



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINLA APPEAL NO. E125 OF 2021**

**ROBERT MWONGELA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. Before the trial court, the appellant faced a substantive charge of rape contrary to section 3(1) (a)(b) as read with Section 3(3) of the Sexual Offences Act and an alternative charge of committing an indecent act contrary to section 11(A) of the same Act.

2. The particulars of the main charge as well as the alternative charge were given to be that on the 29<sup>th</sup> day of July 2020 at around 1600hours within Meru County, intentionally and unlawfully caused his penis to penetrate the vagina of CN without her consent or will.

3. The appellant denied the charges and a trial ensued in which the prosecution called six witnesses while the appellant gave sworn evidence, without calling any other witness, and was cross examined. In that evidence, PW 1 gave evidence that on the material day, she was raped by the appellant who pulled her hair and held her neck, removed her pants, laid her on the ground and inserted his penis into her vagina. Before doing so the appellant had removed her clothes as well as his and that after the act, he gave to the complainant Kshs 500/= for buying a weave. She then informed the mother of the act and to court she said that the appellant is not related to her. In cross examination, she denied the allusion by the appellant that the two were not together on the material day

4. Pw2, CK, the mother to PW1 told the court that on the material day she had sent PW1 to her grandmother to help the grandmother fetch water. In the course of the day, at about 5pm, the witness' other daughter called K received a call from one Karirmi asking her why she had left the complainant to roam about Muthikine area. The said K went searching for PW1 and came back home with her. PW1 was then donning a weave which she declined to tell the mother who had given to her till the mother caned her. After the canning, PW2 said that PW1 told her that while going to the grandmother's home, she met the appellant who promised to give her Kshs 500 on condition that she agrees to have sexual intercourse with him. She added that after the talk, both proceeded behind the church, they had sex, appellant gave PW1 the Kshs 500/=, told her to go and buy weave at Muthikine and that she had a baby in her stomach. PW2 then decided to report the matter to the area manager, but since it was late she was asked to come with the Complainant the next day. The next day the witness and PW1 went to the area assistant chief who advised them to go and make a report at the police station. From the police station both went to Githongo Sub-county hospital where PW1 was examined and was issued with treatment notes and completed P3 form. She marked the two documents as MFI 1-4. She identified the accused on the dock as the offender. On cross examination he denied having framed the appellant, denied any knowledge of a difference with the Assistant chief and that she never saw him on the date of the incident.

5. The evidence of PW3 was to the effect that he was called by the Assistant Chief on the 30/7/2020 with instructions to help effect the arrest of the appellant. After the arrest he came to learn that the appellant had allegedly raped PW1. The witness identified the appellant on the dock as a person known to him before that date. In cross examination he denied any knowledge of a grudge between appellant and the Assistant chief.

6. The evidence of Pw4 was that, being the Assistant chief of the area, she met PW2 on 30/7/2020, who told her that Pw1 had been defiled. She then made a call to PW2 with instructions to arrest the appellant and the appellant was arrested the same day. She said there was no grudge with the appellant. To her, the appellant did not ask any questions. For PW5, the investigating office, the evidence was to the effect that she received a report from PW1 was she called mentally challenged, and who was accompanied by the mother. The report was that Pw1 had been allegedly raped by the appellant who gave her Kshs 500 to make her hair. She escorted the complainant to the hospital for examination and later to Meru Level 5 hospital for mental assessment which report she produced as Exhibit P4. In cross examination, the witness told the court that the appellant had been seen with PW1 on the material day.

7. The last prosecution's witness was one Severina Kaimatheri, PW6, a clinician stationed at Kanyakine sub-county. He said that he examined the complainant who was in fair general conditions with clothes not torn nor dirty but mentally challenged hence unable to explain much. In his assessment the age of injury was about 5 days' old. His examination revealed broken hymen but with no obvious injury to the

vaginal area. A test conducted on noted whitish creamish discharge revealed epithelial cells, white blood cell as well as proteins but no spermatozoa. Pregnancy, HIV and Hepatitis B tests turned negative but he formed the opinion that presence of Epithelial cells and broken hymen were indicative of sexual activity. He produces MFI 1-4 as PEXH 1-3.

8. Upon cross examination, the witness said he could not say when the hymen was broken but according to the complainant that as her first sexual intercourse.

9. With such evidence, the court adjudged that the prosecution had established a prima facie case against the accused and put him on his defence.

10. Appellant opted to give sworn evidence and raised the defence that on the material day he was at Mitunguu doing some casual work till 7pm when he left for home arriving there at 9pm. The next day at about 10 am he went to the shop to buy medicine and had done so when the area manager in the company of some four village elders arrested him and took him to the office of the Assistant chief who ordered that he be tied with ropes. He was then taken to the police station where PW2 was called by the Assistant chief and appellant was charged with rape.

11. He then asserted that PW4 had accused him of having stolen her water pipes and vowed to make him pay for it and that that was the grudge between them for which CN was coached to lie against him. He denied having met or had sexual intercourse with her and that the area manager was a neighbour but was never involved. He said PW2 works for PW4 in the farm.

12. At the end of production of evidence and in a reserved judgment the trial court believed the prosecution's case and disbelieved that of the appellant. The court convicted the appellant with the offence of rape and sentenced him to serve 60 years in prison. The decision aggrieved and dissatisfied the appellant who then preferred the current appeal on some five grounds.

13. The four grounds are to the effect that; the conviction was grounded on uncorroborated and contradictory evidence by a person found by a doctor to be unfit to give evidence; that the investigations were below the standards required; that his evidence in defence was not given due regard and lastly that the sentence of 60 years was too harsh and excessive.

#### **Determination**

14. Even though the appeal sets out several ground attacking the judgment, all the grounds essentially seek the answer to the question whether or not the prosecution proved its case beyond reasonable doubt. In other words, whether the prosecution's case was riddled with inconsistencies; if the defence evidence was ever given due regard and if the investigations were shoddy thus failure to satisfy the incidence of and burden of proof upon the prosecution, all boil down to the sufficiency of proof. Accordingly, I will decide the appeal on two fronts; whether there was proof to the requisite standards and if the sentence impose was appropriate or too harsh and excessive.

15. Closely and intractably tied to the question of burden and incidence of proof is the question of the probative value of the evidence by Pw1, who in the words of the doctor, an expert was adjudged to '*have severe intellectual disability and not fit to give evidence in a court of law*'.

16. It is of note that the prosecution being aware that the complainant, PW1 to be mentally retarded, brought that fact to the attention of the court which then asked the witness some questions about her name and place of aboard and if she knew the appellant then made a determination that she was able to express herself and ordered that she gives unsworn evidence.

17. The question that must be posed and answered is what value of the unsworn evidence of a mentally challenged carried. While in sexual offenses cases corroboration is not a requirement, in other ordinary cases, unsworn statement is worthless and of no probative value. That trite position of the law must however be married with and synchronised with sections 124 and 125 of the Evidence Act. Section 124 imposes the duty upon the prosecution to corroborate its evidence, except in sexual offenses cases, while section 125 makes all persons, including the mentally challenged, competent to give evidence in court unless his condition prevents him from understanding the questions put to him and giving rational answers thereto. In this matter, prior to the complainant being offered as a witness, she had been assessed by a medical doctor who concluded that she lacks the intellectual ability to give evidence in court. That verdict however remains an expert opinion that does not bind on the court, however for the court to depart from it, a valid, a valid ground must be laid and reasons given.

18. Under section 31 of the Sexual offenses Act, a court, before which a sexual offence is to be tried has the duty to inquire and declare if a witness is a vulnerable one, on the parameters given, declare so and then take the prescribed measures to protect such a witness. When the court in these proceedings set to interview PW1, the law expected the court to observe that stipulation. It would appear from the proceedings that the court proceeded like it was conducting a vior dire, under section 19 of the Oaths and Statutory Declarations Act, and determined the coherence and ability of the witness to express herself. That I find to have been an error. An error in that the concern ought to have been to ascertain vulnerability and not the determination whether the witness takes an oath or gives sworn evidence. I consider that error and the decision to receive unsworn evidence to be fatal to the proceeding that ensued thereafter. Fatal to the proceedings and conviction for the reasons that, it was the evidence of the complainant that was to premise any other evidence to prove the offence. When the evidence went in as unsworn, no foundation was laid to mount any proof of the offense charged.

19. In **Brian wetoto Ongunya vs Republic (2019) eKLR**, the court had this to say on the question of uncorroborated evidence of a complainant: -

**It follows, therefore, that the central plank of the prosecution's case in the instant cause, the testimony of PW2, should collapse, to the extent that she gave an unsworn statement, which in law did not amount to evidence, as it was of no probative value whatsoever. The reception of that evidence, as stated above, was an illegality that rendered the trial a nullity.**

20. I take the view that other than an accused opting to give unsworn evidence as ordained by law, only a minor has the right to give such evidence when directed by the court after voir dire. All other witnesses must give evidence under oath or an affirmation so that the evidence may be tested by cross examination. It is my view and holding that unsworn evidence that is given by a witness, other than the accused and a minor on the direction by the court, lacks the credibility expected and cannot be the basis of a safe conviction.

21. Here, the complainant was challenged mentally over and above fact that her evidence was unsworn. It take it that it is difficult, nay impossible, for a court to deal with such a witness when there is no finding by the court as to her reliability and credibility tested by the court itself and cross examination. In addition, having received the evidence, I find that the evidence of the complainant was improperly received and take that persuasion **David B Saxe**, in an article titled, **Psychiatry, Psychoanalysis, and the Credibility of from witnesses**, **Notre Dame Law Review** ,Volume 45 | Issue 2 writes: -

**“Mental defectives are classified as idiots, imbeciles, or morons.” A subnormal is an unreliable witness because of limitations on his powers of observation and because of his propensity to be easily led into "traps" by an attorney. “**

22. The high court in *Njoroge Mungai v Republic*[2017] eKLR , when faced with a situation like ours here, did make the following observations: -

**“If the complainant PW1 was “mentally challenged” as held by the trial Court, the Court should have made a finding as to her competency as a witness to justify reception of her testimony in terms of section 125 of the Evidence Act...**

**In the present case, there was no evidence that the trial court considered the matter and made a specific finding on the competency of the complainant, PW1.”**

23. It is clear to me that in the instant case, the trial court other than receiving inadmissible evidence of the PW1 on the basis that she was an adult, albeit mentally retarded, who ought to have been sworn after the court found her to be able to express herself, the court also failed to find that that evidence was cogent and reliable. In the judgement, having adverted to the medical finding on the complainant, without stating the reason to depart or disbelieve that finding and without finding that the evidence by PW1 was indeed trustworthy or just coherent and in congruence with the questions asked, the court delivered itself as follows: -

**“That would explain her being gullible being given Kshs. 500 to buy a weave, buying it and proceeding to have it braided on part of her head. That also explains the accused’s promise that he would give her a baby.**

**In her state of mind, she was easily duped. She although an adult as per her age assessment report dated 15/10/202 by Dr. Andrea – which forms part of this record, is gullible and would be easily misled by someone with evil intentions.**

**I thus find that the prosecution has proved its case to the required standard.**

24. The evidence of PW1 having been the only evidence that linked the appellant to the offense was so weak and could not have been the basis of a conviction in the absence of some other cogent evidence.

25. The other evidence that would have been beneficial to the court, but only as corroborative of that by PW1, was that by PW6. However, that evidence was diluted when the witness told the court that when she examined the complainant on the 30/7/2020, he approximated the age of injuries to be five days. Those injuries could thus not be the same ones inflicted on the previous day being the 29/7/2020.

26. In conclusion, I find that the conviction grounded on unsworn evidence by a mentally retarded PW1, without other independent evidence was most unsafe and the conviction thus cannot stand but must be set aside. I do quash the conviction and set aside the sentence and order that the appellant be released from custody forthwith unless otherwise lawfully held.

Dated signed and delivered at Meru this 1<sup>st</sup> day of April 2022

**Patrick J.O Otieno**

**Judge**

**In presence of**

Mr. Maina for respondent

Appellant in person.

**Patrick J.O Otieno**

**Judge**