REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

(CORAM: R. MWONGO, J)

CRIMINAL APPEAL NO. 4 OF 2019

HENNERY KIMANI NJAGI.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an Appeal from the Original Conviction and Sentence in Criminal Case No. S. O. 37 of 2017

in the Senior Principal Magistrate's Court, at Engineer, G. N. Opakasi, SRM)

JUDGMENT

Introduction

1. The appellant was charged with the offence of defilement of a girl, FNK, aged 10 years. The particulars were that on 7th July, 2017, at [particulars withheld] village in Kinangop, Nyandarua County, he intentionally caused his penis to penetrate the vagina of FNK.

2. After hearing four prosecution witnesses and the defendant's unsworn statement the trial court convicted the appellant, and imposed a sentence of life imprisonment.

3. The appellant filed an appeal consisting of fourteen grounds which may be consolidated into five categories as follows:

a. That the Trial Court violated the appellants rights to a fair trial and used wrong procedures.

b. That the Trial Court relied on opinion evidence and uncorroborated evidence in reaching its determination.

c. That the age of the complainant was not established.

d. That the defendant's alibi was not considered and the burden of proof was not met.

e. That the mandatory life sentence imposed was unlawful as mitigation factors were not properly considered.

Background

4. The brief facts are that the child FNK who stated that she was 12 years old had been sent home from school for lack of text books. On the way she met the appellant, a neighbour, who told her he could buy books for her, and they went to a building. They entered a house and he tied her, forced her down, pulled off her underwear, and inserted "*his thing for urinating*" into her "*thing for urinating*". She felt great pain and screamed. He untied her hands and ran away. She went home, and kept quiet about the incident. Soon after, she started involuntarily urinating on herself, and told her teacher what had happened. She disclosed that her neighbour, the accused had defiled her.

5. The complainant's father testified as PW2. On 11th July, 2017, his daughter's teachers told him what had happened and on 12th July, 2017 reported the matter to Kinangop Police Station. He took FNK to Engineer District Hospital. She was examined five days after the incident by Dr. Maingi who was unavailable to give evidence, but had worked with PW3 Dr. Mururi Ntwiga. The examination confirmed that FNK had been defiled, her hymen freshly broken, with reddening of the vaginal opening. A high vaginal swab revealed dead spermatozoa. The complainant was treated and the P3 Form was produced as Exhibit 1.

6. FNK's father gave corroborating evidence, confirmed that the school had called him, and confirmed he had taken her to both the police station and the hospital. He availed a birth notification document, which was produced as Exhibit 2 by the investigating officer Leah Kiiru, PW4.

7. In his defence the appellant said that on the material day 7th March, 2017 he left with his mother to Karemi's home. He was not feeling well that day and stayed with baba Karemi. After lunch at about 2.00pm his mother came and they went back home. Later in the afternoon some people came and knocked on his door. When he did not open they broke in, arrested him and took him to Kinangop Police Station where he was told he had defiled FNK. He said he had been blind from a young age. He also said he was Hennery not Hillary or Edward as stated by some of the witnesses.

8. The state concedes the appeal on the first four grounds only with regard to the trial court's failure to take cognizance of the appellant's visual impairment and providing him the necessary assistance. He was not given statements in braille despite asking for them, and the court never took into account that he had been certified blind by the reports of two doctors.

9. I have perused the proceedings and trial court file. I have seen letters by Dr. Nyaga and Dr. Musyoki both of which conclude that according to WHO classification, the appellant was blind. Accordingly, he should have been facilitated with statements in braille. To that extent, the accused's right to a fair trial under **Article 50 (2)** of the **Constitution** was violated. The appellant cited the Court of Appeal's holding in **Elijah Njihia Wakianda v Republic [2006] KLR 4** in this regard. As the state concealed this point I hold that the trial was improper on these grounds.

10. The appellant submitted that the age of the complainant was not proved. He argued that the child stated her age as 12 and her father PW2 said she was 11. The Birth Notification produced as P. Exhibit 2 however shows she was born on 25th October, 2006. Thus at the date of the offence on 7th July 2017, she was aged eleven years. The point is not really arguable; and I reject the appellant's suggestion that a Birth Notification Form is not a document that can ascertain the complainant's age.

11. Exhibit 2 is an official form (B1) under the **Births and Deaths Registration Act**. **Section 11** of the Act makes it obligatory for every birth to be registered under the Act in the following terms:

> **"Upon the birth of any child the registration of whose birth is compulsory, it shall be the duty of the father and mother of the child, and, in default of the father and mother, of the occupier of the house in which to his knowledge the child is born, and of every person present at the birth, and of the person having charge of the child, to give notice of the birth, within such time as may be from time to time prescribed, to the registrar of the registration area in which the birth occurs:**
>
> **Provided that, in the case of births in prisons, hospitals, orphanages, barracks or quarantine stations, the duty to give such notice shall lie on the officer in charge of the establishment in which the birth took place."**

"**Birth**" is defined in **Section 2** of the act to mean:

> **"the issuing forth of any child from its mother after the expiration of the twenty-eighth week of pregnancy, whether alive or -dead."**

The appellant's argument therefore has no basis.

12. In any event there is ample case law that holds that age of the victim may be proved by many means including birth certificate, victim's parents or guardian, medical evidence, and by observation and common sense. (See **Omuroni v Uganda, Criminal appeal No. 2 of 2000,** Court of Appeal; **Musyoki Mwakavi v Republic [2014] eKLR**).

13. In addition, **Section 124** of the **Evidence Act** provides that the evidence of a child of tender years can stand to convict an accused person. The law on this point was settled in ***Chila v Republic [1967] EA 722***:

> **"The law on the point that the Court can convict on the evidence of a single minor's was settled in the case of Chila v R [1967] EA 722 at 273 that: The law of East Africa on corroboration in Sexual Offences is as follows:-**
>
> **The Judge should warn the assessors and himself of the danger of acting on the uncorroborated Evidence testimony of the complainant, but having done so he may connect in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given then the conviction will normally be set aside unless the Appellate Court is satisfied that there has been no failure of justice. In this case, as earlier stated, the trial Magistrate after conducting that "I have assessed the minor and I find her fit to proceed with this trial. She can be sworn." In her assessment of the Prosecution's evidence, she stated. The witness/minor appeared confident and believable when describing the events and I have no doubt in my mind that she was able to identify the Accused person as the perpetrator of the offence."**

14. With regard to the appellant's submissions that there was failure by the prosecution to avail corroboration evidence, it is true that a critical witness Teacher Esther was not availed to testify. The appellant argues that failure to call these witnesses must head to presumption that they would have given evidence favourable to the appellant.

15. In this case the prosecution availed medical evidence, and the evidence of the complainant. All that is required of the prosecution is to avail the witnesses necessary to establish the commission of the offence. There is no requirement for the prosecution to call a plurality of the witnesses to establish a face.

16. In **Donald Majiwa Achilwa & 2 others v Republic [2009] eKLR** the Court of Appeal held:

> **"The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See Bukenya & Others v. Uganda [1972] EA 549)."**

17. The evidence of Teacher Esther would have ascertained that the complainant told her of the rape incident and that the teacher told the father. The father testified that he was told of the incident from a source at the school and took the complainant to hospital where the rape was medically confirmed.

18. The appellant also complained that his defence *alibi* was not taken into account. I have perused the trial magistrate's judgment and note that she devoted tow pages thereof to analyzing the *alibi* (Pages 13 - 16) and referred to authorities. In her conclusion she found that the defence was raised as an afterthought.

19. I have taken into account the respondents submissions that there was a mistrial in this case. I agree on the basis that the appellant's right to a fair hearing were violated. The state cited the Court of Appeal case in **Samuel Wahini Ngugi v Republic [2012] eKLR** where the court ordered retrial stating:

> **"The admissible evidence or potentially admissible evidence in this case, without going to the merits of it, would on consideration lead to a conviction. The appellant has been in prison for close to eight years. He was sentenced to 21 years imprisonment. On the other hand the offence that was allegedly committed was beastly and the victim will suffer traumatic butts for the rest of his life. The victim was allegedly appellant's nephew and thus the main witness is a family member of the appellant's family. It might not be difficult to trace J.T.N who is the Deputy Headmaster, R. Primary School, the Doctor and APC Peter Irungu. We think a retrial can be mounted. In our view, the ends of justice would be served by an order of retrial and we so order it."**

20. In this case, other than for the breach of the appellant's right to a fair trial, there was substantial evidence of the commission of the offence. In deciding whether this is a proper case for re-trial, I consider the fact that: the offence occurred barely three and a half years ago; that witnesses would still be available; that the appellant was out on bond; and that the sentence was meted on 20th December, 2018, two and a half years ago.

Disposition

21. Accordingly, I come to the determination that the appeal succeeds for the reason of breach of the appellant's rights to a fair trial. I order as follows:

a. That a re-trial shall be commenced with expedition at the lower court before another magistrate not being Hon. G. Opakasi.

b. The matter shall be mentioned before the Principal Magistrate for directions within seven (7) days from today.

Administrative directions

c. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

d. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

e. Orders accordingly.

DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 27TH DAY OF APRIL, 2021

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R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the State

2. Mr. Gichuki for the Appellant

3. Hennery Kimani Njagi - Appellant present at Naivasha Maximum Prison

5. Court Assistant - Quinter Ogutu