Case Number:	Criminal Appeal 28 of 2019
Date Delivered:	12 May 2020
Case Class:	Criminal
Court:	High Court at Lodwar
Case Action:	Judgment
Judge:	James Wakiaga
Citation:	Emmanuel Ekuwom v Republic [2020] eKLR
Advocates:	Mwaura for the State
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Turkana
Docket Number:	-
History Docket Number:	Sexual Offence Case 60 of 2018
Case Outcome:	Accused acquitted
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT LODWAR

HIGH COURT CRIMINAL APPEAL NO. 28 OF 2019

EMMANUEL EKUWOM alias LOPUTO.......................................APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(From the original conviction and sentencing of Sexual Offence Case No 60 of 2018)

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to **Section 8(1)(3)** of the **Sexual Offences Act No. 3 of 2016** the particulars of which were that on 29/8/2018 in Turkana Central sub county within Turkana County, penetrated the vagina of **LW** a child aged 13 years.

2. He faced an alternative charge of committing an indecent act with a child contrary to **Section 11(1)** of the Sexual Offences **Act No. 3 of 2006.**

3. He was tried, convicted of the charge of defilement and sentenced to eight (8) years imprisonment. Being aggrieved by the said conviction and sentence he filed this appeal and raised the following grounds of appeal:-

a) He was not accorded fair trial and he was not supplied with witness statements.

b) He was a minor at the time of trial.

c) His identification was not safe.

d) Vital prosecution witnesses were not called to testify.

e) The age of the complainant was not established.

f) His sentence was not lawful.

4. When the appeal came up for hearing before me, the Appellant who was unrepresented filed Amended Grounds of Appeal together with written submissions which he relied upon, while Mr. Mongare the Learned Prosecutor made oral submissions in opposing the appeal.

5. It was submitted by the Appellant that he was convicted on the basis of mistaken identity as the evidence of PW2 was that the perpetrator was arrested at the scene but was released by the police after PW1 claimed that he was not the one. He submitted that he was arrested after two months. Reliance was placed on the case of **KIARIE v REPUBLIC [1984] KLR App. No. 739.** It was further submitted that since the incidence occurred at night the conditions prevailing were not ideal for positive

identification as pointed out by the trial court in the judgment. The case of **ANJONONI v REPUBLIC [1980] KLR 59, JUMA NYONGESA v REPUBLIC CRA No. 63/1993 and SABWETO v REPUBLIC [1960] EA 194** were submitted in support.

6. It was submitted further that critical and essential witnesses mentioned by PW1 and PW3 were never called to testify and therefore adverse inference should be made against the prosecution case as per **BUKENYA v UGUNDA [1972] E.A 549**. It was contended further that he was convicted on the strength of the evidence of family members which was unfair and unjust and that the age of the complainant which is a critical element in the offence was not proved for which the case of **HILARY NYONGESA v REPUBLIC ELDORET CR. APP. NO. 129/2009** was submitted.

7. It was contended further that the case was not properly investigated and that his alibi defence was wrongly rejected by the trial court for which the following cases were submitted:- **KARANJA v REPUBLIC [1983] KLR and VICTOR MWENDA MULINGE v REPUBLIC [2014] KLR**. It was stated that the case of defilement was not proved as there was no proof of penetration. It was further contented that he was a minor at the time of the trial and should have been treated as such.

8. On behalf of the prosecution, it was submitted by Mr. Mongare, that the victim PW1 identified the Appellant who had asked her to go to the house and sleep there until morning and bought her chips only to sneak to where she was sleeping and defiled her. The age of the complainant was proved as 13 years. It was submitted that the sentence meted out was lawful and in line with sentences for the same offence.

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 was that on 28/8/2018 when the complainant (PW1) was going to school, she fell ill and therefore went to a shop near the school and stayed there until 6.00 p.m. when the appellant told her to go and sleep in his place until the following morning. He bought her chips and soda. Later on he sneaked into the room where she was sleeping and defiled her. She stated that the Appellant applied saliva on his penis and penetrated her. She screamed and a lady responded and removed the Appellant from her.

11. PW2 LWG her mother testified that the complainant was aged 13 years and on 29/8/2018 while preparing her child for school the complainant was not feeling well. She did not come back from school and was informed by her neighbour's child that she had been seen sitting at a corridor. She looked for her and on 30/8/2018 reported to Lodwar police station. She was later on informed by a lady that she had been seen at Jack City where she was found. When interrogated she informed her of what had happened. She was taken to Turkana wellness centre where the Doctor confirmed that she had been defiled. She later on took them to the house where she had been defiled and one person was arrested thereat. The lady who had rescued the complainant said that the person arrested was not the perpetrator, who was after one month pointed out by the complainant at Kanam Kemer and was arrested.

12. PW3 GABRIEL EWOI stated that on 29/8/2018 at 9.00 a.m. he went home and found his beddings missing. He was informed by one Dickson that the Appellant had taken them and was with a girl. He went to his room and found PW1 crying. He took his beddings and left the Appellant with PW1.

13. PW4 ANDREW EMURIA a clinical officer with LCRH examined the complainant on 31/8/2018 and confirmed that her hymen was perforated and there were lacerations on both labias. He concluded that there was penetration and assessed the age at 13 years. **PW5 PC WALTER RORO** produced the age assessment report confirming the age of the complainant and the appellant who was found to be above eighteen (18) years of age.

14. When put on his defence, the Appellant gave sworn statement and stated that on the material day he went to his Aunt place at Kanam Kemer and later on went to Kalokol where he picked up a friend. He was not at Lodwar on the material night. **DW2 WILSON EKADEI** stated that on 28/8/2019, he was from watching football when he heard a voice saying "Wachana na mimi" on going there he found a man sleeping on top of a girl. He took the girl to her mother's house and the girl said she had been chased away by the mother from the house. In cross examination he stated that he did not know the name of the man who was with the girl and that it was not the accused. He stated that the person who had defiled the girl was arrested on 29/8/2019.

15. From the proceedings, memorandum of appeal and submissions herein I have identified the following issues for definition:-

a) Whether the Appellant was positively identified.

b) Whether the Appellant age was taken into account both during the trial and in sentence.

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

d) Whether the sentence was harsh.

16. On the issue of identification, the Appellant submitted that the perpetrator of the offence was arrested at the scene but was later on released and thereafter the Appellant was arrested at a stage in Kanam kemer two months after the offence. It was further submitted that as per the evidence of PW3, the condition prevailing was not ideal for positive identification since it was at night. In dismissing the Appellant's defence herein the trial court had this to say:-

"Although PW1 was not examined properly by the prosecution as to the visibility of the area where she was and how she managed to identify the accused person, her evidence of identification of the accused was corroborated by PW3 who testified that he accused person was in the house with PW1 on the material night.

It is also essential to note that none of the prosecution witnesses other than PW1 testified about witnessing PW1 and the accused person engaging in sexual intercourse. Even PW3 also testified that he found the accused person with PW1 in the room informed this court that he found the accused person in the room with PW1 and PW1 was crying but never saw any sexual intercourse between PW1 and the accused."

17. It is therefore clear that the identification of the Appellant was in doubt even in the mind of the trial court. Rather than the circumstantial evidence that the Appellant was in the room with the complainant and that he had taken the beddings of PW3, there is no direct evidence linking the appellant to the defilement of the complainant and the fact that somebody else was found in the said room who was arrested and released by the police and without being called as witness raised doubt as to the identification of the Appellant when looked at against the evidence of DW2 who stated that it was not the Appellant.

18. The law on identification was stated in **CRIMINAL APPEAL NO. 24/2000 PAUL ETOLE & ANOTHER v REPUBLIC** where the Court of Appeal had this to say:-

"The appeal of the 2nd appellant raised problems relating to evidence and visual identification, such evidence can bring about a miscarriage of justice occurring can be much reduced if whenever the case against the accused person depends wholly or substantially on the correctness of one or more identification of the accused, the court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally it should remind itself of any special weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than the identification of a stranger, but even when witness is purporting to recognize someone who he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made. All these matters go to the quality of the identification evidence. When the quality is good and remains good at the close of the accused case the danger of mistaken identification is lesser, but the poorer the quality the greater the danger."

19. Having raised doubt on how the Appellant was identified, the trial court should have given the same the benefit of doubt and not to dismiss the same on the basis that corroboration was not needed. The complainant did not state in her testimony whether or not she knew the Appellant before the fateful day. The only other witness who linked the appellant to the crime PW3 states that the appellant had stolen his clothes thereby raising a possibility of a grudge.

20. As submitted by the Appellant vital witnesses who would have strengthened the prosecution case including the women who allegedly rescued the complainant from the hands of the Appellant and the boy who was arrested from the house where the complainant was allegedly defiled and released by the police were not called thereby raising a doubt in the prosecution case. The benefit of this doubt being a criminal trial should have been accorded to the appellant.

21. I have further noted that the trial court shifted the burden of proving the alibi defence to the appellant, which burden rests with the prosecution throughout the period of trial and therefore fall into error. It was for the prosecution to seek more time so as to bring in any evidence to displace the same as was stated in the case of **WANGOMBE v REPUBLIC [1976-80] 1KLR 1683** and in **GANZA & 2 OTHERS v REPUBLIC [2005] 1KLR 52** where the Court of Appeal stated that where the defence of alibi is raised for the first time in the Appellant's defence and not when he pleaded to the charge, the correct approach is for the trial court to weigh the defence of alibi against the prosecution case.

22. From the analysis herein, it is clear that the identification of the Appellant was not free from error and therefore his conviction was not safe. For that reason I will allow the appeal herein, quash the conviction and set aside the sentence. The Appellant shall be set free forthwith unless otherwise lawfully held.

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:-

Mwaura for the State

In person for the appellant

Court Assistant: Maurine/ Lotim

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