



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 107 OF 2019

JACKSON WAMBUA MWINZI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence of the Principal Magistrate's Court at Kwale (Honorable T. A SITATI, PM) dated 30th August 2019 in Criminal Case No. 74 of 2017

REPUBLIC.....PROSECUTOR

VERSUS

JACKSON WAMBUA MWINZI...ACCUSED

JUDGMENT

INTRODUCTION

1. Jackson Wambua Mwinzi ("the Appellant) was charged with the offence of defilement of an 8-year-old girl contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act no. 3 of 2006.
2. The Appellant further had a count II of committing an offence contrary to section 5(1) (a) as read with section 5 (2) of the Sexual Offences Act No. 3 of 2006.
3. The Appellant denied the charge and after trial, he was found guilty and convicted of the offence.
4. The Appellant was found to be a repeat offender with a previous record in S.O (Criminal) 73 of 2017 Kwale Law Courts, and thus considered a dangerous sexual offender and was sentenced to life imprisonment. He, (The Appellant) has now appealed to this court against both conviction and sentence.
5. The accused filed his Petition of Appeal on the 2nd October, 2019 with five grounds of appeal as follow:

1. The learned judge convicting and sentencing Magistrate erred in law, misapprehended and misapplied the intendment of legislation to *wit* section 200 of the criminal procedure code, thereby occasioning injustice

2. The Convicting and sentencing magistrate erred in law and fact in weaving a narration not in conformity with the testimony of the prosecution witnesses as recorded by the trial Magistrate and the consequence arriving at an erroneous conclusion of guilt against the appellant.

3. The Convicting and sentencing magistrate erred in law and fact in failing to take into account, ignoring and or giving diminished attention to hand written marginal notes on the minor complainant's demeanor which are/were patently in favour of the appellant.

4. The learned convicting and sentencing magistrate erred in law and in fact in finding that the appellant was not positively identified as the perpetrator of the defilement act.

5. The conviction in the circumstances of the case was/is such that a manifest travesty of justice occurred

6. He prayed, thus, that his appeal be allowed and the conviction and sentence made on 30/8/2019 be set aside and he be set free.

7. Parties agreed to dispense the matter through written submissions.

Submissions

8. The Appellant filed his written submissions dated the 23rd January 2020 and raised the following issues: -

a. The sitting magistrate lacked jurisdiction by dint of section 200 (3) & (4) of the Criminal Procedure Code. The claim is that his file was placed on a visiting magistrate and that the said magistrate lacked jurisdiction to proceed with the matter to its conclusion.

b. The appellant further claims that the prosecution had not proved its case beyond reasonable doubt as is the requirement in criminal matters. He claimed that he was convicted on basis of inferences or conjecture and he relied on the case **R vs. Danson Mgunya (C.A at Mombasa Criminal Appeal No. 21 of 2016)**

c. It is stated in the Petition of Appeal that the testimony of a child requires utmost discretion on identification of the accused and he believes such discretion was not exercised.

9. The appellant relied fully on his written submissions. The respondent also relied on their written submissions dated the 25 /9/2020.

10. The DPP submitted that they had proved the three ingredients required in a defilement case which are age, penetration and the identification of the complainant.

11. The Respondents relied on the cases of **Martin Okello Alogo v Republic [2018] eKLR** and **Omuroni versus Uganda, Court of Appeal Criminal Appeal No. 2 of 2000** to show that they adduced enough before court prove a case such as defilement. They insist that they have proved their case against the accused beyond reasonable doubt.

12. Counsel for the DPP further submitted that the child was 8 years and the imprisonment term served on the Appellant is well deserving.

DETERMINATION

13. The following issues are arising in determination of the appeal herein:

i. Whether the Appellant was informed of his rights as required by Section 200 (3) of the Criminal Procedure Code

ii. Whether the Prosecution proved their case as against the accused beyond reasonable doubt

Whether the Appellant was informed of his rights as required by Section 200 (3) of the Criminal Procedure Code

14. One of the appellant's grounds is based under **Section 200 (3) of the Criminal Procedure Code**. The Appellant claims that he was denied the opportunity as required by law to start his case *de novo*.

15. The Appellant claims that his case was heard by **Hon. P. Wambugu** who was still present at the station being Kwale Law Court, whilst he was convicted and sentenced by a visiting magistrate **Hon. T. A. Sitati**.

16. A trial has been said to be unsatisfactory if the trial judge or magistrate does not see, assess and gauge the credibility of witnesses and as such was deemed to be a fatal vacuum as was held in **Ndegwa v. R** (1985) KLR 535 where Madan, (as he then was) Kneller and Nyarangi, JJ.A said that:-

"It could also be argued that the statutory and time honoured formula that the trial magistrate being the best person to do so, he should himself see, hear, assess and gauge the demeanour and credibility of witnesses. It has been and will be so in other cases that will follow. In this case, however, the second magistrate did not himself see and hear all the prosecution witnesses even though he said that he carefully "observed" the evidence given by the prosecution witnesses. He therefore was not in a position to assess the personal credibility and demeanour of all the witnesses in the case. A fatal vacuum in this case in our opinion.for these reasons we have stated, in our view the trial was unsatisfactory."

17. The court of Appeal has set a precedent of how Section 200 of the Criminal Procedure Code applies to transferred or visiting judicial officers. The case is **Abdi Adan Mohamed v Republic [2017] eKLR**; the court opines as hereunder: -

"...Section 200 envisages two situations in a trial that is incomplete at the time the trial magistrate ceases to exercise jurisdiction. The trial magistrate will have either recorded the whole or part of the evidence. Where judgment has been written and signed by the former magistrate, the succeeding magistrate is only required to deliver it. Where all the witnesses have been heard and the trial magistrate is transferred, no issue arises. The succeeding magistrate may act on the recorded evidence. But the succeeding magistrate may also recommence the trial and resubmit witnesses. The transition of criminal cases from a magistrate or judge who has ceased to have jurisdiction to the one succeeding him or her remains a matter of

concern.

Problems are normally encountered in the last scenario where the succeeding magistrate decides to adopt the evidence recorded by the predecessor or altogether recommence the trial..."

18. The above case is the clear depiction of what occurred in the instant case, where the Appellant's trial was heard by a different magistrate Hon. P. Wambugu and his convicted and sentence delivered by a different magistrate Hon. T. A Sitati.

19. **Section 200 (3)** of the Criminal Procedure Code gives the accused person a right to be re-heard if the trial magistrate ceases jurisdiction and a new magistrate takes over his case.

20. The Criminal Procedure code under the **section 200 (4)** Criminal Procedure Code gives this court powers to set aside a trial and order a new trial, where the trial magistrate and convicting magistrate are different.

21. The Court in **Abdi Adan Mohamed v Republic [supra]** makes it mandatory, that an accused person must be informed of the provisions of **section 200 (3) of the Criminal Procedure Code** which gives them an opportunity to choose what they wish should happen in their case;

"...In that case the accused person may demand that any witness be re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right. As we have said earlier where only a handful of witnesses have testified or where the evidence so far recorded is not contested or is only formal in nature, the hearing need not start de novo..."

22. The proceedings of the subordinate court at **page 39** indicates that Hon. T. A. Sitati complied with the provisions of **section 200 (3) of the Criminal Procedure Code**, and the Appellant stated that he did not wish to recall any witnesses and stated he was ready to proceed with his case from where it had reached.

23. In my view, the visiting magistrate complied with the provisions of **section 200 (3) of the Criminal Procedure Code**.

Whether the Prosecution proved their case as against the accused beyond reasonable doubt

24. The High Court in Migori defined what constitutes defilement in the case of **G O A v Republic [2018] eKLR** as;

"...key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the appellant was the perpetrator of the offence.."

25. It is therefore settled, for one to be convicted of defilement, the court must take into consideration the age of the minor, proof of penetration and identification of the perpetrator.

26. The age of the minor does not seem to be a matter of contention as the prosecution produced complainant's age assessment report as proof of age which indicated that she was 8 years old at the time of the offence. The Appellant also agreed that the complaint was his daughter's agemate. There was also no dispute as to whether there was penetration. The complainant was examined and treated at Diani Health centre, and it was found that her hymen was broken, she had whitish discharge on her external genitalia and P3 form filled to that effect.

Whether the Appellant was the perpetrator

27. In ground 4 of the petition of Appeal, the Appellant contests that he was positively identified for the reason that the complainant was 8 years old at the material time and that her evidence ought to have been taken with uttermost discretion, since she was a child of tender age. The Appellant is not specific on the evidence by the Complainant that was to be considered with utter most discretion by the trial magistrate.

28. The Appellant was known to the complaint and she refers to him as **'Baba Teresia'**. It is not disputed that the Appellant and the complainant knew each other, as they were neighbors.

29. The Complainant narrated to her mother what transpired in her absence, that the Appellant, defiled her after buying for them chapati and beans. The Complainant's mother realized that her daughter was in pain while passing urine and on inquiring, she learnt that the child had been defiled by the Appellant, who was their neighbor. She called Maria Kasyoka to hear what the child had told her, and that the child led Maria Kasyoka to the Appellant's house where the incident had taken place. PW1 examined the child's private parts, and found she was dirty and smelly. When she took the child to hospital, it was confirmed that indeed the child had been defiled. The child also said, that she did not inform PW1 because, the Appellant threatened to slaughter her.

30. The submission by the Appellant does not bring out the reason why it is claimed that the complainant did not properly identify the Appellant.

31. Ground No. 4 of the Petition of Appeal cannot therefore be sustained. The appellant submissions are generalized and do not point out any specific error in law or fact that can make this court fault the finding of the trial magistrate as to the Appellant's guilt.

32. The trial court, further, in its judgment noted that PW3, the complainant's father had his statement told the Court, that this was not a

witch hunt and that he holds no grudge against the Appellant. The court agrees with the trial court that the defense that complainants' parents PW1 and PW3 had a born to chew with the Appellant does not hold water. The Appellant did not raise the issue with any of the witnesses including PW4 who could have investigated the same. I concur with the analysis of the trial court.

33. For the above reason, I find the appeal devoid of any merit and the same is dismissed.

Dated, signed and delivered at Mombasa this 29th day of January, 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE