



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO.17 OF 2018

ANTONY MWAMZINYI GOMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the original conviction and sentence by Hon. N.N Njagi,

Senior Resident Magistrate in Senior Principal Magistrate's Court

at Wundanyi Sexual Offence Case No. 21 of 2017)

JUDGMENT

1. The Appellant was convicted for the Offence of defilement contrary to **Section 8(1) as read with Section 8 (2) of the Sexual Offences Act No.3 of 2006.**

2. The particulars of the charge were that:-

“On the 25th August 2017 at around 7.00p.m in [particulars withheld] Location within Taita Taveta County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of HM, a girl aged 10 years”.

3. He was sentenced to life imprisonment vide a Judgment delivered on **21st February, 2018** by Hon. N. N Njagi.

4. Being aggrieved by the said decision, the Appellant filed a Petition and Grounds of Appeal, on **3rd May, 2018**. On **16th July, 2020**, the Appellant with leave of court amended his **Grounds of Appeal** which are as follows: -

1. That the learned trial Magistrate erred both in law and fact when he relied on incredible to convict me in the present case [sic].

2. That the learned trial Magistrate erred both in law and fact when he convicted me in the present case yet failed to find that I was not provided with adequate witnesses statements to prepare my defense.

3. That the pundit trial Magistrate erred both in law and fact when he failed to hold the scale fairly during the evaluation of the case which resulted into an unsafe conviction.

Summary of the evidence before the Trial Court

5. PW1 was **Dr. Esha Abdulrehman Said**, the medical officer attached at Mwatate Sub-county Hospital. She testified that she examined HM on a claim that she had been defiled by a person known to her who she alleged had had sex with the same man twice.

6. It was PW1's testimony that on examining her, she found that **HM's** clothes were wet with blood stains, she had scratches and bruises on the external genitalia, her vaginal walls were reddish and the hymen was broken. She further added that **HM** had bruises on the vagina and that the vaginal swab showed that she had presented epithelia, pus cells and a yeast infection.

7. PW1 stated that **HM** was put on medication and her treatment notes together with a **P3 form** were adduced as evidence before the trial

court. PW1 confirmed from the evidence and examination of **HM** that there had been penetration and assessed the degree of injury sustained as harm.

8. PW2 was **HM** [name withheld], a minor aged 10 years as per her Birth Certificate. She was taken through a *voire dire* examination and gave sworn evidence.

9. PW2 went on to testify that she was sent to pick milk by her grandmother when on her way, she met a man who grabbed her hand, led her to the bush and did bad manners on her. It was PW2's evidence that the man removed her tight skin pants, then proceeded to remove his trouser and inner wear and removed his penis to penetrate her vagina.

10. PW2 stated that the man had sex with her severally but she could not tell how many times. She stated that he ran away once he was done. It was her testimony that she did not scream as the Appellant defiled her as she was in pain. She identified the man as **Andrew Mwamzinyi**, a neighbour, who is the accused person in this case.

11. PW2 also testified that she reported the matter to her grandmother who took her to Mwatate Sub-County Hospital and proceeded to report the matter to the Police at Mwatate.

12. On cross-examination, PW2 testified that she met the Appellant at 8.00 pm and admitted that she held his hand.

13. PW3 was **SKM** [name withheld] and he stated that she was the PW2's grandmother. She testified that she recalled sending her grandchild to get milk from the home of one **Righa** on **25th August, 2017**. She said that the child was late in returning home and after one and half hours, and she decided to go and look for her at **Righa's** place. On her way to **Righa's** place, PW3 heard a child calling her from a bush at a distance of about three (3) metres from the road and on looking found that it was PW2, her granddaughter.

14. It was PW3's testimony that the child was fully dressed but was claiming that she had been defiled by Anthony, the Appellant herein. She stated that the child told her that the Appellant had used his penis to penetrate into her vagina which was in pain and she had abdominal pains. She also stated that the child's vagina was bleeding and that spermatozoa could be seen on her knickers.

15. Further, PW3 testified that she checked the child's vagina and saw bruises on the outer and inner sides. She stated that she screamed and the villagers came. They took the child to Mwatate Hospital where she was treated.

16. It was stated that the child was examined and the doctor confirmed that she had been defiled. PW3 produced the child's birth certificate that showed she was born in **2006** as an exhibit.

17. The investigating officer was **No.88391, PC David Masinde** who was stationed at Mwatate Police Station and he testified as PW4. It was his evidence that on the **26th August, 2017**, he was instructed by the OCS to investigate the case of a lady who had alleged that the grandchild had been defiled by a person known to them by the name **Antony M. Gombe**.

18. He testified that the complainant's grandmother stated that on the **25th August, 2017** at 7.00 pm she sent her grandchild to buy milk from a neighbour and when the child took long to get back home, she went looking for her. That they met on the way and the child reported to her that she had been defiled by the Appellant.

19. It was PW4's evidence that the child was sent to see a doctor, who examined her and found she had injuries on the genitalia (her vagina). The **P3 form** was completed at Mwatate Sub-County Hospital.

20. PW4 also testified that he recorded the witnesses' statements, had the accused arrested and taken to the police station where he admitted to have met the child on the way, but denied having had sexual intercourse with her.

21. When put on his defence, the Appellant chose to remain silent.

22. The Appeal was admitted for hearing on **14th October, 2019** and parties directed to canvass the same by way of written submissions on **10th March, 2020**. The appellant filed his amended Grounds of Appeal and submission on **1st July, 2020** while the Respondent filed theirs on **3rd November, 2020**. They opted to rely on their submissions as filed.

23. In his written submissions, the Appellant has stated that the present case could not have sustained a conviction nor a sentence as the evidence by the two key witnesses did not provide concrete proof that there was any incident of defilement on that material day.

24. The Appellant has also stated that the evidence as adduced by PW2 and PW3 was contradictory with regard to who defiled the complainant and where and when PW3 received the report of defilement from PW2. He stated that the PW2 made a report that one **Andrew Mwamzinyi** had defiled her but PW3's evidence was that it was Antony.

25. It has further been submitted by the Appellant that he did not rigorously participate in the trial because he was not served and/or provided with the statements of all the witnesses who testified. He has submitted that the act of denying him witnesses statements amounted to a breach of his constitutional right as provided for under **Article 50(2)(j)** of the **Constitution of Kenya**.

26. The Appellant has urged the court to reverse his sentence and or order for a retrial to give him an opportunity to cross examine the prosecution's witnesses to ensure a fair trial.

27. The Respondent through their learned counsel **Ms. Mukangu** has submitted that PW2, a 10 year old girl was the main witness who testified under oath that she knew the Appellant by name which was later proved to be the Appellant's name. It has been stated that the reference to the Appellant as Andrew is not enough to cast doubt in the court's mind on the identity of the assailant.

28. It has also been submitted that PW2 knew her assailant and the corroborating evidence of the medical report was enough to render the evidence free from any possibility of error.

29. The Respondent has indicated that how the report of the defilement was made by PW2 and PW3 did not affect the evidence in the case. It has been stated that the ingredients required to be proved in an offence of defilement are the age of the complainant, penetration of the victim's sexual organs and identification of the assailant were proved beyond reasonable doubt as against the Appellant.

30. It has also been stated by the Respondent that during the hearing of the case the Appellant was aware of his right under Article 50(2)(j) of the Constitution but never protested that he had not been supplied with witnesses statements, which only means that the same were supplied and raising the issue now is clearly an afterthought. The Respondent has added that if indeed the Appellant did not have witnesses statements, it was his fault that he never raised any objection to the hearing until such time that the Prosecution would supply him with the said witnesses statements.

31. The court has been asked to dismiss the Appellant's Appeal as the Prosecution has shown that they proved their case beyond reasonable doubt.

Analysis and determination

32. This being the first Appeal, this Court has the duty to re-evaluate and analyze the evidence in detail, then come up with its own independent conclusions while bearing in mind that it neither saw the witnesses nor heard the evidence when the parties were testifying so as to observe their demeanour. The said duty was espoused by the Court of Appeal in the case of **Mark Oiruri Mose –vs- Republic [2013]eKLR**, in the following words: -

“...It has been said over and over again that the first appellate court has the duty to revisit the evidence tendered before the trial court, afresh analyse it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that...”

33. It is the Appellant's contention that he was not provided with witness statements to enable him prepare for his defence adequately as is required under **Article 50(2)(j)** of the **Constitution**. A look at the trial court's proceedings on page 2 shows that on the **28th September, 2017** the Appellant protested that the prosecution had not supplied him with any witnesses' statements and the trial court directed that the prosecution avail the same to him.

34. **Article 50(2)(j)** of the **Constitution** provides that the accused person has the right to *be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.*

35. It is therefore a requirement of law that an accused person should be provided with any evidence or witnesses' statements that the prosecution intends to rely on during the hearing of the case before the trial court, as of right. On this issue, I agree with the observations of Mativo J, in the case of **Joseph Ndungu Kagiri –vs- Republic [2016]eKLR**, where he held: -

“Article 50(2)(j) correctly interpreted means that an accused person should be furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence in advance. The sole purpose of doing so is so as to avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence at the opportune time both in cross-examination and in his defence. This provision must then be read together with Sub-Article 2(c) which includes the right to have adequate time and facility to prepare a defence.

The latter cannot be met if the accused is not furnished with the evidence the prosecution intends to rely on ahead of the trial. If this goal is not met, it means that the court shall be misinterpreting the letter and spirit of the supreme law of the land thereby belittling the Constitution and the very purpose for which it was intended. Courts must therefore be very keen in ensuring that this provision is adequately given regard to so as to ensure that the rights of an accused person are not violated.

As pointed out above, the right to a fair trial is not one of those rights that can be limited under Article 24 of the Constitution. The cardinal principle in criminal justice is that an accused person is presumed innocent until proven guilty. In this regard, it is apt to reproduce a passage from a decision by the Supreme Court of India in the case of Natasha Singh v. CBI[15] where it was held as follows:-

“Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized.” (Emphasis added)

In R v Ward [16] the Court of Appeal in England was unanimous that:-

“The prosecution’s duty at common law is to disclose to the defence all relevant material, i.e. evidence which tended either to weaken the prosecution case or to strengthen the defence, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statements to the defence or to allow them to inspect the statements and make copies unless there were good reasons for not doing so. Furthermore, the prosecution were under a duty, which continued during the pre-trial period and throughout the trial to disclose to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure. Pursuant to that duty the prosecution were required to make available the records of all relevant experiments and tests carried out by expert witnesses. [Emphasis Mine]

As pointed out earlier, although the Cholmondeley case was decided under the former Constitution, principles of disclosure it elucidates are well entrenched in the Constitution of Kenya 2010 as stipulated under Article 50(2) (j) cited above.

The case of R v Ward [17] is clear that the duty of disclosure is a continuing one throughout the trial. Furthermore, the words of Article 50(2)(j) that guarantee the right “to be informed in advance” cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with the other rights that constitute the right to a fair trial. Article 50(2) (c) guarantees the accused the right, “to have adequate facilities to prepare a defense.”

This means the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his or her defence. This position had also been stated in R v Stinchcombe [18] where the Supreme Court of Canada observed, “The obligation to disclose was a continuing one and was to be updated when additional information was received.”

I find that failure to provide the appellant and his co-accused with the prosecution witness statements in advance as provided for under Article 50(2) (j) violated their constitutional right to a fair trial and vitiated the entire trial and it’s immaterial that they were ultimately acquitted. In my view, under no circumstances should a fair trial be jeopardized. These were the key witnesses and their evidence was crucial and the accused persons were entitled to be supplied with the said statement prior to the trial. It is immaterial that they were able to cross-examine the prosecution witness as learned counsel Mr. Njue for DPP submitted. The fact that they were able to cross-examine the witnesses does not take away their constitutional rights provided in the constitution nor can it be the yardstick for measuring a fair trial. In fact, failure to provide the accused persons with the witness statements prior to the trial was an illegality and a breach of their rights to a fair trial. I find that failure by the prosecution to provide the accused persons with prosecution witness's statements amounted to a violation of their constitutional rights to a fair trial.

36. It is therefore immaterial that an accused person did not object when the trial proceeded on the various occasions that it did. It is the duty of the Prosecution to provide the accused with witnesses’ statements to enable him prepare his defense adequately. See the case of **FMN –vs- Republic [2019] eKLR**, where Odunga J, held that: -

15. In Kenya, the prosecution is obliged to inform the accused in advance of the evidence they intend to rely on, and to give the accused reasonable access to that evidence. It is an obligation that never shifts to the accused and hence even without an accused applying for the same, the prosecution has a constitutional duty to place the said material at the disposal of the accused upfront. That is my understanding of the decision of the Court of Appeal in Simon Githaka Malombe vs. Republic [2015] eKLR, where the said Court expressed itself as follows:

“We do not quite fathom how the appellant can possibly be to blame for the prosecution’s failure to supply the witnesses’ statements requested by the appellant and ordered by the trial court. It would seem that both courts below somehow considered the appellant to blame for not having money to photocopy the statements. This notwithstanding that he was in custody and had indicated

on the record that his kin had not been to see him. To adopt the stance of the two courts would be to stigmatize and even criminalize poverty or inability to pay for statements. It is rather surreal...It is the prosecution that assembles and retains custody of evidence against an accused person. The duty of disclosure lies with the prosecution and not with the court. In the face of clear constitutional provisions, it is not a responsibility that the Office of the Director of Public Prosecutions can shirk. Whenever an accused person indicates inability to make copies, the duty must lie with the State, which the prosecutor represents, to avail the copies at State expense. It is for that Office to make proper budgetary allocation for that item. Then only can the constitutional guarantee in Article 50(2) (c) and (j) be real.”

37. However, it has further been held that that an accused person has a duty to bring to the attention of the Court that he has not been supplied with witness statements. See the case of **Francis Muniu –vs- Republic [2017]eKLR**, where the court held: -

“...It is salutary practice for the Court to do so when it has given orders. Indeed, it is salutary practice for the Trial Court to satisfy itself that an Accused Person has all the reasonable facilities for his defence and all the prosecution disclosure documents before commencement of trial.

However, an Accused Person has an obligation to bring it to the attention of the Court that he has not been supplied with the witness statements (or any other prosecution documents) as ordered by the Court. This minimum obligation on the Accused Person triggers the Court’s duty to ensure the documents are supplied before commencement of the trial...

38. In this case, the accused has been shown to have been aware of his constitutional right to be furnished/supplied with witness statements, hence as held in the case of **Francis Muniu (supra)**, he had an obligation to bring to the court’s attention that had not been provided with the

same. It is further evident that the Appellant never raised any objection when the trial proceeded as it aptly did on the **28th September, 2017**, and there is no indication that he further asked for witnesses' statements and the same were not supplied to him. This only shows that he was either supplied with the said statements or he failed to fulfil his minimum obligation and inform the court that he did not have witnesses' statements. For this reason, this ground on the issue of not being supplied with witnesses' statements must fail.

39. The other issue that has arisen in the case herein, is whether the prosecution proved their case as against the Appellant beyond reasonable doubt. This being a case of defilement, it was trite law that the ingredients of an offence of defilement, be proved, which are; **identification or recognition of the offender, penetration and the age of the victim**. There was no contention as to the age of the complainant whereby a birth certificate was produced before the court that showed she was born on the **23rd July, 2006**. She was thus 10 years old at the time of the incident.

40. On the issue of penetration, it was PW1's evidence that the complainant's clothes were wet with blood stains and that there were scratches and bruises on the child's external genitalia. Further, it was evidenced that PW2's vaginal walls were reddish, her hymen was broken and she had a bacterial infection as a result. This was enough proof that there had been penetration.

41. Once penetration has been proved, the same must be shown that it is indeed the Appellant who committed the said act. In this case, the complainant who was 10 years old at the time, testified that the accused was the one who defiled her and reported the said information to PW3. PW2 told the court that the Appellant was a neighbour and thus it could not be a case of mistaken identity.

42. It was not denied that the Appellant and the complainant met on the fateful day and on cross examination, PW2 indicated that they held hands, a fact that the Appellant did not rebut. It is therefore immaterial that PW2 referred to the accused as "**Andrew Mwamzinyi**" as what is important is that she was able to positively identify the Appellant as the perpetrator.

43. I find that the Appellant was properly identified as the assailant of the Complainant. The complainant's evidence on how the said incident was reported to PW3 has not raised any doubt in the court's mind that PW2 was defiled by the Appellant and neither has it left a doubt as to the identity of her assailant. In the circumstances, I am unable to fault the learned trial Magistrate as the Appellant was properly convicted on the evidence that was adduced by the prosecution against him.

44. From the foregoing analysis, I find that the Respondent proved its case against the Appellant beyond reasonable doubt. In the resultant, I find no merit in this appeal and the same is hereby dismissed. The conviction and sentence of the Appellant by the trial court is upheld.

45. The Appellant has 14 days right of appeal.

DELIVERED VIRTUALLY, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF NOVEMBER, 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Chirchir counsel for State

Appellant in person – present

Court Assistant - Otolo