



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 15 OF 2019

JOHN KATUNGE WAMBUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of the Senior Principal Magistrates Court at Kangundo delivered on 7.2.2019 by the Senior Resident Magistrate M. Oponga in Kangundo SPMCC Criminal Case SO.36 of 2017)

JUDGEMENT

1. This is an appeal from the judgment and sentence of **Hon. M. Oponga SRM, in Criminal Case SOA No. 36 of 2017** delivered on **7.2.2019**. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with 8(4) of the Sexual Offences Act No. 3 of 2006. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. He pleaded not guilty to both charges.
2. The appeal was lodged on 11.2.2019 that was within the time provided in the law. The appellant's case is three-fold. Firstly that the prosecution did not prove its case. Secondly that the court rejected the defence of the appellant. Thirdly that the trial court did not consider the appellant's rights under Article 50(2) and 49(c) of the Constitution. The appellant prayed that the conviction and sentence of the trial magistrate be set aside in its entirety and the appellant acquitted and set free. The appellant added an additional ground that the charge sheet was defective and that he was charged with an offence not known in law.
3. The appellant submitted that the section under which he was charged relates to a victim aged within 16 and 18 years and yet the charge sheet particulars indicate that the victim was aged 5 years. The appellant submitted that the charge sheet ought to have been amended under Section 214(1) of the CPC. The appellant also prayed that a mandatory sentence was declared unconstitutional and placed reliance on the case of **Evans Wanjala Wanyonyi v R (2019) eKLR**.
4. The state opposed the appeal vide submissions dated 22.10.2019 filed on 28.10.2019. Learned counsel addressed one issue namely whether the charge sheet was defective. It was counsel's argument while placing reliance on the case of **Sigilani v R (2004) 2 KLR 80** and the provisions of Sections 134 and 382 of the Criminal Procedure Code that the appellant understood the charges that he was facing and that there was an inadvertent error in framing the charge and this is not sufficient ground to interfere with the discretion of the trial court.
5. This is the first appeal and this court has to evaluate the evidence afresh and make its own conclusion. The prosecution made an application that the victim testify through an intermediary under Section 31 and 32 of the Sexual Offences Act. In that regard **PW1** was JMM, the intermediary who testified that the victim is her niece aged 5 years old and that on 11.10.2017 she discovered that the victim had been defiled. She testified that the victim informed her that it was the herdsboy who defiled her and that the assailant was traced and arrested.
6. **PW2** was **Andrew Mutuku Wambua** who testified that on 11.10.2017 he received a report that the victim had been defiled and that he was required to assist in arresting the appellant.
7. **PW3** was **Peter Ngatia Warui** who testified that he was familiar with the handwriting of Dr. Wambui who prepared the PRC form in respect of the victim who had a history of defilement by a man who was herding sheep. It was his testimony that the examination of the victim revealed that her vagina was bleeding and was torn at the perineum grade two and that it was concluded that the minor had been defiled judging from the injuries on her genitalia.
8. **Pw 4** was **Dominic Mbindyo**, clinical officer Kangundo Level 5 Hospital. He testified that he used the PRC form to fill the P3 form that he signed and tendered as an exhibit.
9. **Pw6** was **Pc John Obul**, the investigating officer who testified that on 11.10.2017 a defilement case was reported to him and that he saw

blood oozing from the vagina of the victim. He testified that the victim explained herself well and that she saw the appellant herding cattle on her way to and from school and that the appellant was arrested. He testified that the birth certificate of the child was presented by her mother and that the date of birth was indicated as 2012.

10. The court was satisfied that a prima facie case had been established against the appellant who was placed on his own defence. Section 211 Criminal Procedure Code was explained to the appellant and he opted to give sworn evidence. The appellant testified that on 11.10.2017 he was at home at 8.00 am and then went to the Huduma Centre at 4 pm and on return at 5 pm he was arrested. On cross examination, he testified that the first time he saw the victim was on the date of his arrest.

11. The court found that the age of Pw1 was proven vide the birth certificate; that penetration was proved vide medical evidence and that the appellant was identified as the perpetrator meaning that ultimately she was satisfied with the identification of the appellant. She found that the prosecution proved its case against the appellant and that the charge ought to have been brought under Section 8(4) instead of 8(3) however she saw no prejudice that the appellant was likely to suffer if there was invocation of Section 179 of the Criminal Procedure Code to convict him of an offence other than the one charged hence he was convicted of defilement and sentenced to life imprisonment.

12. Having looked at the Appellant's and state's written submissions, the grounds of appeal and the evidence on the court record the following are the issues for determination:-

a. Whether or not the Prosecution had proved its case beyond reasonable doubt.

b. Whether the court correctly substituted the charge after the prosecution had closed its case.

c. What orders may the court make?

13. On the issue of proof of the prosecution case, the Appellant made no submission and neither did the state. A perusal of the list of exhibits in the trial court showed a birth certificate as evidence of age, a P3 form as evidence of penetration as well as a PRC form. There is no eye witness account of the incident but however there is evidence of the intermediary who gave an account of what was reported to her; there is evidence of the account that was reported to the investigating officer who testified as Pw5.

14. The appellant has disputed that he was at the scene on the material day and yet Pw1 was said to have identified him. The appellant denied commission of the offence. The trial court relied on the P3 and PRC forms to prove that there was penetration and the account of Pw1 as identification and was satisfied with her account. The court rejected the alibi that was set up by the appellant.

15. It is trite law that in cases of defilement, the prosecution must prove each of the following essential ingredients beyond reasonable doubt;

- a. That the victim was below 18 years of age.
- b. That a sexual act was performed on the victim.
- c. That it is the accused who performed the sexual act on the victim.

16. The prosecution has the burden of proving the case against the accused beyond reasonable doubt. The burden does not shift to the accused person and the accused is only convicted on the strength of the prosecution case and not because of weaknesses in his defence, (See *Ssekitoleko v Uganda [1967] EA 531*). By his plea of not guilty, the accused put in issue each and every essential ingredient of the offence of defilement which he is charged and the prosecution has the onus to prove each of the ingredients beyond reasonable doubt. Proof beyond reasonable doubt though does not mean proof beyond a shadow of doubt. The standard is satisfied once all evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent, (see *Miller v. Minister of Pensions [1947] 2 ALL ER 372*).

17. The evidence as narrated by the Pw1 to Pw5 is largely hearsay and violates the provisions of s 63 of the *Evidence Act* which requires that oral evidence must, in all cases whatever, be direct; that is to say, if it refers to a fact which could be seen, it must be the evidence of a witness who says he or she saw it. Nevertheless, the constitution as well as the sexual offences act allows evidence to be given through an intermediary and the court relied on the evidence of Pw1 to be that of an intermediary. In the case of *M.M v Republic [2014] eKLR*, the court observed that "the role of an intermediary is provided for in subsection 7 of section 31 namely, to convey the substance of any question to the vulnerable witness, inform the court at any time that the witness is fatigued or stressed; and to request the court for a recess." It was further observed that "It is clear from sections 31 (2) and 32 that, first and foremost it is the duty of the prosecution to ascertain the vulnerability of the witness and to apply to the court to make that declaration before appointing an intermediary. In addition, the court, as observed above can on its own motion, through voir dire examination, declare a witness vulnerable and proceed to appoint an intermediary. Any witness (other than the one to be declared vulnerable) can likewise apply to the court for the declaration. The application must not be granted merely because the victim is young or too old or appears to be suffering from mental disorder. The court itself must be satisfied that the victim or the witness would be exposed to undue mental stress and suffering before an intermediary can be appointed." I find that the procedure in which evidence was taken from the intermediary is wanting and implies that evidence relied on by the trial court is not evidence capable of sustaining a conviction and need to ensure that the procedure is followed as per the law.

18. With regard to the issue of a defective charge sheet section 214(1) of the Criminal Procedure Code provides as follows:

"Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge sheet as the court thinks necessary to meet the

circumstances of the case:...

19. In light of the foregoing, it was erroneous to amend and or substitute the charge after the prosecution had closed its case. Be that as it may, in applying an approach to promote substance over form, I find that the error in the charge sheet here did not render the charge sheet as defective. The fact that the charge section is at variance with the particulars *vis a vis* the evidence that was tendered in court meant that there was no confusion created as to the charge that the appellant faced. The mentioned error in the charge sheet is curable under section 382 of the Criminal Procedure Code that provides, in material part that:.... no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.

20. The proviso to Section 382 provides that in determining whether the error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

21. The case of **Sigilani v. Republic [2004] 2 KLR** held:

The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.

22. From the evidence on record, the appellant was charged with an offence known to law, it was disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him and there is no indication of any prejudice occasioned to the Appellant or any miscarriage of justice occasioned. I find that the challenge to the appellant's conviction on the basis of the charge sheet must fail.

23. This court in light of the procedural infraction in taking the evidence of the intermediary it is trite law that in cases where the appellate court forms the opinion that a defect in procedure resulted in a failure of justice, it is empowered to direct a retrial but from the nature of this power, it should be exercised with great care and caution. An order of a retrial should not be made where for example due to the lapse of such a long period of time, it is no longer possible to conduct a fair trial due to loss of evidence, witnesses or such other similar adverse occurrence.

24. The Court of Appeal in the case of **Mwangi vs. Republic [1983] KLR 522** held as follows;

“...several factors have therefore to be considered. These include:

- 1. A retrial will not be ordered if the conviction was set aside because of insufficient evidence.**
- 2. A retrial should not be ordered to enable the prosecution to fill up the gaps in its evidence at the first trial.**
- 3. A retrial should not be ordered where it is likely to cause an injustice to the accused person.**
- 4. A retrial should be ordered where the interest of justice so demand.**

Each case should be decided on its own merits.”

25. Because of the infraction on the procedure of taking the evidence of the intermediary I find that the justice of the case warrants a retrial. The appellant was sentenced on 7.2.2019 after a trial that lasted about one and half years. The appellant has hardly served his sentence and will not be prejudiced if a retrial is ordered. On the other hand the respondent is able to trace the witnesses for the retrial.

26. In the result I find the appeal has merit. The same is allowed. The conviction and sentence is set aside and that an order for retrial is made with the following directions:

a. The Appellant shall be released from prison custody and placed at Kangundo Police station and to be presented before the Senior Principal Magistrate at Kangundo Law courts on the 31.1.2020 for the purposes of a retrial.

b. The Deputy Registrar is directed to forward the lower court file herein to Kangundo law courts.

It is so ordered.

Dated and delivered at Machakos this 29th day of January, 2020.

D. K. Kemei

Judge