



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 222 OF 2017

JACKSON JUMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence by J.M. Nang'ea,

Chief Magistrate, in Mombasa Chief Magistrate's Court Sexual Offence Case No. 52 of 2016).

JUDGMENT

1. The appellant was on 31st May, 2016 arraigned in court for the charge of attempted defilement contrary to Section 9(1)(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 23rd day of May, 2016 at [Particulars withheld] area in Changamwe Sub-County intentionally and unlawfully attempted to cause his penis to penetrate the vagina of GJ [name withheld] a girl aged 13 years.
2. He faced an alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 23rd day of May, 2016 at [Particulars withheld] area in Changamwe Sub-County within Mombasa County intentionally attempted to cause his penis to penetrate the vagina of GJ [name withheld] a girl aged 13 years.
3. The appellant was found guilty of the main charge and sentenced to 10 years imprisonment. He was dissatisfied with the decision of the lower court and on 6th April, 2017 he filed a petition and grounds of appeal. On 4th November, 2019 he amended his grounds of appeal, with leave of the court.
4. His grounds of appeal are that the offence he was charged with was not proved beyond reasonable doubt, that PW1 and PW2 were witnesses of doubtful integrity and that his arrest had no connection with the offence he was charged with. He also raised grounds of appeal to the effect that the medical evidence adduced was unreliable, that his defence was not considered and that the sentence meted out to him was harsh and excessive.
5. In his written submissions, the appellant stated that no cogent evidence was adduced to prove the allegations made by PW1 and PW2 that he had given cash to the victim. He also stated that the school administrator should have testified to prove that the victim paid some of her debts. He indicated that M and F who were mentioned in the proceedings were not called as witnesses.
6. The appellant claimed that the source of his arrest was not ascertained as no witnesses testified on the said fact. He relied on the case of **John Kenga v Republic**, Criminal Appeal No. 118 of 1984, where the appeal was allowed because some witnesses who had been mentioned during trial were not called to testify as to the source of the arrest of the appellant therein.
7. It was submitted that PW1 gave contradictory evidence with regard to the place where the incident took place, as to whether there were some people who were taking drugs nearby or if there was nobody at the scene.
8. The appellant urged this court to disregard the evidence of PW1 and PW2 because they were not reliable witnesses. He relied on the case of **Ndung'u Kimanyi v Republic** [1979] eKLR to support his submission that the evidence adduced in his case should be disregarded and more particularly, the evidence of PW2 who relied on information from one Mwaka, who did not testify.
9. With regard to the P3 form, the appellant submitted that it gave the date of the incident as 22nd May, 2016 which was 2 days after PW2 knew of the existence of an affair between him and her daughter.

10. The appellant expressed doubt as to the authenticity of the P3 form. He stated that the Trial Court held that PW1 was taken to hospital at Port Reitz first and later to the Coast Province General Hospital (CPGH), which was not the case. He submitted that both PW1 and PW2 did not mention in their evidence about having gone to Port Reitz Hospital. It was pointed out that the hospital which PW1 was escorted to by the police on 10th June, 2016, was not disclosed and that the police officer who escorted PW1 to hospital did not testify. He further indicated that the medical document given to PW1 at Port Reitz Hospital showed that she was in the hospital on 25th May, 2016, yet PW4 gave evidence about a document he received at Changamwe Police Station on 29th May, 2016.

11. It was claimed that PW4 testified that at the time he received the report from PW1 about the incident, the appellant was already at the police station and as such, the present case could not have been the cause of his arrest. The appellant was of the view that the sentence was harsh and excessive and prayed for a reduction of the same.

12. Mr. Muthomi, Prosecution Counsel, filed his written submissions on 2nd December, 2019. He stated that from PW1's evidence, the appellant took her to a place where drama used to be played, laid on her and used his "mdudu" to rub her vagina. That the appellant would pour water on her private parts and used his penis to penetrate her on 3 occasions. It was submitted that the P3 form established that PW1's hymen was perforated. He therefore asserted that the act of penetration as defined in Section 2 of the Sexual Offences Act was proved beyond reasonable doubt.

13. On the age of PW1, it was submitted that her birth certificate was produced which established that she was born on 21st March, 2003 hence at the time the offence was committed on 23rd May, 2016 she was 13 years old.

14. The Prosecution Counsel also submitted that the appellant was positively identified as the one who caused his penis to penetrate the genital organ of PW1. In addition, that PW1 said that it was Zolo who committed the offence. Mr. Muthomi submitted that even though it was not included in the charge sheet that the appellant was also known as Zolo, the appellant never denied that he was also known by the said name. It was stated that the appellant in his defence said that they were neighbours with PW1, thus identification was properly proved.

15. Mr. Muthomi indicated that the appellant was arrested on 29th May, 2016 by members of the public on the same day the incident was reported and he was escorted to Changamwe Police Station. It was pointed out that the appellant in his defence said that he was summoned by the village elders on 29th May, 2016 and found them with members of the community policing. He was then arrested. It was submitted that medical evidence corroborated the evidence of PW1 that she was defiled.

16. Mr. Muthomi was of the view that the sentence was neither harsh nor excessive as the appellant was sentenced to the minimum sentence provided for under Section 9(2) of the Sexual Offences Act.

EVIDENCE TENDERED IN THE LOWER COURT

17. PW1, GJ [name withheld] testified that sometime in the year 2015 she went to play with other children in a certain field after school. At 7:00p.m., she started walking home. She came across a man who was popularly called Zolo (correct name verified from the original handwritten proceedings). She indicated that he was their neighbor. She identified him as the appellant herein. She stated that she met him near their house where she was, with her step-mother. PW1 stated that the latter left and the appellant asked her to accompany him to a place where people usually hold drama plays. She indicated that she did so and by then it was already dark.

18. She testified that no one else was at the scene and the appellant asked her to strip naked. He removed her clothes and removed his "mdudu" which he inserted in her genital area. She further indicated that as she lay down, the appellant "rubbed" her with his "mdudu" and she saw mucous like substance oozing from it. He then gave her Kshs. 200/= and warned her not to report the incident. He threatened he would kill her if she revealed the incident. PW1 stated that she went home, bathed and never reported the incident to anyone that night.

19. She recounted a second incident 2 weeks thereafter when they went to the same place. It was her evidence that the appellant gave her Kshs. 500/= and requested to penetrate her. He then inserted his "mdudu" in her genital area. She indicated that she used the money he gave her to pay for her exams and school activities. In school, she said she was given the money by her parents.

20. It was her testimony that there was another day when the appellant picked her from home and gave her Kshs. 200/= which she used to buy chapati for her sister. She stated that her friends asked her where she got the money from and reported her to her mother. She was questioned by her mother and taken to members of the area community policing, whom she recounted to, what the appellant had done to her. She stated that he confronted her later and told her that her mother was threatening to jail someone, but she declined to speak to him.

21. It was PW1's evidence that she was taken to hospital on a Monday. She indicated that she felt no pain during the incidents as the appellant would pour water on her private parts and then brush them with his "mdudu". She stated that he did the act on 3 occasions at the place where drama used to be held and she had known the appellant for a long time.

22. PW2, ZNO [name withheld] was PW1's mother. It was her evidence that on 20th May, 2016 she went to work and when she returned home, a child by the name M reported to her that her daughter (PW1), had money. PW2 stated that she took PW1 to the village elders where she was questioned. She explained that she did so because she had on a previous occasion beaten PW1 for failing to go to school and she was charged with assault which led her to being convicted and she was placed on probation.

23. It was her evidence that when PW1 was questioned, she told them that there was a man by the name Zolo who had given her money on several occasions and he would then engage in "bad manners" with her, by placing his "mdudu" on her genitals. PW2 indicated that she knew the appellant as he was their neighbor. She knew his common name was Zolo. She later learnt that his name is Jackson Juma.

24. PW2 testified that the following day, she and PW1 were taken by a village elder to Changamwe Police Station and they were sent to Coast Province General Hospital (CPGH). PW2 had with her a copy of PW1's certificate of birth which showed that she was born on 21st March, 2003.

25. Dr. Hassan Mohamed of CPGH testified as PW3. He produced PW1's P3 form on behalf of Dr. Samira Osman, whose signature and handwriting he was conversant with. PW3 stated that as per the P3 form, PW1's hymen was torn and Doctor Osman made a finding that PW1 had been defiled. PW3 also produced the PRC form for PW1.

26. PW4 was No. 81123 Corporal Calvin Odero of Changamwe Police Station. He was attached to the Gender and Children Section. It was his evidence that on 29th May, 2016 a woman went to the said station with his daughter (PW1) and they made a complaint that a man had attempted to defile the girl. PW4 stated that PW1 had been attended to at Port Reitz Hospital and the suspect (appellant) was in their custody. PW4 produced a copy of PW1's certificate of birth to show she was 13 years of age. He indicated that findings from Port Reitz Hospital were captured in the P3 and PRC forms.

27. The appellant gave sworn defence and stated that on 20th November, 2015 he sent his pregnant wife to his rural home in Kinango to deliver the baby and he remained in Jomvu with their children. He stated that he seduced PW2, who was his close neighbour, for sexual intercourse, and they had a love affair.

28. He claimed that in the month of May, 2016 his wife returned to their house after delivering their last born child and got to know about his love affair with PW2 and the two women quarreled. He stated that when he intervened, PW2 threatened his wife with unspecified consequences. That on 29th May, 2016 he received a call from village elders summoning him and his wife. They met the village elder and found PW2, her brothers and members of the community policing present. That he was then arrested and charged with the present offence, which he denied having committed.

ANALYSIS AND DETERMINATION

29. The duty of the 1st appellate court is to analyze and re-evaluate the evidence adduced in the lower court and come to its own independent conclusion while bearing in mind that it neither saw nor heard the witnesses testify and make an allowance for that fact.

30. One of the appellant's grounds of appeal is based on the medical evidence which was adduced by PW3. The appellant expressed doubt as to the authenticity of the document, more so on the issue of PW1 having been attended to at Port Reitz Hospital first before she was examined CPGH. In his submissions, the appellant raised some questions which only the Doctor (PW3) was capable of responding to. This court notes that the appellant was not given an opportunity to cross-examine PW3, who was a crucial witness as the appellant was facing a charge of attempted defilement.

31. The lower court record reveals that PW3, Dr. Hassan Mohamed, testified on 30th November, 2016. On that day, the appellant who was being represented by an Advocate (who appeared interchangeably with another), who had been instructed to appear for him by the Law Society of Kenya, Mombasa branch, informed the court that he preferred to represent himself. His exact words were -

"I don't want the government advocate he didn't execute any instructions. I want to represent myself."

32. The Trial Court granted the 2 advocates leave to withdraw from acting for the appellant. After PW3 testified, the appellant indicated that he was not ready to cross-examine the witness as his advocate had withdrawn and he had the document. The appellant then said he had received the document back but he was not prepared to cross-examine. He requested for one or two months to enable him to cross-examine PW3. He then applied for the case to start afresh and said it had been maliciously brought against him.

33. The prosecution objected to the application for the case to start *de novo* and stated that the appellant should have expressed his discomfort with the Advocate earlier on. The prosecutor said that the appellant should cross-examine the Doctor and that other witnesses could be called later. She prayed for the hearing to continue.

34. The Trial Court's decision on the above issue reads as follows -

"I note that the accused advocate (sic) has just withdrawn. The accused ought to have expressed his discomfort earlier considering this is a children's case. However, in the interests of just (sic) the accused should be allowed to personally cross examine the Doctor. The court however declines to order for the case to begin de novo. The accused is however, granted leave to recall the witness (sic) who testified including the doctor for further cross-examination. Hearing continues on 7/12/2016 which is suitable to the doctor, PW1 and PW2 are also summoned for further cross-examination by the accused."

35. On 7th December, 2016 PW1 and PW2 attended court for cross-examination. The Doctor (PW3) did not attend court and the prosecutor explained that medical officers were on strike. The appellant stated that he was not ready to cross-examine the witnesses as he needed to read the statements which he had received from his Advocate a week before the hearing date. The prosecutor opposed the application which he regarded as a delaying tactic.

36. The Trial Court ordered for the case to proceed as the appellant had indicated that he had sufficient time to prepare and that the case was delicate and needed to be expedited. The appellant indicated that he would not cross-examine the witnesses because he was not ready. The prosecutor indicated that the hearing should then proceed and informed the Trial Court that the Investigating Officer was yet to testify. The said court noted that the appellant had been given sufficient time to prepare and directed for the case to proceed for hearing on 14th December, 2016. Come the said date, the Investigating Officer testified and the prosecution closed its case. The appellant was thereafter put

on his defence.

37. Due to an oversight on the part of the prosecutor, the Doctor who had testified as PW3 was never called for cross-examination by the appellant. It is therefore apparent that the appellant was not accorded a fair trial as the questions he had for the Doctor who produced the P3 and PRC forms went unanswered. One of his grounds of appeal was to the effect that the medical evidence adduced was unreliable. This court's finding is that if the Doctor had been cross-examined by the appellant, it would have given clarity on the contents of the PRC and P3 forms which remained hazy to him. Had that happened, the appellant would probably not have brought up the issues he raised in his submissions with regard to the medical documents which were produced by PW3.

38. Article 50(2)(k) of the Constitution of Kenya provides that every accused person has a right to fair hearing which includes the right to adduce and challenge evidence.

39. The provisions of Section 208(2) and (3) of the Criminal Procedure Code give an accused person the right to cross-examine witnesses called by the prosecution. The section provides as follows:-

“(2) The accused person and his advocate may put questions to each witness produced against him.

“(3) If the accused person does not employ an advocate, the court shall, at the examination of each witness for the prosecution, ask the accused person whether he wishes to put any questions to that witness and shall record his answer.” (emphasis added).

40. It is noted that the Trial Court gave the appellant time to go through witness statements which were relied on by the prosecution and the medical documents produced in court before he could cross-examine PW3. The Doctor however never attended court at a later date to be cross-examined. It was the duty of the prosecutor to avail the Doctor in court. This court's finding is that the mistake made by the prosecution greatly prejudiced the appellant. The type of an error which was committed by the prosecution in the lower court cannot be cured by the provisions of Section 382 of the Criminal Procedure Code as it all boils down to the issue of infringement of the rights of an accused person to a fair trial. Having found so, there is no need to engage in an academic exercise on the other complaints raised by the appellant in this appeal.

41. This court has considered if it should order a retrial. In doing so, it has borne in mind the Court of Appeal decisions in **Muiruri v Republic** [2003] KLR 552 and **George Karanja Mwangi & 2 others v Republic** [1983] eKLR. In **Muiruri v Republic** (supra) the Court of Appeal stated that generally whether a retrial should be ordered or not must depend on the circumstances of each case.

42. The Court of Appeal in the case of **Yusuf Sabwani Opicho v Republic** [2009] eKLR stated thus on the instances when an appellate court can make an order for retrial-

“In many other decisions of this Court it has been held that although some factors may be considered, such as illegalities or defects in the original trial; the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether on a proper consideration of the admissible or potentially admissible evidence, a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for retrial should only be made where the interests of justice require it.”

43. This court notes that the appellant was arraigned in court on 31st May, 2016 when he was charged. He was sentenced to 10 years imprisonment on 9th March, 2017. As at the time of writing the judgment herein, he has served sentence for 3 years and 3 months. He was in remand for a year during the hearing of the case in the Trial Court. He has therefore been in custody for 4 years and 3 months. If this court orders a retrial, it may lead to the appellant staying in remand for a few more years pending the hearing and determination of the fresh case.

44. This court holds that it will occasion the appellant injustice if a retrial is ordered and the case drags on for a number of years as he has only 4 years left of his sentence, inclusive of the remission, which he is entitled to. Besides that, if this court orders a retrial, the appellant could end up being sentenced to imprisonment for 10 years or more in the event that he will be found guilty of the same offence. Further, ordering a retrial in this case will result in giving the prosecution the opportunity to rectify the error it made in the trial in the lower court.

45. I hold that the circumstances of this case do not call for a retrial. The appeal is hereby allowed, the conviction quashed and sentence set aside. The appellant shall be set at liberty forthwith, unless he is otherwise lawfully held.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 19TH DAY OF JUNE, 2020.

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Mr. Muthomi, Prosecution Counsel, for the DPP

Mr. Mohamed Mohamud- Court Assistant.