REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO.11 OF 2019

NTHEI MUTISO…….…….....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal arising from the original conviction and sentence in Machakos Chief Magistrate's Court (Hon. B. Bartoo, SRM), in Criminal Case SOA No. 44 of 2016 and judgement delivered on 29.1.2019)

BETWEEN

REPUBLIC …….....…….….....PROSECUTOR

VERSUS

NTHEI MUTISO.....ACCUSED

JUDGEMENT

1. This is an appeal from the judgment, conviction and sentence of Hon. B. Bartoo, Senior Resident Magistrate in Criminal Case SOA No. 44 of 2016 delivered on 29.1.2019. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that the appellant "On the 1st day of January, 2016 in Machakos District within Machakos County intentionally and unlawfully caused his penis to penetrate the vagina of **GM** a child aged 3 years. 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.

2. The appeal was lodged on 14.2.2019 and an amended appeal was lodged on 29.10.2019 by D. Nzioka and Co Advocates. 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 passed an excessive sentence. The appellant prayed that the appeal be allowed; that the judgement of the trial court be reversed and or set aside and the appellant be acquitted; that the appellant be set free unconditionally and in the alternative that the appellant be retried by an independent and impartial court of competent jurisdiction.

3. The appellant's counsel filed submissions and submitted that there were no independent witnesses to establish the truth. Reliance was placed on the cases of **Bukenya v Uganda (1972) EA 549 and Halkano Matabagaja v R (2015) eKLR**. It was counsel's submission that the appellant was not granted legal representation and in this regard his right to fair trial was infringed. Counsel cited the case of **Joseph Kiema Philip v R (2019) eKLR.**

4. The state opposed the appeal vide submissions dated 9.12.2019 filed on the same day. Learned counsel addressed the issue of proof of the prosecution's case and submitted that the prosecution met its standard. Reliance was placed on the case of **Kassim Ali v R (2006) eKLR** where it was found that rape could be proved not only by medical evidence but also by circumstantial evidence and that of the victim.

5. Learned counsel submitted on the issue of consideration of the appellant's defence that the appellant gave an unsworn statement that was of no probative value. Further that the appellant's defence was found as not able to exonerate him of the offence. It was submitted that the circumstances pointed towards the guilt of the appellant and hence the appeal lacked merit.

6. 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 MM, the intermediary who testified that the victim is her daughter aged 3 years old and that on 1.1.2016 the victim came home crying and that she checked her clothes only to find that she had blood stained pants. She testified that the victim informed her that it was the appellant who had defiled her and she took her to hospital where she was examined and treated.

7. **PW2** was Isaack Musembi and after a voir dire was conducted on him, the court found that he did not understand the nature of an oath and so he gave an unsworn statement. He testified that he saw the victim come out of the appellant's house while crying.

8. **PW3** was Gilbert Kyalo who testified that on 1.1.2016, he was told that the victim had been defiled.

9. **Pw 4** was Peter Mutisya Katunga who testified that on 1.1.2016 he was in the group of persons who assisted in apprehending the appellant.

10. **Pw5** was **Dr John Mutunga**, based at Machakos Level 5 Hospital. He testified that he examined the victim on 5.1.2016 and filled the P3 form. He testified that he used the PRC form to fill the P3 form that he signed and tendered as an exhibit.

11. **Pw6** was **Elizabeth Kisilu** a clinical officer based at Machakos Level 5 Hospital who testified that she examined the victim on 1.1.2016 and signed the PRC form on 4.1.2016. She testified that the examination revealed that the victim had a torn hymen.

12. Pw 7 was **IP Lorna Kimuma** the in-charge of the gender desk and on duty when the report was made on 1.1.2016 in respect of a defilement. She testified that she received the birth notification in respect of the victim.

13. 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 31.12.2015 he was at home drunk and sleeping when he was awoken by noise. He testified that he was taken to the police station and charged.

14. The court found that the age of the victim was proven vide the birth notification; that penetration was proved vide medical evidence and that the appellant was identified as the perpetrator meaning that the prosecution proved its case against the appellant. The appellant was convicted of defilement and sentenced to life imprisonment.

15. Having looked at the Appellant's and State's written Submissions, the grounds of appeal and the evidence on the court record I find the following issues for determination:-

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

b. Whether there are procedural infractions that would vitiate the trial in the trial court.

c. What orders may the court make

16. On the issue of proof of the prosecution case, a perusal of the list of exhibits in the trial court showed a birth notification as evidence of age, a P3 and PRC form as evidence of penetration. There is no eye witness account of the incident, however there is evidence of the person named as 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; there is evidence of Pw2 who was the person who saw the victim leaving the appellant's house.

17. The appellant has not disputed that he was at the scene on the material day as he confirmed residing within the same compound with the victim's parents but he claimed that he was asleep in his house when he was arrested hence impliedly 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 and Pw2 as identification and was satisfied with the same account. The appellant's evidence did not set up any plausible defence.

18. 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.

19. The prosecution has the burden of proving the case against the appellant beyond reasonable doubt. The burden does not shift to the appellant who 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 had 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**).

20. The evidence as narrated by the prosecution witnesses 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 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." I find that the procedure in which evidence was taken from the intermediary is wanting meaning 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.

21. 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 injury or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.

22. This court has noted the procedural infraction in taking the evidence of the intermediary and 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.

23. 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."*

24. As noted above the appointment of an intermediary was not procedurally conducted by the trial court and that the evidence adduced dwelt on hearsay evidence. The circumstances of the case warrants an order for retrial. It is noted that the appellant has barely served the sentence and hence a retrial will not cause any prejudice to him. Besides the Respondent will not have difficulties in securing their witnesses.

25. In the result the appellant's appeal succeeds. The conviction is hereby quashed and sentence set aside and is substituted with an order for a retrial. The appellant is ordered to be presented before the Chief Magistrate Machakos Law courts as soon as is practically possible for the purposes of a retrial.

It is so ordered.

Dated and delivered at Machakos this 27th day of April, 2020.

D. K. Kemei

Judge