



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 14 OF 2019

SALIM SAID MKOSEKO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence by Hon. D. Odhiambo, Resident Magistrate, delivered on 14th December, 2018 in Shanzu Senior Principal Magistrate's Court Sexual Offence Case No. 55 of 2018)

J U D G M E N T

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. The particulars of the charge were that on the 17th day of May, 2018 in Kilifi South Sub-County within Coast region unlawfully and intentionally caused his penis to penetrate the vagina of VKJ (name withheld) a child aged 3½ years. He was sentenced to life imprisonment.

2. He was aggrieved by the said decision and on 8th January, 2019 he filed a petition and grounds of appeal. On 18th February, 2020 he filed amended grounds of appeal, with leave of the court. He raised the following grounds of appeal:-

- (i) That the learned Trial Magistrate erred in law and fact by admitting the evidence of the complainant's mother (PW1) without a proper finding that the minor was not subjected to a *voir dire* examination before her mother was allowed to testify in court as an intermediary;
- (ii) That the learned Trial Magistrate erred in law and fact by failing to find that the identification of the appellant was not free from the possibility of error since the complainant minor did not point fingers at him as the perpetrator of the defilement in issue;
- (iii) That the learned Trial Magistrate erred in law and fact by discounting and not considering in detail his defence evidence;
- (iv) That the learned Trial Magistrate erred in law and fact by failing to consider his defence; and
- (v) That the learned Trial Magistrate erred in law and fact by not considering his mitigation.

3. The victim of the defilement was 3 years and 3 months old at the time the incident happened. The prosecutor applied for her to testify through her mother as an intermediary. The Trial Court declared the minor a vulnerable witness under Section 31(1) of the Sexual Offences Act and allowed her mother, MN [name withheld] to testify as an intermediary.

4. The victim's mother testified as PW1 and recounted how on the night of 17th May, 2018 at 8.00p.m., she gave her daughter VKJ [name withheld] Kshs. 50/= to go and buy chips. She followed the child but on reaching the place where chips were being sold, her daughter was nowhere to be seen. On inquiring about the child from the person who was selling chips, she told PW1 that she had not seen her. PW1 went back home and informed her husband. She then went out to look for her. She heard the child crying from a neighbouring plot behind the place where chips were being sold. PW1 ran to the plot and heard her child's cries coming from a house constructed with iron-sheets. She found the door open. She saw her child getting out of the said house. It was her evidence that she saw a man therein and on asking him why the child was crying, he said he had done nothing to her.

5. It was PW1's evidence that she checked her child's private parts and saw that they were wet. They took the appellant to the District Officer (DO), who told them to go to hospital. They took VKJ to Vipingo (Health Centre) where she was treated and given a PRC form. They reported the incident to Kijipwa Police Station. Afterwards, they went to Mtwapa Health Centre for filling of the P3 form.

6. PW1 produced VKJ's birth notification card before the lower court, showing that she was born on 13th February, 2015. She said that the child was 3½ years old. She indicated that she had been seeing the appellant for some time and he had stayed close to them for 2 weeks.
7. PW2 was No. 228804, APC Forklands Okeyo. His evidence was that on 17th May 2018 the appellant was taken to South District Headquarters, District Commissioner's Office, Kilifi, on an allegation of having defiled a 3 year old child. PW2 received a report that the appellant was found with VKJ who was crying. PW2 re-arrested the appellant and VKJ was taken to Vipingo Health Centre where she was treated and a P3 form filled. They then handed the appellant to Kijipwa Police Station.
8. PW3, John Musau, a Clinical Officer at Mtwapa Health Centre examined VKJ and filled a P3 form on 24th May 2018. He stated that she was by then aged 3 years and 3 months. He assessed the degree of injury as harm. He found lacerations and redness on her vulval wall. PW3 did a urinalysis on VKJ and found pus cells in her urine. Apart from producing the P3 form, he produced the PRC form filled by Dr. Nicholas Kisui, whom he had worked with for 3 years.
9. PW 4 was No. 106265, PC Felister Mwendwa attached to Kijipwa Police Station. She was the Investigating Officer. She stated that a report of the offence of defilement was received at the said police station. She sent the child and her mother to hospital where she was given a PRC form. The appellant was arrested and charged.
10. The appellant gave sworn defence and denied having committed the offence. He stated that he was arrested on a false allegation which he did not know about. He indicated that he was arrested at work and brought to court and charged with the offence herein.
11. In his written submissions, the appellant indicated that the Trial Court declared the minor a vulnerable witness before conducting *voir dire* examination in order to establish if she was not capable of testifying, before allowing her mother (PW1), to testify as an intermediary. The appellant urged this court to disregard the evidence of the complainant's mother (PW1).
12. The appellant submitted that PW1 and PW2 did not indicate in their evidence that he was the one who defiled VKJ. The appellant contended that the Trial Court believed PW1's version of the evidence because the medical report by PW3 confirmed that the VKJ had superficial bruises as a result of him having penetrated her on 17th May, 2018.
13. He submitted that the prosecution did not adduce any evidence to prove that he was indeed the one who caused the superficial injuries on VKJ's vagina as she did not point him out as the perpetrator of the offence. The appellant indicated that the Trial Court erred in holding that the prosecution witnesses were credible. He relied on the case of **Kimanyi Ndungu vs Republic** (1979) KLR 282 where the court held that the witness upon whose evidence it is proposed to rely on should not create an impression in the mind of the court that he is not a straightforward person or raise suspicion about his trustworthiness or do or say something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence.
14. It was the appellant's view that failure by VKJ's mother to tell the court that VKJ told her that he was the one who defiled her, created the impression that she was not truthful.
15. The appellant submitted that since VKJ's hymen was found to be intact, the offence disclosed was that of indecent act as per the provisions of Section 11 of the Sexual Offences Act. While relying on the decision in **David Masila Githumu v Republic** [2018] eKLR, he stated that this court has powers to substitute a conviction for the offence of defilement with that of indecent act by virtue of the provisions of Section 179 of the Criminal Procedure Code.
16. On the issue of the sentence of life imprisonment, the appellant relied on the case of **Samuel Achieng Alego v Republic** [2018] eKLR, to illustrate that mandatory sentences are frowned upon. The appellant submitted that the prosecution did not prove its case beyond reasonable doubt and relied on the case of **Sekitoleko v Uganda** (1967) EACA 531. He prayed for his appeal to be allowed.
17. The Office of the Director of Public Prosecutions (DPP) through Ms Mwangeka, Prosecution Counsel, filed its written submissions on 12th March, 2020. She stated that under the provisions of Sections 31(2) and 32 of the Sexual Offences Act, it was the duty of the prosecution to ascertain the vulnerability of VKJ and apply to the court to make that declaration before appointing an intermediary. The Prosecution Counsel submitted that a court on its own motion after conducting *voir dire* examination, could declare a witness vulnerable and proceed to appoint an intermediary. She relied on the case of **Kennedy Chimwani Mulokoto v Republic** [2013] eKLR, where the Judge found that the Trial Magistrate had properly appointed the mother of the victim therein aged 3 years, as an intermediary.
18. Ms Mwangeka submitted that the Trial Court in this case erred when it treated the evidence of PW1 as that of an intermediary instead of regarding it as evidence of an independent witness. She submitted that under Section 33 of the Sexual Offences Act, the Trial Court was right to rely on the evidence of PW1 as well as that of the clinical officer and the surrounding circumstances, which linked the appellant to the defilement of the complainant.
19. She submitted that under Article 50(7) of the Constitution of Kenya, an intermediary's role is to convey the general purport of any question to the relevant witness, inform the court at any time that the witness is fatigued or stressed; and request the court for a recess. Ms. Mwangeka stated that it was sufficient for the Trial Court to rely on PW1's direct evidence as an independent eye witness.
20. She further submitted that any requirement that insists on a child victim of defilement irrespective of his or her age to testify in order to found a conviction would occasion serious miscarriage of justice. She relied on the case of **Robinson Tole Mwakuyanda v Republic** [2010] eKLR, to show that a victim of 6 months of age, like in the said case, would get no justice if the court held that she had to testify in order to found a conviction, as such a child cannot speak.
21. On the issue of the age of VKJ, Ms. Mwangeka indicated that PW1 produced a birth notification card which showed that VKJ was born

on 13th February, 2015 thus she was 3 years and 3 months old at the time of the incident. She pointed out that the issue of the victim's age was not disputed by the appellant and that the birth notification card was conclusive proof of the age of the victim.

22. On the issue of penetration, Ms. Mwangeka submitted that PW1 checked VKJ's private parts and saw that they were wet. On examination at Vipingo Health Centre, a few hours after the incident, she was found with red bruises on her vagina. The Prosecution Counsel submitted that PW3 stated that on examining VKJ he noted lacerations and marked redness on her vulval wall. He assessed the degree of injury as harm. He concluded that the injuries had been caused by a blunt object. She further stated that on re-examination, PW3 indicated that the bruising was indicative of penetration.

23. In regard to the identification of the appellant as the perpetrator of the crime, Ms. Mwangeka submitted that the Trial Court correctly held that PW1's identification of the appellant was by way of recognition and that the evidence of PW1 placed him at the scene of crime.

24. The Prosecution Counsel submitted that the appellant's defence and mitigation were considered but the Trial Court found that the case by the prosecution had been proved beyond reasonable doubt.

ANALYSIS AND DETERMINATION

25. The duty of the 1st appellate court is to analyze and re-evaluate the evidence adduced and reach its own independent decision while bearing in mind that it has neither seen nor heard the witnesses testify and make an allowance for the said fact. See **Kiilu & Another vs Republic** [2005] 1 KLR 174 and **Okeno vs Republic** (1972) E.A. 32.

26. The issues for determination are:-

(i) If PW1 testified as an intermediary;

(ii) If the prosecution proved its case beyond reasonable doubt; and

(iii) If the sentence imposed on the appellant can be regarded as either harsh or excessive.

27. Ms. Mwangeka was correct in submitting that the procedure followed by the Trial Court after it declared the victim who was 3 years and 5 months old at the time the case commenced hearing a vulnerable witness, under the provisions of Section 31(1) of the Sexual Offences Act was erroneous. Section 31(2) of the Sexual Offences Act provides as follows:-

“The court may on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of –

a) Age;

b) Intellectual, psychological or physical impairment

c) Trauma;

d) Cultural differences;

e) The possibility of intimidation;

f) Race;

g) Religion;

h) Language;

i) The relationship of the witness to any party to the proceedings;

j) The nature of the subject matter of the evidence; or

k) Any other factor the court considers relevant.”

28. Section 2 of the Sexual Offences 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, counsellor, guardian, children's officer or social worker”.

29. In this case the victim's mother was directed to testify as an intermediary. Under the provisions of Section 31(7) of the Sexual Offences

Act, an intermediary's role is to convey the substance of any question to a vulnerable witness, inform the court at any time that the witness is fatigued or stressed and to request the court for recess.

30. The Court of Appeal in the case of **MMV Republic** [2004] eKLR stated as follows regarding the procedure of appointing an intermediary and his role-

“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 witness would be exposed to undue mental stress and suffering before an intermediary can be appointed. It is clear from what we have said so far that the procedure of appointing an intermediary precedes the testimony of the intended vulnerable witness even where the court does so suo moto. It is also clear that an intermediary can be an expert in a specified field or a person, who through experience, possesses special knowledge in an area or a social worker, or a relative, a parent or a guardian of the witness. The expertise, possession of special knowledge in an area or a social worker, or a relative, a parent or a guardian of the witness. The expertise, possession of special knowledge or relationship with the witness must be ascertained by the trial court 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.”

31. In this case, it is apparent that the Trial Court did not follow the correct procedure in receiving the evidence of PW1 in her perceived role as an intermediary after it declared VKJ a vulnerable witness under the provisions of Section 31(1) of the Sexual Offences Act. VKJ did not give evidence due to her tender age of 3 years and 5 months. In the said circumstances, her mother who testified as PW1, gave evidence as an independent witness. She did not play the role of an intermediary. This court's finding is that the misdirection made by the Trial Court on the said aspect was not fatal to the prosecution's case and is curable under the provisions of Section 382 of the Criminal Procedure Code, which provides in part-

“Subject to the provisions hereinbefore contained, 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.”

32. PW1's evidence was circumstantial in nature. When she failed to find VKJ at the place where they used to buy chips, she went back to their house and informed her husband about it. The two then started looking for VKJ. PW1 heard her cries from a plot behind the place where they used to buy chips. PW1 ran towards the said plot and in a house which had been constructed with iron sheets, she found the door open and saw VKJ coming out of the said house. She also saw a man in that house. She asked him why VKJ was crying but he said he had not done anything to her. On checking VKJ's private parts, she saw they were wet. They took the man (appellant) to the DO, who told them to go to hospital.

33. The Court of Appeal in the case of **Abanga alias Onyango v Republic**, Criminal Appeal No. 32 of 1990 (unreported) set out the tests to be satisfied for a conviction based on circumstantial evidence. The said court stated thus –

“It is settled that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

i. The circumstances from which an inference of guilt is to be drawn must be cogently and firmly established.

ii. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.

iii. The circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.”

34. In the present case, PW1 said that she gave the victim Kshs.50 to go and buy chips in a place which takes about 2 minutes to walk to. Whereas she used to go to the said place with VKJ, on that day she gave her money and then followed her. It is apparent from her evidence that she lost sight of the victim as on reaching the place where chips used to be sold, she did not find her there. After alerting her husband of VKJ's disappearance, she started looking for her and she saw her emerging from the appellant's house.

35. From the said circumstances, it is evident that the appellant is the only person who had the opportunity to defile VKJ within such a short time span. The fact that her cries were heard coming from a house behind the place where she was supposed to go and buy chips, and more particularly, from the appellant's house, indicates that the appellant was the perpetrator of the offence he was charged with.

36. The victim's mother checked VKJ immediately after she emerged from the appellant's house and found her private parts were wet. VKJ was examined at Vipingo Health Centre on the night of the incident, on 17th May, 2018 and she was found with some bruises on her vagina, as per the PRC form. She was examined at Mtwapa Health Centre on 24th May, 2018 by PW3 who found that the victim had lacerations and marked redness on the vulval wall. Her hymen was intact.

37. The circumstances of this case leave no doubt that it was the appellant who defiled VKJ. Although the appellant said that PW1 said that VKJ had been crying at home, the reason she was doing so, was in order to have chips bought for her. The court concludes that the reason why VKJ was crying at the appellant's house was because he had defiled her. As to the issue of the identity of the perpetrator of the offence, it was undoubtedly the appellant who defiled VKJ. PW1 was attracted by her cries which led her to the appellant's house.

38. In his submissions, the appellant stated that VKJ was not defiled as her hymen was intact. Section 2 of the Sexual Offences Act defines penetration as either complete or partial. In this case, there was partial penetration of the VKJ's vagina which was evident from the lacerations which the Doctor noted on her private parts. Penetration was therefore proved. This court has no justifiable reason of substituting the conviction for the charge of defilement with that of indecent act, as was submitted by the appellant.

39. The age of the victim is not in contention. A copy of her birth notification card was produced in the lower court by the Investigating Officer. It shows that she was born on 13th February 2015.

40. The appellant generally stated that the witnesses were not credible. He however failed to pin point which part of their evidence was untrue. The appellant's defence was considered and properly dismissed. This court's finding is that the prosecution proved its case beyond reasonable doubt. I uphold the conviction.

41. On the issue of the sentence of life imprisonment which was meted out on the appellant, this court notes that there were aggravating circumstances in this case. VKJ was only 3 years and 3 months old when she was defiled. She was a toddler who was barely out of her diapers, when her world of innocence was shattered. A man who looks at a child of that age as an object of sexual gratification should be locked behind bars for long time. This court's finding is that the sentence of life imprisonment imposed on the appellant cannot be said to be either harsh or excessive. The appeal against conviction and sentence is dismissed. The appellant has 14 days right of appeal.

DELIVERED, DATED and SIGNED at MOMBASA on this 30th day of July, 2020. Judgment delivered through Microsoft Teams online platform due to the outbreak of covid-19 pandemic.

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Mr. Muthoni, Prosecution Counsel- for the DPP

Mr. Mohamed Mohamud – Court Assistant.