REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

CRIMINAL APPEAL NO. 5 OF 2021

IK...APPELLANT

-VERSUS-

REPUBLIC.................................RESPONDENT

(Being an appeal from the judgment (conviction and sentence) of Hon. S.K. Mutai, PM,

delivered on 27/9/2019 in Kapenguria SPM Court Criminal Case No. 539 of 2019, R. v. Issah Kemoi)

JUDGMENT

1. The Appellant, IK, has lodged this appeal against conviction and sentence in respect of two counts. The brief background is that the Appellant was, in count 1, charged and convicted for the offence of committing unnatural offence contrary to Section 162(a) of the Penal Code and sentenced to serve 7 years in prison. In count 2, he was charged, convicted and imprisoned for ten years for the offence of causing grievous harm contrary to Section 234 of the Penal Code.

2. The particulars of the offence in count 1 were that on 16th May, 2019 at Riwo Location within West Pokot County, the Appellant had carnal knowledge of K.P. against the order of nature. In count 2, it was said that on the date and place stated in count 1, the Appellant did grievous harm to the named K.P.

3. In his petition of appeal filed on 14th February, 2022, the Appellant raised four grounds of appeal namely that the learned trial magistrate erred in admitting the inconsistent evidence of the prosecution witnesses which was not handled as required by law; basing the conviction on uncorroborated evidence; denying him an opportunity to cross-examine PW1 who was a key witness in the case; and failing to evaluate and appreciate the defence case.

4. During trial, the prosecution called five witnesses. K.P., a minor aged 3 years testified as PW1. The trial court after *voir dire* examination of PW1 declared him **"incompetent to give sworn statement."** In his unsworn evidence the child told the court that the Appellant was his father. His testimony was that the Appellant burned him with a cigarette on his thigh and also cut him with a knife. He further stated that his mother was in Makutano at the time of the incident and that he was alone with the Appellant. The witness was not cross-examined by the Appellant.

5. MR who gave evidence as PW2 informed the trial court that on 16th May, 2019 at around 7am, one Joseph Losir informed her that PW1 who is her grandson had been assaulted by his father, the Appellant. PW2 in the company of PW3 Jack Lukwanga and the said Losir went to the Appellant's house where they found PW1 naked. His body was swollen and he had burns on his thighs and a cut on the penis. PW2 reported the matter to Kacheliba Police Station and they were referred to Kacheliba Sub-County Hospital where PW1 was admitted for two weeks. On cross-examination PW2 stated that she was informed that PW1 was beaten by the Appellant but that she did not witness the beating. She also stated that that the Appellant had penetrated PW1's anus. She further testified that she escorted PW1 to the hospital alongside Losir.

6. PW3 Jack Lukwanga told the trial court that on 16th May, 2019 at 7am he was summoned by PW2 to her house. Upon arrival, he found other neighbours. PW1 was lying down naked. Together with PW2 they escorted PW1 to the hospital and later reported the matter at Kacheliba Police Station. PW3 testified that PW1 had a fracture on the shoulder bone, a burn on his thigh and other injuries on the body. He identified the Appellant in court. On cross-examination, he testified that Losir lived in the Appellant's house and that the Appellant assaulted PW1 at night.

7. Solomon Tukei, a clinical officer at Kacheliba Sub-County Hospital, testified as PW4. He informed the court that he attended to PW1 and also filled his P3 form. PW4 stated that he saw blood stains and burns on the child's clothes. Upon examination of the patient, he noted bruises on the right clavicle and all over the body. The neck was swollen and there were cuts on the penis and thighs. X-ray revealed that the right clavicle was fractured. PW4 further testified that there was a tear on the anal region and the anal muscle was damaged. He concluded that the patient had been sodomised after observing that the stool was mixed with blood. The witness produced the P3 form as exhibit. On

cross-examination, PW4 stated that the child had been taken to the hospital by his grandmother and another person.

8. PW5 Police Constable Joseph Halonda testified that he took over the investigation of the matter from his colleagues who went on transfer and training. PW5 stated that he received PW1 and PW2 on 16th May, 2019, issued them with a P3 form and referred them to Kacheliba Sub-County Hospital. He testified that upon investigation he established that the Appellant had assaulted and sodomised PW1 who sustained bodily injuries. He recorded statements from witnesses. Among those witnesses was one Joseph Losir who disappeared after being threatened. He stated that the Appellant who had fled after the incident was arrested on 25th May, 2019.

9. When he was placed on his defence, the Appellant gave unsworn testimony and told the trial court that on 16th May, 2021 he spent the night at a friend's house at Makutano. The next day he visited his family and found his first wife was unwell. He took her to Keringet Dispensary from where she was referred to Kapenguria County Hospital where she was admitted and discharged on 23rd May, 2019. The Appellant produced his wife's treatment records in support of his claim that he was not at Kacheliba on the date of the alleged crime.

10. The Appellant filed submissions on 14th February, 2022. On the first ground of appeal the Appellant submitted that the evidence tendered by PW2, PW4 and PW5 was not credible and should be disregarded. He stated that despite PW2, PW4 and PW5 testifying that he had molested PW1, PW1 did not give any evidence to support their evidence. The Appellant further submitted that the prosecution did not link him to the alleged crime due to the failure to subject the blood and stool found by PW4 to further scientific or chemical examination. The Appellant additionally relied on the case of **Albert Githinji Njagi v Republic Cr. App. No. 5 of 2015** and urged this Court to find that the investigations by the police were shoddy hence the evidence adduced could not sustain the charges.

11. In respect to the second ground of appeal, the Appellant submitted that the evidence tendered before the trial court by the prosecution in support of the charge of grievous harm was not corroborated. The Appellant argued that the evidence of PW1, PW2, PW3 and PW4 was contradictory as regards the extent of injuries allegedly sustained by the victim. According to the Appellant the serious injuries allegedly sustained by the victim required a considerable degree of certainty and uniformity that did not exist amongst the prosecution witnesses. He relied on the case of **Richard Apella v Republic [1981] EACA 945** to urge this Court to find that contradictory statements cannot be relied on.

12. Turning to the third ground of appeal, the Appellant submitted that he was not given an opportunity to cross-examine PW1 thereby being denied a fair and impartial hearing in violation of Article 50(1) & (2) of the Constitution. The Appellant argued that the failure to be accorded an opportunity to cross-examine PW1 denied him an opportunity to test the credibility of the witness. According to the Appellant, the trial court erred by failing to inform him of his right to cross-examine the witness. He submits that PW1 was still liable to cross-examination as provided by Section 208 of the Criminal Procedure Code, notwithstanding the fact that he gave unsworn evidence.

13. On the last ground of appeal, the Appellant submitted that the trial magistrate erred in failing to consider his defence which was credible. The Appellant contended that the new matters he introduced in his defence were not rebutted by the prosecution and the same ought to have been treated as credible by the trial court. The Appellant consequently urged this Court to allow his appeal and set aside the conviction and sentence.

14. The Respondent on its part filed a notice of enhancement of sentence dated 14th February, 2022 and submissions dated the same date. The Respondent submitted the first issue for the determination of the Court was whether the Appellant committed the offences for which he was charged and convicted. The second issue identified by the Respondent was whether the Appellant was properly identified.

15. The Respondent submitted that the evidence of PW1, PW2 and PW3 was consistent and the witnesses properly identified the Appellant as the assailant. The Respondent also submitted that the medical exhibits produced at the trial corroborated the testimony of PW1 as to the injuries sustained. The Respondent urged this Court to dismiss this appeal and sustain the findings of the lower court on conviction and sentence.

16. Upon perusal of the grounds of appeal and the submissions of the parties, I find that this appeal will be disposed by determining the issue as to whether the failure by the Appellant to cross-examine PW1 rendered the trial defective.

17. The Appellant is discontented with the manner in which the evidence of PW1 was taken by the trial court. According to the Appellant, the trial court denied him an opportunity to test the credibility of the evidence of PW1. The Appellant further assert that his right to a fair and impartial hearing was trampled upon by the trial court when he was denied an opportunity to cross-examine PW1. The Appellant also argues that the trial magistrate did not inform him of his right to cross-examination. There was no reply by the Respondent to the Appellant's arguments on this ground of appeal.

18. The record of the trial court of 22nd July, 2019 shows the relevant proceedings as follows:

> **"<u>PW1- MALE MINOR EXAMINED BY COURT IN SWAHILI LANGUAGE</u>:**
>
> **I am Krop Kemoi. I am 3 years old. Accused is my father. My father beat me and burnt. I do not know the meaning of taking an oath.**
>
> **<u>COURT:</u> Minor is hereby declared incompetent to give sworn statement."**

19. After finding that the complainant was incapable of giving sworn testimony, the trial magistrate proceeded to his unsworn evidence. From the record, the Appellant did not cross-examine PW1. The record does not indicate that the Appellant was given an opportunity to cross-examine PW1 and he declined to do so. It can therefore be implied that the Appellant was not afforded an opportunity to cross-examine

the complainant.

20. The Appellant argues that by denying him an opportunity to cross-examine PW1, the trial court infringed on his right to a fair and impartial trial. The law is clear that an accused person is entitled to test the evidence of the prosecution witnesses by way of cross-examination. This right to cross-examine witnesses covers a situation where a witness has given unsworn testimony. In **Paul Kinyanjui Kimauku v Republic [2016] eKLR**, the Court of Appeal addressed the issue of cross-examination of unsworn witnesses as follows:

> **"[23] Again, the record reveals that following the evidence of *G* that was unsworn, the appellant was not given the opportunity to cross-examine the witness. This was a clear violation of the appellant's right to a fair trial. Under Article 50(2) of the Constitution, every accused person has a right to a fair trial. This includes the right of an accused person to challenge the prosecution evidence through cross-examination. Therefore, an accused person is entitled to cross-examine any person who testifies as a prosecution witness. This is so even in the case of a minor witness giving unsworn evidence. A witness including a minor witness, unlike an accused person has no right to refuse to answer questions or not to be subjected to cross-examination. Thus, there is a clear distinction between an accused person who opts under Section 211 of the Criminal Procedure Code to give unsworn evidence in his defence, and a minor witness who gives unsworn evidence as the latter must be cross-examined."**

21. Similarly, in **Angechel Lotip v Republic [2017] eKLR**, the Court of Appeal held that:

"… The record shows that after AA testified, the court went on to hear the evidence of PW 2, without the appellant cross examining AA. No explanation or reasons were provided for this omission. As such, the appellant was denied the opportunity to cross examine the complainant, resulting in a misstep in the criminal justice process, which has led to a mistrial."

22. From the cited authorities, it follows that the failure by the trial court to accord the Appellant an opportunity to cross-examine PW1, as well as the failure to record any reason for the lack of cross-examination of PW1 by the Appellant, resulted in miscarriage of justice which was prejudicial to the Appellant. The whole process was rendered a mistrial by this failure by the trial court. Having established that there was a mistrial, it will not serve any useful purpose to consider the Appellant's other grounds of appeal.

23. What then should be the fate of this appeal? A perusal of the trial court record shows that the charges facing the Appellant were serious. Similarly, the injuries suffered by the complainant were also of a serious nature. Further, I also note that the complainant is of a tender age hence a vulnerable member of society who deserves the protection of the courts. The record of the trial court discloses that there was adequate evidence for instituting the trial in the first instance and the ends of justice can only be met once a proper trial is held.

24. As to the circumstances in which a retrial may be ordered, the Court in **Angechel Lotip (supra),** cited with approval its holding in **Muiruri v Republic [2003] KLR 552** that:

> **"Generally whether a retrial should be ordered or not must depend on the circumstances of the case. It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not."**

25. I note that the Appellant herein was charged on 27th May, 2019 and though released on bail, his bond was cancelled after he allegedly violated the bond terms. It is also observed that the Appellant has been in prison for about two years and five months from the time of his conviction and sentence. Considering the minimum sentences for sexual offences one cannot say that the period the Appellant has been in custody is too long as to render a retrial prejudicial to him. The period spent in remand and prison custody by the Appellant cannot be said to be so long as to defeat the need for a retrial. I also do not think that there will be serious difficulties in securing the witnesses. In my view, this is a case fit for retrial.

26. In the circumstances the Appellant's appeal is allowed. The conviction and sentence are quashed. As already explained, it is in the interest of justice to have this matter retried. As such, the Appellant's case is referred back to the Magistrate's Court at Kapenguria for hearing *de novo*. The matter shall be heard by any magistrate of competent jurisdiction other than S. K. Mutai, Principal Magistrate.

27. The Appellant to be detained at Kapenguria Police Station and presented to Kapenguria SPM's Court under police custody on or before 1st April, 2022 for retrial on priority basis.

DATED, SIGNED AND DELIVERED AT KAPENGURIA THIS 30TH DAY OF MARCH, 2022

W. KORIR,

JUDGE OF THE HIGH COURT