REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

HIGH COURT CRIMINAL APPEAL NO. 23 OF 2019

JOSEPH WAMALWA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(An appeal from original conviction and sentence in RM Sexual Offence Case No 24 of 2018 Lodwar Law Courts Judgement of RM Hon. MK Muhiri dated 23/7/2019.)

JUDGMENT

1. The Appellant was tried and convicted of the offence of defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act No. 3 of 2016** and sentenced to imprisonment period of 15 years.

2. Being dissatisfied with the said conviction and sentence he filed this appeal and raised the following grounds of Appeal:-

(1) THAT the trial magistrate erred in law in failing to take into consideration the appellant's alibi defence.

(2) THAT the learned magistrate erred in law and in fact when he failed to consider the impact of the prosecution's failure to call key witnesses, the complainant's father and mother.

(3) THAT the learned trial magistrate erred in law and in fact by not conducting voir dire examination on PW1.

(4) THAT the learned trial magistrate erred in law and in holding that the prosecution had proved its case beyond reasonable doubt yet evidence on record did not support such a finding.

(5) THAT the learned trial magistrate erred in law and in failing to make a finding that the evidence adduced by PW1 and PW2 about the age was contradictory and inconsistent thus not safe to convict.

(6) The learned magistrate failed to make a finding that the mother and or family of PW1 had ulterior motives against the appellant and their aim was to unjustly punish the appellant.

3. When the appeal came up for hearing before me, the Appellant through his Advocate on record filed written submissions while the prosecution made oral submissions in opposition.

SUBMISSIONS

4. It was submitted by the Appellant that his defence of alibi was not considered by the trial court, having dismissed the same as an afterthought. It was contended that the burden of proving the falsity of alibi defence always has on the prosecution for which the

following cases:-

1) KARANJA v REPUBLIC [1983]KLR 501,

2) UGAND v SEBYALA & OTHERS [1969] EA 204 to the effect that all the accused has to do is to create a doubt as to the strength of the case for the prosecution.

3) VICTOR MWENDWA MULINGE v REPUBLIC [2014] eKLR to the effect that even if the accused raised the defence for the first time during trial. The prosecution ought to apply to adduce further evidence as per Section 309 of CPC.

4) KIARIE v REPUBLIC [1984] KLR to the effect that an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer.

5. It was further submitted that the trial court did not conduct *voir dire* examination on the complaint who was 14 years as per the provisions of Section 19 of the Oaths and Statutory Declarations Act and as stated in the cases of:- **JULIUS KIUNGA MRITHIA v REPUBLIC [2011]eKLR, FRANSISCO MALOVE v REGINA[1961] EA and PATRICK KATHURIMA v REPUBLIC [2015] eKLR.**

6. It was contended that vital and crucial prosecution and crucial prosecution witnesses were not called to testify and therefore on the basis of **BUKENYA & OTHERS v UGAND [1972] EA 549** the court should have made an adverse inference to the prosecution case. It was therefore submitted that the prosecution case against the Appellant was not proved beyond reasonable doubt.

7. On Sentence it was submitted that the sentence meted out to the appellant was harsh and on the authority of **FRANCIS KARIOKO MURUATETU & OTHERS v REPUBLIC [2017] eKLR** and **JANE KOITA INJIRI v REPUBLIC [2019] eKLR** the same should be reduced since the trial court did not consider the appellant's mitigation.

8. On behalf of the prosecution, Mr. Mong'are submitted that the appellant's alibi defence was considered and found not to hold, as the receipt the Appellant produced in court was contradictory as against the date of the offence. It was submitted that the prosecution called the witnesses who were relevant and necessary to sustain a conviction. It was contended that since the complainant was fifteen years at the time of trial, she was not a child of tender age and her evidence as corroborated with the medical evidence was enough to sustain a conviction. It was stated further that it was for the Appellant to prove the existence of a family dispute between him and the mother of the complainant since those were facts within his own knowledge.

9. This being a first appeal the court on the basis of the authority of **OKENO v REPUBLIC [1972] EA 32** is under a legal duty to re-evaluate the evidence tendered before the trial court to come to its own conclusion though giving allowance to the fact that unlike the trial court it did not have the advantage of seeing and hearing witnesses.

10. The prosecution case against the Appellant was PW1 PA then aged 14 years was sent by her mother on 24/4/2018 to the house of the Appellant to collect some money owed to her by the Appellant, who requested her to sit down. The Appellant then sat next to her, gagged her mouth using his hand and defiled her. He then threatened to kill her if she disclosed his action to anyone but she nevertheless reported to her mother and father and later to the police who referred her to the hospital where a P3 form to that effect was issued. She denied the existence of a grudge between the Appellant and her family. She stated in cross examination that she knew the Appellant.

11. PW2 ANDREW EMURIA a clinical officer at Lodwar County and Referral Hospital examined the complainant on 24/4/2018 and filled a P3 form and confirmed that her hymen was perforated. He formed an opinion that there was penetration and assessed her age as approximately 14 years. In cross examination he stated that the minor confirmed that she had been sexually assaulted severally before that date and was therefore not a virgin. **PW3 PC FELIX ORENG** stated that he took over investigations from **APC MARTHA** and was unable to find other witnesses. He confirmed that the Appellant was never taken for medical examination upon arrest.

12. When put on his defence, the Appellant stated that he was a preacher and that between 17/4/2018 and 23/4/2018 he was in Eldoret preaching and came back to his place at 9.30 p.m. when he met another preacher whom he had left to take care of his house.

The following day he woke up and prepared tea. At 7.15 a.m. A certain lady who was passing by came to the house and wished him well for travelling back safe. He gave her onions on a plate. At 8.00 a.m. he went for a meeting with a friend called Yashpata and returned back at 8.00 p.m. when he heard some noise outside wanting to attack. He stated that prior to the case, the mother of the complainant had told him that his church was a devil worshipping church and therefore the case was due to the grudge she had with his church. In cross examination he stated that he had only the receipt from Lodwar to Eldoret but not for return.

13. DW2 JOSEPH EMEKWI testified that he was with the Appellant on 17/4/2018 who left his house key to him and he travelled to Eldoret. On 23/4/2018 he returned and they made super and slept after eating. On 14th April, 2019, they went to preach in Town and when they returned a certain lady came to the house. In cross examination he stated that the Appellant left him with his house keys in the presence of JOSEPH and ALICE. He stated that he was with the Appellant on 24/4/2018 but not when he was arrested. **DW3 JOSEPH ERENGA EKIRU** stated that the Appellant came back from Eldoret on 23/4/2018 and on 24/4/2018 together with DW2, they left for church in town for worship up to 200 p.m. and went back home at 4.00 p.m. In cross examination he stated that he did not see the Appellant give keys to DW2.

14. DW4 ALICE EJIKAN stated that the Appellant had gone to visit his children on 17/4/2018 and came back on 23rd April, 2018. On 24/4/2018 at 7.40 a.m. while on her way to work passed through the Appellant's house who gave her onions and the two left for church meeting. At 8.00 p.m. He heard noise from the Appellant's house which was surrounded by people on allegations that he had defiled PW1, who said it was false. In cross examination she confirmed that she was an usher at the Repentance and Holiness church while the Appellant was a pastor. She stated that the Appellant gave her onions in a paper bag and not a plate.

ANALYSIS AND DETERMINATION

15. From the proceedings, the grounds of appeal and the submissions herein, I have identified the following issues for determination in this appeal:-

a) Whether the appellant's alibi defence was considered by the court.

b) Whether it was necessary to conduct *voir dire* examination on PW1.

c) Whether the prosecution case was proved beyond reasonable doubt.

d) Whether the sentence meted against the Appellant was lawful.

e) What order should the court make.

16. On the appellants alibi defence: in dismissing the same the trial had this to say:-

"The accused person purports that he had travelled to Eldoret on 17th April, 2018 and produced a receipt of the travel that he boarded as Dexh1, I have looked at the receipt and the same is dated 23rd June 2018 and it indicated that the travel is from Kitale to Lodwar. Needless to say, the receipt did not add any value to the accused person defence and even if it were correctly dated the material date herein is as to what transpired on 24th April, 2018 and so the receipt is irrelevant."

17. The law on alibi defence as submitted by the Appellant is that the burden was with the prosecution to prove its falsity throughout the trial. In this case the Appellant's alibi defence was that he was in Eldoret between 17th - 23rd April, 2018. The prosecution evidence is that the complainant was on 24th April, 2018 at 8.00 a.m. sent by her mother to the house of Appellant when he defiled her. The issue for determination herein is whether the Appellant was at his house on 24th April, 2018 at the said time. The appellant in his defence confirmed that he was in his house between 7.15 a.m. and around 8.00 a.m. when he left allegedly for the house of DW3 at 8.00 a.m. DW4 who stated that she went to the house of the Appellant at 7.40 a.m. and saw him and PW3 were together contradicted the Appellant's evidence on how she was given onions and further contradicted DW3 on whether he had the Appellant's house keys. I am therefore satisfied that the alibi defence did not cast doubt on the prosecution case as it was related to the time of the offence. I therefore find no fault with the trail Court alteration thereon.

18. On whether the prosecution case was proved beyond reasonable doubt;- In a charge of defilement, the prosecution is in law required to prove the age of the complainant, penetration and the identity of the Appellant. The age of the complainant was proved

through the age assessment report to be 14 years which was corroborated the complainant's evidence. On proof of penetration, PW2 examined the complaint and confirmed that there was penetration even though it was his evidence that the complainant was not a virgin. The issue before the trial court was not whether the complainant had been defiled before but on whether she had been defiled by the Appellant on the 24th of April, 2018. It was PW2's evidence that the complainant's hymen was perforated which was proof of penetration as was stated in the case of **WALTER OTIENO OKUMU v REPUBLIC [2017] eKLR**. Further there was no need for the Appellant to be subjected to medical examination the prosecution having placed before the trial court enough evidence to prove penetration.

19. On the issue of identification, the complainant's evidence was that the Appellant was her neighbour and her mother used to supply to him vegetables. The Appellant in his defence confirmed knowing the mother of the complainant whom he alleged had a grudge with him. DW4 placed the complainant at the place where the Appellant was arrested thereby corroborating her evidence in material particulars. I am therefore satisfied that the identification of the Appellant was as held by the trial court that of recognition and was not mistaken and free from error.

20. On whether there was need to conduct *voir dire:-* the complainant was aged 15 years at the time of her testimony and as rightly stated by the court was not a child of tender age within the definition of Section 19 of the Oaths and Statutory Declaration Act (Cap 15) and Section 2 of the Children Act. The Court of Appeal in **PATRICK KATHURIMA v REPUBLIC [2015] eKLR** stated that the age of 14 years remains a reasonable indicative age for purposes of **Section 19** of Cap 15 while in **SAMWEL WARUI KARIM v REPUBLIC [2016] eKLR** the Court of Appeal had this to say on the issue.

"Which definition should guide the courts in determining who is a child of tender years, is it the Children Act on the precedents set by the Court of Appeal" The requirements by the aforementioned provisions of the Evidence Act and the Oaths and Statutory Declaration Act of voir dire examination of a witness of tender years in a criminal trial is meant to guarantee an accused person a fair trial. A fair trial is guaranteed by the constitution. We have done aforementioned review of the law and decided cases in an attempt to ascertain in this case whether failure by the trial magistrate to conduct voir dire examination on the complainant a child aged 12 years affected the credibility of her evidence. We are persuaded the definition of a child of tender age under the Children Act cannot globally be imported for offences under criminal law. This is because children develop and mature differently depending on their social economic and other factors such that some children of 11, 12 or 13 years can be very sharp and intelligent witnesses whereas others in the same age bracket may not at all comprehend what is a court of law. This explains why the courts have held on the age at 14 years and sometimes even higher age as the age below which a child is of tender age for purposes of criminal trial and insisted the competency be tested through questions that must be put to the child and answers given by the child be recorded verbatim. The definition of a child of tender years provided under the children Act has remained a guide in regard to criminal responsibility."

21. From the above analysis I am not persuaded by the submissions by the Appellant that the trial court erred in not conducting *voir dire*. Further whereas the complaints account of what happened was corroborated through the medical evidence of PW2, this being a sexual offences matter, there was no requirement of corroboration under the provisions of **Section 124** of the **Evidence Act**.

22. On failure to call crucial witnesses which included the father and the mother of the complainant, the trial court has this to say on the same:-

"It is my considered view that it is not necessary for the prosecution to call a multiplicity of witnesses, some of whom may be merely cumulative and repetitive. It is enough to call such a number as are sufficient to prove its case. Where, however, the prosecution fails to call a material witness without any apparent reason, the court is entitled to presume or infer that the evidence which that witness would have given would, if produced be unfavourable or adverse to that party. This view received judicial endorsement in the case of BUKENYA & OTHERS v UGANDA [1972] EA 549 .....

Be that as it may, in the case of ERICK ONYANGO ONDENG v REPUBLIC [2014] eKLR the Court of Appeal held:-

"In BUKENYA & OTHERS VS UGANDA (supra), the former East Africa Court of Appeal held that the prosecution has a duty to call all the witnesses necessary to establish the truth even though their evidence may be inconsistent; that the court itself had the duty to call any person whose evidence appears essential to the just decision of the case;……

While fully in agreement with the above statement, it should be remembered that the context in which it was made is that of a case in which the evidence called is barely adequate. In the present case, the proviso to section 124 of the Evidence Act (Cap 80)

which provides that, in the absence of any requirement by provision of law, no particular number of witnesses shall be required for the proof of any fact. In this appeal, it is not clear to us what value the evidence of Violet would have added to the evidence of PW2, which the court found trustworthy, as well as the medical evidence. In our opinion, violet would have been a peripheral witness as she was said to merely have happened by when the appellant was with PW2 on a different occasion.

The proviso to Section 124 of the Evidence Act therefore allows the court to convict on the sole evidence of a victim of a sexual offence if it is satisfied that the victim is being truthful. Accordingly, the prosecution need not call all witnesses who may have information on a fact. Failure to call a witness will only be fatal if the evidence presented by the prosecution is insufficient to sustain a conviction and contains gaps which could have been filled by a witness who was not available.

I am guided and bound by the Erick Onyango Ondeng case (supra) and on this penultimate issue I do find that the evidence presented by the prosecution was sufficient and did not contain any gaps which could have been filled by either Selina Asto or Rael Akolong. Therefore, I find that it would be a mockery of justice if this court were to infer that the evidence of the uncalled witnesses would have been adverse to the prosecution's case."

23. The trial court took into account the evidence tendered and I therefore find no fault with his determination thereto.

24. The final issue is whether the sentences meted out to the appellant was harsh:- The Appellant was charged with defilement under Section 8(1) as read with Section 8(3) of the Sexual Offences Act where the sentence upon conviction is imprisonment for a term of not less than twenty years. It is clear that the minimum sentence provided therein is imprisonment for twenty years. The trial court being guided by the Court of Appeal decisions in **CHRISTOPHER OCHIENG v REPUBLIC [2018] eKLR and JARED KUITA INJIRI v REPUBLIC [2019] eKLR** quoted by the appellant in his submissions sentenced the appellant to imprisonment for a period of 15 years, which was not the mandatory minimum sentence provided for under the offence, having taken into account his mitigation. Sentencing being an exercise of discretion on the part of the trial court and having found that, the court applied the correct principles, I am unable to interfere with the same.

25. Having taken into totality, the proceedings, the petition of appeal and submissions herein as analyzed above I am satisfied that the conviction was safe and the sentence lawful. The appeal herein is therefore dismissed as lacking merit and the conviction and sentence affirmed. The appellant has right of appeal.

Dated, signed and delivered at Lodwar through Skype this 12th day of May, 2020

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Mwaura for the State

Appellant – present

Mr. Pukha for the Appellant

Court Assistant: Maureen/Lotim