [particulars withheld] village, Entarara Sub-Location within Kajiado South Sub-County he intentionally attempted to cause his private organ to penetrate the private organ of JN, a child aged 12 years.

4. He also faced an alternative count of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars being that on the 18th day of June, 2017 at [particulars withheld] village Entarara Sub-Location within Kajiado South Sub-County he intentionally touched the private parts of JN, a child aged 12 years with his fingers.

5. The appellant denied the offences and went through a full trial in which the prosecution called 7 witnesses and that of the appellant. The court found the appellant guilty with regard to the alternative charge to count 2, convicted him and sentenced him to 10 years imprisonment.

6. Aggrieved with the conviction and sentence, the appellant lodged this appeal and raised the following grounds of appeal, namely;

1. That the trial Magistrate erred both in law and fact by convicting him relying on evidence which was not confirmed by the complainant.

2. That the trial magistrate erred both in law and fact by convicting him without any recovered exhibits to implicate him for the

crime.

3. That the trial court erred both in law and fact by convicting him on doubtful evidence.

4. That the trial court erred in law and fact by failing to attach any weight to his deface and failing to give candid reasons for its rejection, thereby shifting the burden of proof to him.

7. The appellant filed amended grounds of appeal filed on 22nd October, 2019 raising 5 grounds namely,

1. That the trial Magistrate erred both in law and fact by convicting him on evidence that did not meet the required standard of proof.

2. That the Magistrate erred both in law and fact by relying heavily on circumstantial evidence even though the same was not backed by any material facts or watertight evidence to warrant a conviction;

3. That the trial Magistrate failed to observe that the case was marred with gaps, inconstancies and contradictions;

4. That the trial Magistrate erred both in law and fact by shifting the burden of proof to him and;

5. That the trial Magistrate failed to observe and appreciate the material discrepancies and inadequacies that were inherent in the case and went ahead to give an opinionated judgement and conviction.

8. During the hearing of the appeal, the appellant relied on his written submissions filed together with the amended grounds of appeal and urged the court to allow his appeal.

9. In the written submissions, the appellant submitted that the prosecution did not prove its case to the required standards. He argued that there were numerous inconstancies in the evidence of PW1 and PW2. According to the appellant, whereas PW1, the intermediary, told the court that the minor told him that he inserted his fingers in the minor's private parts, PW2 told the court that he inserted his private organ into her female organ. PW2 also told his mother and father that he had defiled LN.

10. The appellant further argued that PW2 told the court that he was lying on top of the LN and that he even touched PW2's private parts yet she did not take any action. According to the appellant, PW1 told the court that he only put his finger into the private parts of LN and not that he lay on top of her.

11. The appellant argued that the trial court appreciated the variances his judgement stating **that those pieces of evidence are at variance with each other**; that the evidence of penetration on whether there was intercourse was also at variance with the charge sheet when compared with the evidence of PW2 and PW3 on the one hand and PW1 on the other. The appellant argued that whereas PW2 and PW3 talked of the male organ as the probable tool used to touch the complainant's private parts, PW1 told the court that a finger was used. He relied on ***Pandya v Republic*** [1957] EA 336 for the submissions that where evidence is inconsistent or contradictory such evidence should not be relied upon as true.

12. The appellant argued that the evidence of PW5, the Doctor, did not confirm that there had been penetration. He argued that Section 36 of the Sexual Offences Act allows carrying out a scientific investigations including DNA but this was not done. He submitted that the prosecution relied heavily on the evidence of PW2 which the trial court found that the first count and alternative charge to it had not been proved. The appellant submitted, therefore, that the evidence of PW2 did not meet the required standard of proof.

13. The appellant questioned why the complainant's mother and grandmother who were said to have been present were not called as witnesses though they were important witnesses. He relied on ***Nganga v Republic*** [1981] KLR 483 for the submission that when the prosecution fails to call material witnesses it does so at its own risk and an adverse inference will be drawn that the evidence of the material witness if called would have been adverse to the prosecution's case.

14. The appellant next submitted that the prosecution had the burden of proving its case against him. He argued that the prosecution did not do so but the trial court expected him to raise a strong defence when the prosecution case was not proved beyond reasonable doubt and with all the contradictions and discrepancies. According to the appellant, there was no evidence to warrant a conviction and the prosecution relied on circumstantial evidence. He relied on ***Abanga Onyango v Republic*** CRA No. 32 on the factors to be used to test circumstantial evidence.

15. The appellant argued that the fact that he was in the complainant's home did not necessarily point to his guilt. He submitted that for the court to return a conviction, the prosecution evidence must be watertight which, was not the case before the trial court. He relied on Section 124 of the evidence Act which requires evidence to be corroborated but allows evidence of a victim of a sexual offence to be used to convict if believable. He argued that such evidence should however be critically analyzed.

16. Next the appellant submitted that the trial court failed to appreciate that there were material discrepancies and inadequacies that were inherent in the case before it and the court gave an opinionated judgement. According to the appellant, even without evidence, the trial court made an assumption that the he must have masturbated on the complainant's cloths. He argued that the trial court stated that he must have had intercourse with the complainant while naked but again found that there was no evidence of penetration. He relied on ***Muiruri Njoroge v Republic*** Criminal Appeal No. 115 of 1982 where it was held ***that it is a well-established rule of practice that a court of law does not act on mere assertions not unless such assertions are proved by evidence beyond doubt.***

17. He also relied on ***Mdoe Gwende v Republic*** [2004] EKLR where it was held that circumstantial evidence must be thoroughly examined as it is kind of evidence that can be fabricated.

18. Mr. Meroka learned Principal Prosecution Counsel conceded this appeal. He submitted that although there was sufficient evidence to sustain the alternative charge of committing an indecent act, the trial court relied on the evidence of PW2 in sustaining the alternative charge yet the same court discredited part of PW2's evidence touching on count 1 relating to another complaint leading to the acquittal of the appellant in that count as well as the alternative count to it.

19. Mr. Meroka also submitted that the appellant's defence evidence that the charges against him were initiated after he had left as a guest of the complainant's family and his immediate return to Loitokitot on learning that a complaint had been lodged against him, portrayed a high level of innocence. He was therefore of the view that the appellant's conviction was unsafe. On whether the court should order a retrial, he left the matter at the discretion of the court.

Determination

20. I have considered this appeal, submissions by the appellant and those made on behalf of the respondent. This being a first appeal, it is the duty of this court as the first appellate court to reconsider the evidence, reanalyze and reassess it and come to its own conclusion bearing in mind, however, that it did not see the witnesses testify and give due allowance for that.

21. In ***Okeno v Republic*** [1973] EA 32, it was held that:

"An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v Republic [1957] EA 336) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424."

22. I must also point out that although this appeal has been conceded by the respondent, that concession does not bind the court. This court must consider the appeal and make its own decision on it. In ***Odhiambo vs. Republic*** [2008] KLR 565, it was stated that;

"[T]he court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and

reach its own determination based on evidence."

23. PW1 No. 61347 CPL Jackson Kariuki a police officer attached to Illasit police station was appointed by the court as an intermediary to the complainant. He told the court that on 18th June, 2017, LN told him that a person called her to their bedroom, removed her cloths and inserted his fingers in her private parts. LN further told him that she reported the matter to her father and mother and that she was taken to hospital. He however told the court that he had only been able to talk to LN's mother but not her father. Cross-examined, the witness told the court that LN told him that the appellant called her to the room and touched her private parts with his finger.

24. PW2, a minor aged 12 years, testified that the appellant went to their home on 18th June, 2017 and was at their home for some time. She told the court that on that day she was playing with LN in the house while the appellant was lying on his bed. She then found LN entering on the appellant's bedroom and she also entered and sat on the bed. The appellant started touching her (PW2's) private parts using a finger but never removed her pants. She went out leaving LN in the room. She then saw the appellant have intercourse with LN who was naked. The appellant was on top of LN. She then joined her outside. LN was taken to hospital by their father. In cross-examination, she told the court that no one called them to the room.

25. PW3, A OP father to the LN and step brother to PW2, testified that on 18th June, 2017 he was at home with the appellant, his cousin, who had visited him for 3 days. He was social with LN and PW2 and would sing songs and read bible verses to them. On that day, LN and PW2 went to his room. He was sitting outside with his wife and when he called the appellant, the appellant told him that he was tired and that was why he had slept late. His wife demanded that the children get out of the room which they did. He testified that when LN got out her dress had mud on the buttocks and when her mother called her, she ran away to her grandmother.

26. The appellant came out and said he had an emergency he had to attend to at Kimana and declined to take breakfast. The witness called a motorbike which came and took him to Kimana. The witness left and when he came back in the evening his wife told him what had happened. He asked LN what had happened and she told him that the appellant removed her cloths and defiled her. PW2 told him that the appellant had touched her private parts but she (PW2) confirmed that the appellant had intercourse with LN. He took both PW2 and LN to hospital and were treated. When he called the appellant, the appellant told him that he was already in Mombasa. The witness reported the matter to the police and the appellant was traced and arrested in Mombasa and transferred to Loitokitok. The minor was issued with a P3 form which was filled and signed.

27. PW4 Likama Buxton, a Clinical officer based at Loitokitok Sub-County Hospital, testified that he examined PW2 who had been sexually assaulted and the degree of injury was ***grievous harm.*** There were novisible injury on her genitalia. However, there was white discharge from her genitalia but no blood. There were also pus cells showing signs of infections but no of spermatozoa. At that point, the prosecution applied that the witness be stood down since he was not the one who signed the P3 form which was allowed and the witness was stood down. This witness was not recalled to complete his testimony and was not cross examined.

28. PW5 Dr. Maurice Maganju of Loitokitok Sub-County Hospital testified that he examined LN for alleged defilement; the minor's age was assessed to be 4 ½ years and that the probable weapon was a private organ. He put her on anti HIV treatment. According to the witness, there was no visible injury in the minor's private parts. She however had a white discharge from her private parts and had urinary tract a sign of infection but there was no blood or spermatozoa. He filled the P3 form which he produced as PEX 3. He conducted age assessment on both JN which showed that she was 12 years while that of LN was 4 ½ years. He produced age assessment for JN PEX 4 and that of LN PEX 5 respectively.

29. PW6 No. 53187 CPL Osman Halima, a police officer based at Illasit police station testified that on 20th June, 2017 the complainant's father went to the station with the two minors and reported that the appellant had tried to defile the two minors. She took the minors to hospital after issuing them with P3 forms. Age assessment was also conducted on the two. She handed over the case to PC Mercyline for investigations.

30. PW7 No. 107061 PC Mercy Musoga also based at Illasit police station testified that on 18th June, 2017 the complainant's father reported that his friend tied to defile the complainants while he was staying with them. The appellant was traced and arrested at Bamburi in Mombasa and with the help of police from Bamburi police station, he was transferred to Illasit and later charged in court.

31. When put on his defence, the appellant testified that PW3 who works at Kalma Hotel, joined him in the business of selling herbs. One day he told the appellant to go with him to his home where he was to give the appellant some money for the business. He accompanied PW3 to his home where he stayed for 3 days. On the 4th day, he was not feeling well and wanted to visit a herbalist. PW3 called a cyclist to take him. The following day PW3 called him and he, the appellant told him that he was at Mbirikani from where he left for Mombasa. On a Monday, PW3 called him on phone and told him that he had defiled his daughter while at his home. He told PW3 that he was travelling back to sort out the matter and when he came back, he was informed that PW3 had left for Mombasa. He travelled back to Mombasa and found PW3 in Mombasa. PW3 told him they would resolve the issue. However, at 1 a.m. PW3 went with police officers and arrested him and escorted him to Illasit police station where he was charged with the offences. In cross-examination, he denied that he had defiled his minors.

32. After considering the above evidence, the trial court was not satisfied that the prosecution had proved the case against the appellant on count 1 and the alternative count in relation to LN and acquitted the appellant on those counts. The appellant was also acquitted in count 2 but convicted on the alternative to count 2.

33. Regarding count 2 and the alternative count in relation to JN, the trial court stated:

"The accused person also faces an alternative charge of causing an indecent act to the said PW2 by touching her vagina with his finger. It is strite law that for an offence to be said to have occurred, the prosecution must prove two ingredients, these are the mens rea and the Actus reus. That these two must meet for it will be said that the offence has occurred."

34. The court then stated:

"The accused is charged with the offence of attempted defilement to PW2. Therefore, the prosecution is bound to more (sic) that the accused person formed in his mind the intention to defile PW2, however, that this was not crystalized. Therefore can it be said that the prosecution has proved those two ingredients in respect to count 2. The principal charge that is to say, this can only be ascertained from the narrative of the incidence."

35. The court concluded that on the evidence on record, the prosecution did not prove the substantive charge in count 2. The court was however satisfied that the alternative charge had been proved, stating:

"However the evidence of PW2 is very clear in respect to the alternative charge, the minor gave evidence on oath and it remained unshaken. The accused person avers that he never committed the offence; he merely narrates the circumstances that led to him being in PW3's home and his subsequent arrest. His defence does not raise any doubt into the prosecution's case in respect to the alternative charge to count 2."

36. The court then concluded:

"In a nutshell, I find that the prosecution has proved their case beyond reasonable doubt in respect to the alternative charge to count 2. The accused person is guilty as charged"

37. The law in this country, as in many other countries, is that the prosecution bears the burden of proving its case against the accused person beyond reasonable doubt. And as to what is meant by proof beyond reasonable doubt I can do no better than refer to the words of **Lord Denning** in ***Miller v Minister of Pensions*** [1947] 2 All ER 372 where he stated:

"Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man 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."

38. And in ***Bakare v State (***1987) 1 NWLR (PT 52) 579, ***Oputa, JSC,*** writing for the Supreme Court of Nigeria stated:

"Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of

criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability".

39. In the case before the trial court, it was the duty of the prosecution to lead cogent evidence to establish beyond reasonable doubt that the appellant committed the offence he was charged with. Any doubts in that evidence, should have been given to the appellant.

40. In ***Pius Arap Maina v Republic*** [2013] eKLR, the Court of Appeal observed that;

"[***T[he prosecution must prove a criminal charge beyond reasonable doubt and, as a corollary, any evidential gaps in the prosecution's case raising material doubts must be in favour of the accused***."

41. From these decisions, proof beyond reasonable doubt does not allow inference of possibilities. The prosecution must make out a case against the accused to leave no doubt that indeed he committed the offence he is charged with. I must also state that it is the duty of the prosecution to elicit satisfactory evidence from its witnesses to prove its case. That is, the court must only convict on the strength of the prosecution evidence as recorded by the trial court but not on the weakness of the accused's defence.

42. In this appeal, the trial court considered the evidence by PW2 in so far as it related to LN and dismissed it. It was not satisfied that PW2 had told the truth about what happened to LN. In fact, PW2 had testified that she witnessed the appellant defile LN and that he saw him laying on top of LN while defiling her. That evidence was rejected by the trial court because it did not find it truthful. That means PW2 was not telling the truth. The court also rejected that witness' evidence relating to the appellant's attempt to defile her. The court concluded that there was no cogent evidence to sustain convictions on those charges.

43. However, even after rejecting PW2's evidence on the other charges, the trial court still accepted her evidence in relation to indecent act in which the appellant was said to have committed with PW2, the same witness whose evidence the court had rejected with regard to other counts. The witness was alone with LN in the room and, according to her; the appellant touched her private parts. No other person witnessed what happened. If the same witness could not be believed when she testified to the effect that the appellant defiled LN and that she saw him on top of LN while naked but all other evidence including medical evidence did not support her evidence, could she be believed in her own case" I think not.

44. It is not possible, in my view, that the same witness who testified on incidents that are said to have taken place at the same time and by the appellant, but some incidents were found to have not been true while one was taken to be true.

45. I am aware that this court, sitting on appeal, should bear in mind that the trial court had the opportunity to see PW2 testify and was able to observe her demeanor as she testified. I am also aware that Section 124 of the Evidence Act allows the court to convict on the evidence of a victim of a sexual offence alone if satisfied that the victim is telling the truth. However, considering the nature of the evidence of PW2 with regard to the crime allegedly committed against LN, I am doubtful on the cogency, truthfulness and accuracy of her testimony on the alleged indecent act committed against her by the appellant.

46. Even the medical evidence presented before the trial court was suspect. PW4,the Clinical officer who examined PW2, testified that she had been sexually assaulted and assessed the degree of injury as ***grievous harm*** yet the witness confirmed that there were no visible injury in her genitalia. How could that amount to grievous harm without visible injuries"

47. I have also considered the appellant's defence and the circumstances under which he was arrested and charged. He told the trial court how on learning that it had been alleged that he had defiled the two minors, he travelled from Mombasa back to see PW3 over the issue only to be told that PW3 had travelled to Mombasa. He went back to Mombasa and PW3 told him that they would discuss the matter only for PW3 to come with police officers who arrested him in the wee hours of the morning.

48. It is doubtful if appellant would have travelled back from Mombasa to Illasit, if he had actually committed the alleged offence. The trouble he took to travel back and the fact that he was able to confront PW3 over the matter is evidence of some level of innocence in his mind that he did not commit the offences. Mr. Meroka conceded the appeal and, rightly so in my view, because the prosecution had not proved its case against the appellant beyond reasonable doubt.

49. Having considered the appeal submissions and the authorities and having reviewed the evidence on record and reanalyzed it, the inescapable conclusion I have come to is that the prosecution did not prove beyond reasonable doubt that the appellant committed an indecent act with PW2as he was charged

50. For the above reasons, the appeal is allowed, conviction quashed and the sentence set aside. The appellant is hereby set at liberty unless otherwise lawfully held.

Dated Signed and Delivered at Kajiado this 13th Day of December 2019.

E C MWITA

JUDGE