Case Number:	Criminal Appeal 55 of 2015
Date Delivered:	31 Jul 2019
Case Class:	Criminal
Court:	High Court at Kisumu
Case Action:	Judgment
Judge:	Milton Stephen Asike Makhandia, James Otieno Odek, Patrick Omwenga Kiage
Citation:	Erick Otieno Meda v Republic [2019] eKLR
Advocates:	Mr. Kakoi for the State
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Kisumu
Docket Number:	-
History Docket Number:	Cr. Appeal No. 80 of 2014
Case Outcome:	Appeal allowed
History County:	Kisumu
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE MAKHANDIA, KIAGE & OTIENO-ODEK JJA)

CRIMINAL APPEAL No. 55 OF 2015

ERICK OTIENO MEDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Homa Bay, (Majanja, J.) delivered on 20th March 2015

in

H C Cr. Appeal No. 80 of 2014)

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JUDGMENT OF THE COURT

1. The appellant was charged with defilement of a child contrary to **Section 8 (2) of the Sexual Offence Act.** The particulars were that on 6th June 2010, in East Kamagambo Location, Kachieng sub-location in Rachuonyo District within Nyanza Province, he unlawfully and intentionally committed an act which caused penetration of his male genital organ namely penis into the vagina of EAO a child aged 10 years. He faced an alternative charge of an indecent act with a child aged 10 years.

2. The appellant pleaded not guilty and a full trial was conducted. The prosecution case was founded on the testimony of PW1, EAO the complainant, who after a *voire dire* examination testified as follows:

I am EAO. I go to school at[Particulars Withheld]. I am in class three. I am 10 years old. On 6th June 2010, I had gone to the posho mill at Sikri. Then the accused found me there. He is called Jalemo. He told me after finishing I should go to his place to pick some money for my mother.

After the exercise at the posho mill, I went to the accused home. I then made tea and we took it together. Then after that he locked the door. He told me not to scream. He then removed my under pants and also removed his pants. He laid on me on the bed. He defiled me by having intercourse with me. After that he let me go home. I went back to the posho mill and took the flour and proceeded home. The next day I reported to my mother. We then went to Oyugis Police Station in company of my mother and my brother child and reported. I was then taken to Rachuonyo District Hospital where I was treated. I later recorded my statement. The accused person was then arrested. He never gave me money to take to my mother. He is here in the dock.

3. PW4 Dr. Peter Ogolla, a medical officer at Rachuonyo District Hospital, testified that he examined the complainant on 14th June 2010 which was eight days after the alleged defilement. That he filled a P3 Form which he produced in court. That on medical examination of PW1, he found that her hymen was breached and it looked recent. There was no obvious bleeding and no abnormal discharge. A swab from the vaginal cavity revealed nothing abnormal. He concluded that there was recent sexual penetration of PW1 who was aged 10 years.

4. PW4 further testified that he medically examined the appellant. He produced a P3 Form that he filled, that on the alleged sexual

assault, the external genitalia of the appellant showed no obvious signs of injury.

5. In his defence, the appellant gave an unsworn statement and called two witnesses. On his part, the appellant stated that on the alleged 6th June 2010, he was attending a funeral in Awasi at the home of his mother. That he was not at his house on 6th June 2010 when the complainant alleged that he defiled her.

6. The defence witness DW2 Serephaina Omolo Obunga testified that the appellant was her nephew. That on 6th June 2010, she was at Awasi with the appellant and they both attended burial of their uncle on the said 6th June 2010. That the appellant was at Awasi the whole day and he left the next day 7th June 2010.

7. DW3 Benta Anyango testified that the appellant was her brother in law. That the appellant was at Awasi on 6th June 2010 where they both attended the burial ceremony at home. That the appellant arrived at Awasi on 5th June 2010 and left on 9th June 2010.

8. Upon considering the evidence tendered before court, the trial magistrate found the appellant guilty as charged. He was sentenced to a term of life imprisonment. Aggrieved by the judgment of the trial court, the appellant lodged a first appeal to the High Court. His appeal was dismissed. Further aggrieved, the appellant has lodged the instant second appeal to this Court on the following grounds:

(i) That the judge erred in upholding his conviction without appreciating there was no prompt report made to the police station.

(ii) The judge erred in not complying with the provisions of **Article 50 (2) (j) of the Constitution.**

(iii) The judge erred in upholding conviction without noting that crucial witnesses were not summoned to testify.

(iv) The judge erred in upholding his conviction on a medical evidence that was shoddy.

9. At the hearing of the appeal, the appellant appeared in person while the State was represented by the Principal Prosecution Counsel Mr. Kakoi. Both the appellant and respondent had filed written submissions in the appeal which they relied on wholly.

APPELLANT'S SUBMISSIONS

10. In his written submissions, the appellant reiterated his grounds of appeal. That **Article 50 (2) of the Constitution** was violated as he was not supplied with witness statements; that the prosecution had failed to prove the age of the complainant; that no birth certificate or baptismal card was produced in evidence; that the medical report did not link him to the alleged offence; that the clinical examination of the complainant did not reveal the origin of the injuries she sustained. Of significance, it was submitted that the two courts below did not give due consideration and weight to the alibi defence which had been raised by the appellant.

RESPONDENT'S SUBMISSIONS

11. The State in opposing the appeal submitted that all the ingredient of the offence was proved. That the age of the complainant was proved by PW1's own testimony that she was 10 years old. That PW4 the clinical officer testified that the complainant was 10 years of age. On penetration, the State submitted that the complainant testified how she was lured into the appellant's house. Further, PW 4 testified that medical examination of the complainant revealed her hymen was breached. On identification of the appellant, it was submitted that this was a case of recognition; that the complainant knew the appellant. On the alibi defence raised by the appellant, the State submitted the two court's below considered the alibi defence and found the same to be unreliable.

12. In concluding its submissions, the State urged us to consider the circumstances under which the offence was committed. Counsel observed that the Supreme Court in **Francis Karioko Muruatetu & another - v -Republic [2017] eKLR** held that mandatory sentences deprive courts of their legitimate jurisdiction to exercise discretion to individualize an appropriate sentence in each case. In the instant matter, it was submitted that if this Court were inclined to interfere with the mandatory life sentence meted upon the appellant, then a term of imprisonment of not less than 30 years would be appropriate.

ANALYIS and DETERMINATION

13. We have considered the record of appeal as well as submissions by the appellant and the respondent. This is a second appeal and is confined to questions of law only. In ***M'Riungu - v- Republic [1983] KLR 455***, this Court expressed itself thus:

"[W]here a right of appeal is confined to question of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the first appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law".

14. In **Adan Muraguri Mungara - v - Republic, Cr. No. 347 of 2007 (Nyeri),** this Court set out the circumstances under which it will disturb the concurrent findings of fact by the trial court in the following terms:

"As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere." See ***Aggrey Mbai Injaga v Republic [2014] eKLR****.*

15. In the instant appeal, the appellant has urged several grounds. Of pivotal importance is that the two courts below did not consider the alibi defence that was raised. An alibi goes to identification of the appellant as the person who committed the offence. The appellant in his unsworn statement denied committing the offence. He stated that he was not at the scene of crime on 6th June 2010 when the alleged offence took place. Both DW1 and DW2 testified that the appellant was with them at Awasi on 6th June 2010 when the alleged offence took place. The alibi raised by the appellant must be weighed against the alleged recognition of the appellant by the complainant.

16. The trial magistrate in evaluating the alibi defence raised by the appellant stated as follows:

…In his main defence, he stated that he was not at his home area on the material date as he had gone to attend a funeral at Awasi. He called two witnesses who testified that they were with the accused person at Awasi during the funeral.

The evidence of the accused person and his two witnesses, in that regard, did not however tally. The accused person stated that he left the funeral place back to his home on 13th June 2010. His witnesses namely Seraphina Omolo (DW2) stated that the accused person left the place back to his home on the next day i.e. on 7th June 2010. His other witness Benta Anyango (DW3) on her part stated that the accused left the funeral place back to his home on 9th June 2010.

I thus find their evidence is contradictory and unworthy of belief and I reject the same….

17. The learned judge in re-evaluating the alibi defence expressed himself as follows:

…. The appellant stated he was at a funeral and he was there with DW1 and DW2. DW1 and DW2 gave contradictory testimony regarding the period of time he was at the funeral. DW1 said she saw him and he left on the next day while DW2 said she saw him and he remained there until Tuesday which was 9th June 2010 while the appellant stated he left the funeral on 13th June 2010. The alibi was therefore discredited.

18. In an alibi defence based on witness testimony, the credibility of the witness can strengthen or weaken the **defence** dramatically. A successful alibi defence entirely rules out the accused as the perpetrator of the offence. There is no burden of proof on the accused to prove an alibi. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt. In the case of **Kiarie – v- Republic [1984] KLR,** this Court stated:

"An alibi raises a specific defence and 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 and it sufficient if an alibi introduces into the mind of a court a doubt that is not

unreasonable.…..”

19. In the recent case of **Victor Mwendwa Mulinge –v- R, [2014] eKLR** this Court rendered itself thus 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.....”*

20. Comparatively, in the South African case of **S -v- Malefo en andere 1998 (1) SACR 127 (W) at 158 a - e** the court set out five principles with respect to the assessment of alibi evidence:

(a) There is no burden of proof on the accused to prove his alibi.

(b) If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt.

(c) An alibi "moet aan die hand van die totaliteit van getuienis en die hof se indrukke van die getuies beoordeel word."

(d) If there are identifying witnesses, the court should be satisfied not only that they are honest, but also that their identification of the accused is reliable ("betroubaar").

(e) The ultimate test is whether the prosecution has furnished proof beyond a reasonable doubt — and for this purpose a court may take into account the fact that the accused had raised a false alibi.

21. In another persuasive South African case of **R - v - Biya 1952 (4) SA 514 (A)** at **521C** - D Greenberg JA said:

‘If there is evidence of an accused person's presence at a place and at a time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means that there is the same possibility that he has not committed the crime.’”

22. In **S –v- Sithole 1999 (1) SACR 585 (W) at 590g - i** it was correctly stated:

“There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true. These are not two independent tests, but rather the statement of one test, viewed from two perspectives. In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the same time no reasonable possibility that the evidence exculpating him is not true. The two conclusions go hand in hand, each one being the corollary of the other. Thus in order for there to be a reasonable possibility that an innocent explanation which has been proffered by the accused might be true, there must at the same time be a reasonable possibility that the evidence which implicates him might be false or mistaken.”

23. The comparative decisions cited above are persuasive and espouse good law which we adopt herein. In considering an alibi, we observe that:

(a) An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused’s point of view.

(b) An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.

(c) The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.

(d) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. (See **Mhlungu - v - S (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014)**

24. In the instant matter, the two courts below considered the alibi defence raised by the appellant. The question is whether the defence of alibi adduced by the appellant can stand. The law prior to the repeal of **Section 235 of the Criminal Procedure Code** required that an accused who wished to rely upon the defence of an alibi, had to give the particulars of the place where he was, and the particulars of the persons with whom he was. The law today is that it is up to the prosecution to displace any defence of an alibi and show that the accused was present at the place, and at the time the offence was committed by the accused or his accomplices. (*Emphasis supplied* - See **Republic – v - John Kimita Mwaniki [2011] eKLR).**

25. In the instant matter, the two courts below arrived at a conclusion that the alibi defence witnesses were not credible as they gave contradictory evidence as to the date when the appellant returned to his home from the funeral. In our considered view, the date when the appellant returned to his home was not a material fact in placing the appellant at the scene of crime. The material fact and date relevant to placing the appellant at the *locus in quo* is whether the appellant was at his house on 6th June 2010 or if he was at Awasi on the said 6th June 2010. The two defence witnesses DW1 and DW2 both place the appellant at Awasi on the material day of 6th June 2010. On the alibi defence, the evidence of DW1 corroborates the testimony of DW2. The two courts below erred in not considering the corroborative effect of the alibi testimony of the two defence witnesses. The witnesses gave direct evidence of eye witnesses that they saw the appellant at Awasi on 6th June 2010. It was incumbent on the prosecution to discount and disprove this corroborative evidence. The prosecution failed to do so and a reasonable doubt was cast on identification of the appellant as the person who committed the alleged offence. It was incumbent upon the prosecution to prove that the alleged recognition of the appellant by PW1 was not mistaken or false. No person can be at two places at the same time.

26. Given the existence of the corroborative evidence of DW1 and DW2 on record, the prosecution should have gone further and placed the appellant at the scene of crime not only on the material date of 6th June 2010 but at the time at which the offence is alleged to have been committed. *(Emphasis supplied)*

27. On record, there is no explicit evidence to indicate the time at which the offence was committed. The complainant's mother PW2 Silba Achieng Ouko testified that she had sent PW1 to the posho mill at 2.00 pm and that PW1 returned at 4.00 pm. In order to dislodge the alibi defence, the prosecution should have led evidence to place the appellant at the scene of crime between 2.00 pm and 4.00 pm. In the absence of such evidence, the alibi defence is probable and casts doubt on the prosecution case.

28. In totality, we find that the two courts below erred in their consideration and evaluation of the corroborative alibi defence given by DW1 and DW2. We thus find that identification of the appellant as the perpetrator of the alleged offence was not proved beyond reasonable doubt. Accordingly, we allow the appeal, quash the conviction and set aside the life sentence meted upon the appellant. The appellant be and is hereby set forth at liberty unless otherwise lawfully held.

Dated and Delivered at Kisumu this 31st day of July, 2019

ASIKE MAKHANDIA

……...

JUDGE OF APPEAL

P. O. KIAGE

……...

JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR