



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 73 OF 2019

TSUMA CHIKOPHE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence by Hon. D.W. Nyambu, Chief Magistrate, delivered on 8th March, 2018 in Kwale Chief Magistrate's Court Criminal Case No. 495 of 2018).

JUDGMENT

1. The appellant was convicted for the offence of defilement of a girl 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 diverse dates between the month of December, 2015 and 9th May, 2016 at unknown hours in Kwale County within the Coast Region, he intentionally caused his penis to penetrate the vagina of MT [name withheld] a child aged 11 years. He was sentenced to serve 20 years imprisonment.
2. He felt aggrieved by the decision of the Trial Court and filed a petition and grounds of appeal. He amended the same on 30th January, 2020, with leave of the court. He raised the ground that it served no logical purpose to swear the complainant minor (PW1) who did not comprehend the nature of an oath. He also raised the grounds that the offence of defilement was not proved beyond reasonable doubt, that he was convicted and sentenced on uncorroborated testimony of prosecution witnesses and that his defence was not considered.
3. In his written submissions, the appellant pointed out that the Trial Court found that PW1 did not understand the consequences of not speaking the truth and directed that she would testify without being sworn. He indicated that she however gave evidence on oath, as reflected on the record of the lower court. The appellant submitted that it served no logical purpose to swear a witness who did not comprehend the nature of an oath. He stated that an oath could only be binding on a person who comprehends it. He relied on the case of **Albert Ayondiv Republic** Mombasa High Court Criminal Appeal No. 404 of 2010, to support his argument.
4. He contended that although PW1 testified that he inserted his penis in her vagina, the same was not supported by the medical evidence adduced by PW4 through the P3 form, as no sign of defilement was observed on PW1's private parts. The appellant argued that PW4 did not establish that her broken hymen was as a result of him having penetrated her in the month of December, 2015 and on 9th May, 2016.
5. The appellant argued that there was contradiction between the evidence of PW1 and PW4 on the issue of him having committed the offence, which cast doubt on the prosecution case.
6. On the issue of the sentence imposed on him being harsh and excessive, the appellant relied on the case of **Hamisi Bakari and Another v Republic** [1987] eKLR, where the court held that 7 years imprisonment was a long time to serve in a case where the issues were not clear.
7. He cited the case of **Bonface Chitango Ngoba v Republic** Malindi High Court Criminal Appeal No. 51 of 2016, to support his submission that the prosecution had not proved its case beyond reasonable doubt as there were issues which remained unresolved in the proceedings before the Trial Court.
8. He submitted that the burden of proof was on the prosecution to prove its case beyond reasonable doubt, which it had failed to do in this case. He relied on the case of **Sekitoleko v Uganda** [1967] EACA 531, to support his argument that the burden of proof was on the prosecution. The appellant also stated that his defence was not considered. He prayed for his appeal to be allowed.
9. On 2nd March, 2020 Ms Mwangeka, Prosecution Counsel, filed her written submissions to oppose the appeal. She stated that the age of the complainant was established to be 11 years through an age assessment report which was produced before the lower court. She submitted that the Trial Court found that the age of PW1 had been proved.

10. On the issue of penetration, Ms Mwangeka submitted that the evidence of PW1 was that the appellant called her to their house. As he stood by the bed, he told her to get on top of the bed and lie properly. He undressed himself and told her to remove her panty. When PW1 hesitated, the appellant threatened her and she complied. The Prosecution Counsel stated that the appellant then took his “*mdudu*” and inserted it in her private parts. She further stated that he pulled it out a couple of times then left. She indicated that the same had been going on between December(sic) and May, 2016.

11. It was submitted by the Prosecution Counsel that the offence occurred on 9th May, 2016 and PW1 was examined on 10th May, 2016 at Kinango Hospital. Her hymen was found not to be intact.

12. MsMwangeka relied on the case of **Charo Changawa Karisa v Republic** [2018] eKLR, to demonstrate that the offence of defilement can be proved even in the absence of medical evidence through oral evidence of a victim of defilement or by circumstantial evidence. She submitted that the Trial Court held severally in its decision that the evidence tendered by the prosecution was corroborative and truthful.

13. She further submitted that circumstantial evidence supported the testimony of PW1. She elaborated the said submission by stating that on the date of the incident, the appellant sent PW1’s mother, PW2, to fetch charcoal and he was left with PW1 at their home. When PW2 went back home, she did not find her husband (appellant) at home.

14. On the issue raised by the appellant that his defence was not considered, Ms Mwangeka submitted that it was considered by the Trial Court, but it was found to be false. It was therefore dismissed.

15. She submitted that the sentence of 20 years imprisonment cannot be said to be excessive and indicated that it was in keeping with the decision in **Francis Muruatetu v Republic**[2017] eKLR, on judicial discretion in sentencing.

16. In response to the submissions filed by the Prosecution Counsel, the appellant relied on the decision in Mombasa High Court Constitutional Petition No. 104 of 2018 **Andrea Nahashon Mwakisha v The Director of Public Prosecutions**, where the sentence of death which was meted out to the appellant therein for the offence of robbery with violence contrary to Section 296(2) of the Penal Code, was set aside and substituted with a sentence of 14 years imprisonment. He reiterated that the sentence imposed on him was harsh and excessive.

17. This court has considered the submissions made by the appellant and the Prosecution Counsel, it has also considered the evidence adduced by the prosecution witnesses alongside the defence raised by the appellant.

18. In his grounds of appeal, the appellant raised a pertinent issue which this court considers worthy of determination first. He stated that it was not logical for the Trial Court to swear the minor, PW1, who did not comprehend the nature of an oath. The lower court proceedings illustrate that the hearing of the case commenced on 19th September, 2016 before Hon. D. Mulekyo, Chief Magistrate. She conducted a *voir dire* examination on PW1 who was 11 years old. After conducting the said examination, the Hon. Magistrate made a certificate to the following effect-

“While the witness is competent to testify, I nevertheless find that she does not understand the consequences of not speaking the truth or testifying on oath and hence (sic) she will give unsworn evidence.” (emphasis added).

19. In a surprising turn of events, the record of the lower court indicates that PW1 was sworn before she adduced evidence. This court has counterchecked the original handwritten proceedings in order to ascertain if there was an error in the typed proceedings. I have confirmed that the typed record on the above issue is a true reflection of the handwritten proceedings of the lower court. The Trial Court recorded “*Minor/s/s*”, which is the shorthand form normally used by the lower courts to mean “Minor sworn states.”

20. The hearing of this case was later taken over from Hon, Mulekyo, CM, by Hon. D. W, Nyambu, CM, who after analyzing the evidence adduced and the defence case, convicted and sentenced the appellant. Having found that PW1 did not understand the nature of an oath, the act of having her sworn before she testified was a complete departure from the provisions of Section 19(1) of the Oaths and Statutory Declarations Act which state as follows:-

“(1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with Section 233 of the Criminal Procedure Code (Cap 75), shall be deemed to be a deposition within the meaning of that section.

21. The Court of Appeal in the case of **Johnson Muiruri v Republic** [1983] KLR 447 at pages 448- 450, elucidated on the threshold on which a Trial Court should place sworn or unsworn evidence adduced by minors before reaching a determination. In the said case, the Court of Appeal stated thus –

“We once again wish to draw the attention of our courts as to the proper procedure to be followed when children are tendered as witnesses. In **Peter Kariga Kiumev Republic** Criminal Appeal No. 77 of 1982 (unreported) we said:-

“When in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on voir dire examination whether the child understands the nature of an oath in which event his sworn evidence

may be received. If the court is so satisfied, his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. **In the latter event an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.** (Section 19, Oaths and Statutory declarations Act Cap 15). The Evidence Act (Section 124 Cap 80).”(emphasis added).

22. Taking into account the error made by the Trial Court in accepting sworn evidence from a minor, PW1, after the said court had made a finding that she should give unsworn evidence, this court is of the finding that the conviction against the appellant cannot stand as it was based on a flawed process. This court therefore holds that the trial before the lower court was thus null and void. Having found so, there is no need to address the other grounds of appeal raised by the appellant.

23. Having noted that the error in the case before the lower court was caused by the Trial Court, this court has to consider if the appellant should undergo a fresh trial or if he should be set free.

24. In the case of **Samuel Wahini v Republic** [2012] eKLR, the Court of Appeal stated as follows in regard to the issue of retrials-

“The law as regards what the court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumarvs R [1964] EALR 483, the predecessor of this court stated as concerns the issue of retrial in criminal cases as follows:

“It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame it does not in our view follow that a retrial should be ordered In this Judgment the court accepted that a retrial should not be ordered unless the court was of the opinion that on consideration of the admissible and potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person.”

25. The above decision set the principles upon which a retrial can be ordered by an appellate court. Having made a finding that the trial in the lower court was a nullity, the appellant’s appeal must succeed. I therefore quash the conviction against him and set aside the sentence of 20 years imprisonment.

26. The appellant shall however undergo a retrial before the Chief Magistrate’s Court in Kwale. He will be arraigned before the said court on 14th of August, 2020 for a retrial before any other Magistrate save for Hon. D. W. Nyambu, Chief Magistrate, whose decision forms the basis of the present appeal. It is so ordered.

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. Muthomi, Prosecution Counsel - for the DPP

Mr. Mohamed Mohamud - Court Assistant