REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL APPEAL NO. 41 OF 2019

PETER ANTHONY .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the conviction and sentence (Hon. Okuche, SRM), delivered on 4th February, 2019 in Criminal Case S.O No. 14 of 2018 at Loitokitok)

JUDGMENT

1. The appellant was charged with attempted defilement contrary to section 9(1) (2) of the Sexual Offences Act, NO. 3 of 2006. Particulars were that on 14th day of September, 2018 Kajiado County, he attempted to intentionally cause his private organ to penetrate the private organ of NE, a child aged 7 years.

2. The appellant faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars being that on the 14th day of September, 2018 in Kajiado County, , he intentionally touched the private parts of NE, a child aged 7 years with his private organ.

3. The appellant pleaded not guilty to both the main count and the alternative count and after a trial in which the prosecution called 5 witnesses and the evidence of the appellant, the trial court found him guilty, convicted him and sentenced him to ten years imprisonment.

4. The appellant was aggrieved by both conviction and sentence and lodged an appeal raising the following grounds, namely;

> ***1. That the trial magistrate erred in law and fact in convicting him on evidence that was below the required standard.***
>
> ***2. That the trial magistrate erred in law and fact by shifting the burden of proof to him contrary to law.***
>
> ***3. That the trial magistrate erred in law and fact in failing to take into account his defence***
>
> ***4. That the trial magistrate erred in law and fact by failing to observe the general values and practice in criminal trial thus shifting the burden of proof to him.***

5.The appellant filed supplementary grounds of appeal together with his submissions dated 12th February, 2020. In the supplementary grounds of appeal the appellant complained that:

> ***1. The leaned magistrate erred in law and fact in failing to find that the medical evidence was insufficient;***
>
> ***2. That the learned magistrate erred in law and fact by relying on evidence of PW1 as direct oral evidence which was in essence hearsay and offended his right to challenge his accusers' evidence in violation of Article 50(1) (2) 1(c) and (1) of the constitution.***
>
> ***3. That the trial magistrate erred in law and fact by failing to find that the prosecution case was full of contradictions, insufficient and inconsistences.***
>
> ***4. That the trial magistrate erred in law by failing to give regard to his cogent evidence.***

5. That the trial magistrate erred in law and fact by failing to give reasons for his finding of guilty thereby violated section 169 of Criminal Procedure Code.

6. During the hearing of the appeal, the appellant relied on his written submissions and urged the court to allow his appeal, quash conviction and set aside the sentence. The written submissions were mainly in support of the grounds of appeal that the trial court convicted him without sufficient evidence, that the prosecution case was full of contradictions and inconsistencies and that the trial court shifted the burden of proof to him. He relied on several authorities to urge his appeal.

7. Mr. Meroka, learned Principal prosecution counsel conceded this appeal. According to counsel, the evidence by PW1 did not accord with the Sexual Offences Act. He submitted that although there was indication that the victim was vulnerable, the nature of PW1's evidence was a narrative by the intermediary rather than evidence on behalf of the victim. Counsel relied on ***NM v Republic*** [2017] eKLR and ***John Kinyua Nathan v Republic*** [2017] eKLR on the role of an intermediary.

8. Mr. Meroka submitted that the victim was a 7 year old who requires protection; that there was an eyewitness and that the offence was committed about a year ago and, therefore, urged for a retrial. He stated that the prosecution has witnesses and will be ready to proceed with a retrial, if ordered.

9. I have considered the appeal; submissions and the authorities relied on. I have also perused the record of the trial court. Although this appeal has been conceded, that does not mean the appeal must automatically succeed. The court must consider the appeal and make its own determination on it.

10. In ***Odhiambo v Republic*** [2008] KLR 565, the court held that:

> ***"The court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence."***

11. In that regard, this being a first appeal, this court has a duty to reevaluate, reanalyze and reassess the evidence and come to its own conclusion, bearing in mind however, that it did not see the witnesses testify and give due allowance for that

12**.** In ***Okeno v Republic*** [1973] EA 32, the court held:

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination… and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion....It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."***

12. PW1 Ann Kitenge, Sub County Children Officer appointed by the court as the victim's intermediary, told the court that she interviewed the victim who told her that she was playing with her friends when the appellant apprehended her, took her to a nearby shrub and defiled her. In cross-examination, PW1 told the court that she interviewed the victim and that is how she identified the appellant. She also told the court that the incident took place on 14th September, 2018.

13. PW2, Peter Bobasa a clinical officer based at Loitokitok hospital, testified that on 14th September, 2018 the minor was taken to hospital by police officers with allegation of defilement. When he examined her, she had pus cells in her urine, the hymen was intact and vaginal walls were not stretched. He concluded that the probable weapon used was a male organ and that the incident was nine hours old. She was put on treatment and that the injury was permanent. According to the witness, victim said that she felt pain when urinating. The P3, PRC and treatment notes were marked MFI (a) (b) (c) respectively.

14. PW3 Grace Wanjiku Kimani a neighbour to both the victim and the appellant, testified that on 14th September, 2018 she was fetching firewood when she heard a minor crying. She went to where the cry was coming from and found the appellant with the minor. She picked a stone and threw it at the appellant who ran away. She picked the minor and took her to her home. The minor told her that it was the appellant who had taken her to the bush. She passed through Martha Soni's house and soni confirmed what the minor had told her. She handed over the minor to her mother.

15. She testified that she heard the minor say that she was being injured, and she found the appellant lying on top of the minor, he had lowered his trouser. The minor was holding her under wear in her hand. The appellant had rasta hair style. In cross-examination, the witness told the court that she never raised an alarm and that the incident took place at about 5.30 pm.

16. PW4 EA testified that on 14th September, 2018 he was in the farm when his wife went and informed him that the victim had been defiled. He saw members of public assaulting the appellant. They took him to the police station and the minor was also taken to hospital by him in the company of the police and that her cloths were soiled. In cross-examination, he admitted that he never saw the appellant defile the victim.

17. PW5 No. 118552 PC Irene Wambui attached at Illasit police station, testified that on 14th September, 2018 she was instructed to investigate the case. The appellant had been brought to the station on allegation of defilement. She told the court that the appellant was unconscious following beatings from members of the public. She took him together with the victim to the hospital. She issued the minor

with a P3 form which was filled and returned to the station. She also recorded statements from witnesses. The minor's age was assessed and she produced the age assessment form as PEX 3.

18. When put on his defence, the appellant who testified that on 14th September, 2018 he went to the farm up to 11 am, when his boss told him to take her money to the shop. On the way, he met some boys who beat him up and took him to hospital. The following day he was taken to police station and charged. In cross-examination, he denied that he knew the complainant or PW2.

19. The trial court considered the evidence on record, believed the prosecution case, convicted the appellant of attempted defilement and sentenced him to ten years imprisonment, triggering this appeal.

20. I have considered this appeal and the submissions by both sides. Mr. Meroka conceded the appeal on grounds that PW1 narrated the story about what happened but did not aid the victim testify in court. That the victim did not testify, is not in dispute and this fact was appreciated by the trial court. PW1 was appointed by the trial court after the prosecution informed the court that the victim was apprehensive and could not speak.

21. I have analyzed the evidence of PW1. She simply told the court what the minor told her. The court did not interrogate the victim and make its own conclusion that she was indeed vulnerable. Section 31(2) of the Sexual Offences Act allows the court to appoint an intermediary to assist a victim of sexual offence testify. This is also a process allowed by Article 50(7) of the Constitution. However, it is for the court to assess the witness and determine that indeed she/he is vulnerable and decide whether or not to appoint an intermediary. The court did not follow the procedure allowed in law. It simply made a decision to appoint an intermediary on the request by the prosecution without making an inquiry on the viability of this action.

22. Second, the trial court did not give guidelines to be followed by the intermediary. What the intermediary did was to give evidence on behalf of the minor which amounted to hearsay. This approach denied the appellant the opportunity to cross-examine the victim, thus denied him the right to fair trial guaranteed under Article 50(2) of the Constitution.

23. Appointment of an intermediary is at the discretion of the court where circumstances allow. Section 2 if the Act defines an intermediary as

> ***"a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counselor, guardian, children's officer or social worker."***

24. It must be clear that in a criminal trial, an intermediary is not the mouthpiece of the complainant. Section 31(7) of the Act is plain that the role of an intermediary is to convey the substance of any question(s) to the vulnerable witness, inform the court at any time that the witness is fatigued or stressed and request the court for a recess when necessary.

25. The approach adopted by the trial court has been criticized by courts. In **NM v Republic** [2014] e KLR, the Court of Appeal stated;

> ***"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 we have earlier observed, can on its own motion, through voire 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."***

26. The Court was clear that the trial court must ascertain;

> ***"…the expertise, possession of special knowledge or relationship with the witness through examination of the prospective intermediary before the court appoints him or her. It goes without saying, in view of that role, that an intermediary must subscribe to an appropriate oath ahead of the witness' testimony, undertaking to convey correctly and to the best of his/her ability the general purport of the evidence. The trial court must then give directions to delineate the extent of the intermediary's participation in the proceedings." (Emphasis)***

27. The Court emphasized on the role of the intermediary;

> ***"The intermediary's role is to communicate to the witness the questions put to the witness and to communicate to the court the answers from the victim to the person asking the questions, and to explain such questions or answers, so far as necessary for them to be understood by the witness or person asking questions in a manner understandable to the victim, while at the same time according the victim protection from unfamiliar environment and hostile cross- examination; to monitor the witness' emotional and psychological state and concentration, and to alert the trial court of any difficulties."***

28. As the Court of Appeal observed in the above decision, the whole object of the proceedings through an intermediary is to achieve fairness in the determination of the rights of all the people involved in a trial and to promote the welfare of a child or vulnerable witness.

29. Since the victim did not testify in the present appeal, the appellant was disadvantaged in that he could not ask relevant questions a fact that infringed on his right to a fair trial guaranteed under Article 50(2) of the Constitution including the right to challenge the prosecution evidence. Mr. Meroka Properly conceded this appeal on this ground.

30. Mr. Meroka however urged for a retrial. He argued that the prosecution has evidence to sustain a conviction and that they will get their witnesses if a retrial was ordered. Whether to order a retrial or not is a matter at the discretion of the court. The court must consider a number of factors, the most important being to do justice to the parties.

31. In ***Ahmed Sumar v R*** [1964] EA 483, the court stated:

> ***"…in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficient of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered"***

32. In ***Pius Olima & another v Republic*** [1993] eKLR, the Court of Appeal stated that a retrial may be ordered where the original trial, is defective, if the interest to justice so require and if no prejudice is caused to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case.

33. And in ***Laban Kimondo Karanja &2 others v Republic*** [2006] eKLR, Khamoni, J. reiterated the factors to be taken into account in deciding whether to order a retrial and stated thus:

> ***In general a retrial will be ordered only when the original trial was illegal or defective, and from the particular facts and circumstances of the case, the appellate Court, or the court on revision, is of the opinion that on a proper and judicious consideration of the admissible or potentially admissible evidence, a conviction might result, and further that the court is satisfied, not only that the interests of justice require the order for a retrial to be made, but also that such an order when made is not likely to cause injustice to the accused person."***

34. Applying the above principles to this appeal, an order for a retrial should not be made where it will cause prejudice to the appellant, or on the admissible evidence on record, the retrial will not return a conviction. I have considered the evidence on record. The appeal succeeds because the trial was defective. That was not a mistake of the prosecution. Second, the victim was a child who requires justice. It is therefore in the interest of justice that a retrial be ordered. The retrial will not cause prejudice to the appellant since he will have an opportunity to challenge the prosecution evidence.

35. Having considered the appeal, submissions and the authorities relied on the conclusion I come to is that the appeal succeeds and is allowed. The conviction is hereby quashed and the sentence imposed against the appellant is set aside. A retrial is hereby ordered and the appellant is to be tried before any other magistrate other than Hon. Okuche. The appellant be produced before the Senior Resident Magistrate at Loitokitok as soon as the situation allows for a new trial.

36. Orders accordingly.

Dated, signed and delivered at Kajiado this 30th day of April, 2020.

E. C. MWITA

JUDGE