REPUBLIC OF KENYA

High Court of Kisii

Criminal Appeal 54 of 2009

WYCLIFF NYABUTO …… APPELLANT

AND

REPUBLIC …… RESPONDENT

(Being an appeal from original conviction and sentence of the CM's Court at Kisii by Hon. P.L. Shinyada,

dated and delivered on 6th March, 2009 in CM's Court Criminal Case No.1728 of 2006)

JUDGMENT

1. The appellant herein, Wycliff Nyabuto was arraigned before the CM's Court at Kisii on a charge of defilement contrary to **section 8 (3)**of the **Sexual Offences Act**. It was alleged that on the 14th day of September 2006 at around 9.00 a.m. at [particulars withheld] sub location in Kisii Central District within Nyanza Province, he unlawfully had carnal knowledge of F.B., a girl under the age of 16 years. The appellant was charged in the alternative with indecent assault contrary to **section 144 (1)** of the **Penal Code**. It was alleged that on the same day and in the same place, the appellant unlawfully and indecently assaulted F.B., a girl under the age of sixteen years by touching her private parts namely **"vagina."** The appellant pleaded not guilty and the case went to trial during which the prosecution called 5 witnesses.

2. The facts and the evidence of this case can be gleaned from the testimonies of the 5 witnesses. Briefly, the complainant (herein referred to as F.) who was 5 years old at the time of the alleged offence was sent by her mother M.K., PW2, holder of ID No. [particulars withheld] to the home of Nyabuto, the father of the appellant. M. sent F. to go and call the appellant's mother one Josephine to come and accompany M. to the farm. Nyabuto's and M.'s homes were only 50-60 metres apart.

3. When F. did not return by 8.20 a.m., M. became anxious and started to call out her name, but F. did not respond. M. decided to send her son, E. to go and look for F. but on reaching Nyabuto's home, E. found the door to Nyabuto's house locked. When M. was informed by E. that there was nobody at Nyabuto's home, she sent E. to the home of Charles Omboso to see if F. was there, but F. was not there either. At about 9.00 a.m., F. emerged from the direction of Nyabuto's home and informed her mother that Josephine was not at home. Believing that all was well with F., M. went to the farm.

4. In the evening after M. returned from the farm, she interrogated F. as to where she had gone when she was sent to Josephine's home earlier in the day. On hearing that question from her mother, F. became scared but on further enquiry through her older sister M., F. explained how when she got to Josephine's home, the appellant who was alone at home made F. to enter the house grabbed her, removed her panty

and defiled her. After defiling her, the appellant wiped her dry and put back her panty.

5. F. who testified as PW4 gave unsworn evidence and told the court that on the day in question, she was sent by M. to Josephine's home. On arrival at the home, she found the appellant alone in the homestead. The appellant led F. into the house, removed her panty and defiled her by doing **"dirty"** and **"stupid"** things to her and promised to give her money to buy mandazi. The appellant also cautioned F. against saying anything to anyone about what had been done to her. F. however told her sister M. what the appellant had done to her.

6. When M. heard about these things, she took F. to the bedroom, removed her panty and inspected her genitals. On examination, M. noticed that F.'s genitals were red inflamed and bruised but by then F. had already been bathed. M., in the company of her other children went to Nyabuto's home but the appellant was not there, only his parents were. M. reported the incident to Josephine, the appellant's mother. On the following morning, M. and Josephine decided to take F. to hospital.

7. Before they left for the hospital, the appellant appeared and when asked about the report from F., he denied it in the presence of his father. M. then called Charles Ombosa, PW3, to listen to the story. Thereafter, the matter was reported to the area Assistant Chief. On receiving the report, the Assistant Chief referred M. and Josephine to Kisii police station. As the appellant had also gone to the home of the Assistant Chief he was arrested and handed over to the police. The appellant and F. were both taken to Kisii General Hospital for examination and treatment.

8. During cross examination, M. denied a suggestion by the appellant that she had a grudge with his family.

9. Charles Ombosa, PW3, testified that he was informed about the incident involving the appellant and F. on the day after, namely on 15th September 2006. He helped in apprehending and escorting the appellant to Kisii police station. The appellant is a grandson to Charles Ombosa who confirmed to the court that he and the appellant had no grudge between them.

10. When the appellant was taken to Kisii police station, he was taken into custody by Number 83811 Police Constable Linda Okello who testified as PW5. PW5 also received F. and after recording witness statements, PW5 issued F. with a P3 form. She then escorted F. to the hospital for medical examination. PW5 produced the P3 from as **P. Exhibit 1**. According to PW5, the appellant was taken to the police station after F. had been taken to hospital.

11. At the hospital, F. was examined by Jackson Marauni, PW1, a clinical officer at Kisii District Hospital. According to Jackson Marauni (Jackson), F.'s minor labia were red and tender on examination. The H.V.S test revealed that there were 2 pus cells in the urine and gram plus rods which are bacterial organisms which cause sexually transmitted diseases. Jackson also testified that there was a degree of penetration and that F. was infected with gonorrhea. Jackson also testified that according to the clinic card availed to him, F. was born on 8th June 2001 so that by the time of the alleged crime, she was 6 years old. The appellant put no questions to Jackson.

12. At the close of the prosecution case, the appellant was put on his defence. He gave sworn evidence in which he stated that he was not at home when the alleged incident occurred. He testified that on the material date, he had gone on a trip and that it was only upon his return home that he was informed that he had defiled F.. He wondered why he was not examined together with F. especially after he requested that he be examined. In his further testimony, the appellant testified that the village elder tried to broker an amicable settlement of the matter, but that F.'s family turned down the offer.

13. During cross examination, the appellant stated that on the date of the alleged incident, he had gone to Ogembo although he could not remember the exact date when he went to Ogembo. He also testified that it was only his mother who knew that he had gone to Ogembo, and that when K.went to the appellant's home to report the incident, the appellant had just returned from Ogembo. In his further testimony, the appellant stated that though he knew F., he did not see her at all on the day of the alleged incident but saw

her on the day after. He also stated that though he did not go to the hospital, he was called by the village elder to discuss the incident but because of a land dispute between F.'s family and the appellant's family, F.'s family implicated him in the alleged offence. The appellant attributed being implicated in the case because of family grudges. He denied a suggestion by the prosecutor that he had not gone on a trip to Ogembo on the day he is alleged to have defiled F..

14. Though the appellant had given an indication to the court that he would call two witnesses, he called only one by the name David Ogega Momanyi Id Number [particulars withheld] as DW1. DW1 stated that he accompanied the appellant to Ikoba where the appellant's grandmother lives. During cross examination, DW1 testified that he accompanied the appellant on the trip on a date he could not remember though it was in September 2007 and that they spent the night at the appellant's grandmother's house. DW1 only learnt later that the appellant, who is his nephew, had been arrested in connection with the offence of defilement. DW1 also testified that he elected to accompany the appellant because the appellant's grandmother was sick. Finally, DW1 testified to the fact that he had never before travelled with the appellant to any other place.

15. After analyzing all the evidence that was on record, the trial court was satisfied that the prosecution had proved its case against the appellant beyond any reasonable doubt. The trial court ruled out the existence of any bad blood between the family of the appellant and that of F., and noted that the two families were good neighbours to each other as F.'s mother expected the appellant's mother to accompany her to the farm. The trial court therefore found the appellant guilty as charged and convicted him accordingly. He was sentenced to serve eighteen (18) years imprisonment.

16. The appellant was aggrieved by both conviction and sentence. As a consequence, he filed this appeal, citing the following homemade grounds:-

1) That the learned trial magistrate erred in both law and fact in concluding that the prosecution had proved its case against the appellant beyond any reasonable doubt;

2) That the learned trial magistrate erred in law and fact in grossly misdirecting himself and failing to appreciate that the case against the appellant was a fabrication.

3) That the learned trial magistrate erred in law and fact by failing to analyze all the evidence that was placed before the court and thereby reached the wrong conclusions.

4) That the learned trial magistrate erred in law and fact when he failed to appreciate that the prosecution did not prove the ingredients of the offence.

5) That the learned trial magistrate erred in law and fact when he imposed a term of eighteen (18) years imprisonment which was harsh and excessive in the circumstances.

17. The appellant therefore prays that the appeal be allowed, the conviction quashed and the sentence of 18 years imprisonment set aside.

18. This matter is before me on first appeal. On a first appeal, the appellate court is under a duty to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter. The court is thus expected not only to rehear the case, but to also consider and weigh the judgment of the trial court with a view to determining whether the conclusions reached by the trial court can be supported. This duty of a first appellate court was succinctly put by the Court of Appeal for Eastern Africa in **Pandya –vs- R. [1957] EA 336**. The same principle was applied in **Okeno –vs- Republic [1972] EA 32**.

19. At the hearing of the appeal on 24th April 2012, the appellant tendered his written submissions. I have carefully read those submissions. I also heard submissions from learned Principal Prosecuting Counsel, Mr. Jacob Mutai who vehemently opposed the appeal. Counsel submitted that there was more than ample evidence on record to support a conviction on the main count of defilement and he saw no reason why the

trial court convicted the appellant of the alternative charge of indecent assault. Counsel referred to the evidence by K., PW2, starting from the moment she sent F. to call the appellant's mother for her up to the time she found out that F. had actually been defiled by the appellant.

20. Regarding the offence, counsel submitted that the appellant should have been charged under **section 8 (2)**of the **Sexual Offences Act**, since F. was, at the time of the alleged offence aged only 5 years. Counsel urged this court to use the powers conferred upon it by **section 382** of the **Criminal Procedure Code** and to appropriately sentence the appellant. Counsel urged this court to dismiss the appeal.

21. Upon reconsideration and evaluation of the evidence on record, the issues that arise for determination are whether the prosecution proved the case against the appellant on the principal court and secondly whether this court should interfere with the 18 years term of imprisonment and substitute the same with an order enhancing the sentence to life imprisonment as sought by the respondent's counsel.

22. Regarding the first issue, I am persuaded that the prosecution proved its case against the appellant on the principal count beyond any reasonable doubt. I have carefully considered the testimony by F. who narrated how she was sent by K. to the home of the appellant to call the appellant's mother but found her not at home. It was then that the appellant who was alone at home led F. into the house, put her on a bed removed her panty, unzipped his trouser and inserted his penis into her vagina. There was penetration as confirmed by Jackson. There were also other injuries to F.'s private parts as confirmed by Jackson and K.. Both Jackson and K. also confirmed that F. was aged 5 years at the time the offence was committed against her.

23. The appellant raised the defence of alibi during his defence. I have carefully considered this defence. The law on the defence of alibi is that it is the prosecution to disprove such a defence, and that for the defence not to be considered as an afterthought, it ought to be raised at the earliest opportunity during the trial. It is also the law that the burden of proof always rests with the prosecution. See generally the case of**Msembe & another –vs- Republic[2003] KLR 521**, in which it was held that an accused who raises an alibi defence does not assume the burden of proving it and further that where a defence of alibi is raised by an accused person in his defence, the burden is on the prosecution to rebut the same. See also the case of **Kinyua v-s- Republic [2003] KLR 294**.

24. In the instant case, the prosecution forcefully rebutted the appellant's defence of alibi. There was the testimony of F. who described in detail what the appellant, whom she found at home did to her when she was sent to the home of the appellant to look for the appellant's mother. There is also the evidence of PW3, Charles Omboso who escorted the appellant to the chief on receiving the report about what the appellant had done to F. All this evidence pieced together places the appellant squarely at the scene of crime on the morning of 14th September 2006. I have also given careful thought to the evidence given by the appellant and by DW1. In my view, that evidence was not and is not worth believing and I dismiss it altogether.

25. The next issue for determination is whether the decision by the learned trial magistrate to find the appellant guilty of the alternative charge was justified. I have read with much care the judgment of the trial court and the reasons for so finding. I do not think that with the evidence on record there was any justification for convicting on the alternative charge.

26. I now come to the more troublesome issue of sentence. The evidence on record clearly proves an offence committed under **section 8 (2)**of the **Sexual Offences Act** because the complainant in this case was aged eleven years or less. Documentary evidence showed that the complainant was aged 5 years when the offence was committed, and this being the case, the appellant was liable to imprisonment for life.

27. I have been urged by counsel for the respondent to exercise the power confirmed upon me by the provisions of **section 382** of the **Criminal Procedure Code** and mete out the appropriate sentence to the appellant. The said section provides as follows:-

“382. Subject to the provisions hereinbefore contained, no finding,

sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

28. From the above provisions, it appears to me that it is possible for this court to revise the sentence imposed upon the appellant if it can be shown that the error in this case by the trial court of not imposing the appropriate sentence under the law has occasioned a failure of justice. In determining whether there was a failure of justice in this case, this court has to consider the question whether the objection to the sentence herein could have been raised at an earlier stage in the proceedings. See the case of **Kimani –vs- Republic [1989] KLR 382**.

29. Further powers of this court as first appellate court in criminal appeals are set out in **section 354 (3)** of the **Criminal Procedure Code**. This subsection specifies the powers of this court on an appeal from a conviction, an appeal against the sentence and an appeal against an acquittal in the following words:-

“354 (3) The Court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may –

(a) in an appeal from a conviction –

(i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or

(ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; o

(iii) with or without a reduction or increase and

(iv) with or without altering the finding, alter the nature of the sentence,

(b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence.

(c) in an appeal from an acquittal, an appeal from an order refusing to admit a complaint or formal charge or an appeal from an order dismissing a charge, hear and determine the matter of law and thereupon reverse, affirm or vary the determination of the subordinate court, or remit the matter with the opinion of the High Court thereon to the subordinate court for determination, whether by way of rehearing or otherwise, with such directions as the High Court may think necessary, and make such order in relation to the matter, including an order as to costs, as the High Court may think fit.

(d) in an appeal from any other order, alter or reverse the order, and in any case may make any amendment or any consequential or incidental order that may appear just and proper.”

30. The appellant in this case has appealed against both conviction and sentence for the offence of defilement contrary to **section 8 (3)** of the **Sexual Offences Act**. It is however apparent from the record that the entire evidence in this case, including the age of the complainant points to an offence under **section 8 (2)**of the **Sexual Offences Act**. In its judgment in which the trial court convicted the appellant

of the alternative charge, the court stated thus:-

"I have appraised myself on the evidence on record and noted that the only eye witness herein is the complainant whose testimony has not been given on oath.

I have warned myself on the dangers of convicting on such evidence without corroboration.(sic)

However, I find there is some extent corroboration (sic) in the testimony of PW2 which established that the accused had the opportunity to do what he did and also the findings of the clinical officer which established that the child's genitalia had been tampered with.

I also note that the family of the accused and that of the complainant were good neighbours and infact the mother of the complainant expected the mother of the accused to go with her to the farm. There being no evidence for bad blood between the 2 families I see no reason why the complainant would implicate the accused."

31. Such findings in my view could only point to a charge under **section 8 (2)** of the **Sexual Offences Act**. By virtue of **section 187** of the **Criminal Procedure Code**, the trial magistrate could have convicted the appellant for the appropriate offence under **sub section 2** of **section 8**of the **Sexual Offences Act**; although it was not the offence charged, particularly after the trial court found that the complainant's testimony was well corroborated by the testimonies of PW2, K. and that of PW1, Jackson. See the case of **Buru –vs- Republic [2005] 2 KLR 533**.

32. In the circumstances I set aside the conviction on the alternative charge of indecent assault and in lieu thereof I enter a conviction on the offence of defilement contrary to **section 8 (2)** of the **Sexual Offences Act**. I also set aside the sentence of eighteen (18) years imprisonment and in lieu thereof I sentence the appellant to imprisonment for life as provided under **section 8 (2)** of the **Sexual Offences Act**.

33. In the premises, I find that the appellant's appeal is totally devoid of merit. The appeal is accordingly dismissed in its entirety. R/A within 14 days.

34. It is so ordered.

Dated and delivered at Kisii this 25th day of October, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Present in person for the Appellant

Mr. Mutua (present) for the Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE