



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 34 OF 2016

MATHEW MOGAKA MASESE..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence from Adult Criminal Case Number 151 of 2013 by the A. Towett (Resident Magistrate) at Nakuru Chief Magistrate's Court)

J U D G M E N T

1. Mathew Mogaka Masese was charged with defilement Contrary to Section 8(1) of the Sexual Offences Act. It was alleged that on 3rd October 2014 at [Particulars withheld] Estate Elburgon Molo District within Nakuru County intentionally and unlawfully caused his penis penetrate the vagina of DM, a girl aged eight (8) years. In the alternative he was charged, on the same particulars with indecent act with a child Contrary to Section 11(1) of the same act by touching the child's vagina with his penis.

2. The case for the prosecution was set out by six (6) witnesses.

3. PW3 EK the step mother to DM, on 3rd October 2016 evening sent her and her six (6) year old brother CM to collect milk. The home where they were to do so was not far and they took too long to return.

4. She became concerned and sent another child, older than them to check on them. She came back with them having met them on the way. DM was crying and they did not have the milk. On asking DM what had happened, she told her that one Mathew who used to come home with her (PW6's) brother M had pulled her into the maize shamba and done bad manners to her. PW6 was shocked. She took the child into the house, made her lie down and open her legs. On examination she saw there was a mucoid looking discharge and blood. On asking the brother what happened, he told her that when they met Mathew, he sent him ahead to pick the milk while he remained with DM. He instead did not go pick the milk but began to go back home.

Upon this examination she informed the father and they went to Nyayo Ward hospital where they were sent to the police station. From the police station they went back to the hospital where the child was admitted.

5. DM testified as PW1. What she told the court and what her brother PW3 told the court is what both told their mother. She said when they met the accused and he told her to give CM the jerrican she was going to fetch the milk in. She did as she was told. When CM left he took her into the maize where he made her lie down, removed her panty, removed his trouser and put his 'dudu' into her 'chuchu' she said she did not scream but she felt pain and cried, because he told her to keep quiet. After that he told her to go catch up with her brother which she did.

6. Her brother said that when the accused told him to leave, he made like he was leaving but watched and saw what the accused did to his sister, that accused lay on top of her.

7. On further cross examination the PW1's statement showed that she clearly described the accused as the Mathew who used to go to her home with her uncle M.

8. PW2 the complainant's father testified that he was resting on the material date because he was on night duty when PW6 woke him up that her child had been defiled. The child told her it was Mathew who had done it. At the hospital she was admitted, she could not walk and they had to carry her.

9. PW4 No. 88261 PC Rebecca Namoe was the investigating officer. The case was allocated to her to investigate on 4th October 2014. She visited the girl in hospital, recorded statements, was taken to accused's house and arrested him. The accused was arrested on 3rd October

2014.

10. PW5 George Biketi produced the P3 which had been filled by Dr. Valentine who was said to have left for further studies. He told the court that the child's pant had brownish stains, her vagina had a tear, was swollen, red in colour and had a clear discharge. There were epithelial cells but no spermatozoa. There was evidence of force, friction and that a penis had caused the penetration.

11. In his defence the accused made an unsworn statement and did not call any witness. He denied the offence. He said at 5.00 p.m. he was in his house at 6.00 pm went to collect milk and did not leave his house. Towards 10.00 p.m. some police officers came and arrested him. He stayed at police station till Sunday when he was taken to hospital. His testimony was that the doctor was compelled to fill the P3 the way the police wanted. After that he was brought to court.

12. In the judgment delivered on 24th February 2016 the trial court found that defilement was proved, convicted the appellant and sentenced him to imprisonment for life.

13. Aggrieved the appellant filed petition of appeal on 10th March 2016. He amended the same vide **Section 350 (2) (v) of the Criminal Procedure Code**. His grounds for the appeal were;

1. *THAT the learned trial magistrate erred in law and in fact in convicting the appellant on a defective charge sheet.*
2. *THAT the learned trial magistrate erred in law and in fact in failing to note that the appellant's fundamental rights that may not be limited were violated i.e. Article 5(2) (a) and (b) of the constitution.*
3. *THAT the pundit trial magistrate erred in law and in fact in convicting the appellant on inconsistent evidence that lacked logic.*
4. *THAT the learned trial magistrate erred in law and in fact in failing to note the prosecution case did not satisfy the burden of proof.*
5. *THAT the learned trial magistrate erred in law and in dismissing the appellants defence, in treating the prosecution evidence in isolation of the defence and in relying on contexts not canvassed in the actual evidence. (emphasis mine)*

14. He also filed written submissions.

15. On the firm of Morande & Company Advocates filed Supplementary Grounds of Appeal on 25th September 2019 and their written submissions.

1. *THAT the Honourable trial magistrate erred in law and fact finding that the prosecution had proved their case beyond reasonable doubt yet the appellant was not accorded a fair trial as enshrined in article 5(2) (a) and (b) of the Constitution of Kenya 2010.*
2. *THAT the Honourable trial magistrate erred in law and fact by convicting and sentencing the appellant based on inconsistent, contradictory and incredible evidence.*
3. *THAT the Honourable trial magistrate erred in law and fact by failing to note that crucial witnesses were not summoned to tender their evidence.*
4. *THAT the Honourable trial magistrate erred in law and fact by disregarding the Appellant's defence and treating the prosecution evidence in isolation.*
5. *THAT the Honourable trial magistrate erred in law and fact and misdirected himself as to the onus of proof. (emphasis mine)*

In arguing the appeal Mrs. Morande argued the Supplementary Grounds of Appeal filed on 25th November 2019. Ms. Chelang'at appeared for the state.

16. I have considered the evidence on record and the rival submissions. As a first appellate court I am guided by **Okeno vs Republic**, to give the evidence a fresh look, reassess and re-evaluate the same, draw my own conclusions always bearing in mind that I never saw or heard the witnesses.

17. I find that the issues for determination are;

1. ***Whether the appellant was accorded fair trial.***
2. ***Whether the evidence was consistent, contradictory and incredible.***
3. ***Whether the prosecution failed to call crucial witnesses.***
4. ***Whether the appellant's defence was ignored.***

18. The first ground arises from the perennial issue of the prosecution failing to supply witness statements and the evidence they will rely upon to the accused before the commencement of the trial. This is the requirement of Article 50(2)(j) of the Constitution which states that an accused person has the right: to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence; it was argued that the appellant was only supplied with witness statements after 4 witnesses had testified, and this is borne by the record. It is evident that when the complainant, PW1, and PW2, PW3 and PW4 testified, he did not have witness statements. This it was argued was in violation of his right to fair trial **Article 50(2) (b) and (c)**. Appellant relied on **John Mutisya Mbeetu vs Republic [2017] eKLR** where the court held that it was the responsibility of the trial court to ensure that an accused person was supplied with witness statements or material to be used at the trial, and that the duty of protecting the trial rights of an accused person in criminal trial lay squarely with the court.

19. The state on its part opposed the appeal. On this ground Ms. Chelang'at relied on **Dominic Kariuki v Republic [2018] eKLR** where the court held the view that the appellant's right came with a duty, that the appellant had to demonstrate that he had asked for the witness statement and the same had been denied. That he never raised the issue in the trial, at the earliest that he had not been supplied with the witness statements and cannot be heard to complain now. That he cross examined the witnesses and therefore he must have understood the case he was facing.

20. **Article 50(2) (a), (b) (c) and (j)** are clear, and in particular **(j)**. With respect, I take the view that the prosecuting agency carries the Constitutional obligation to ensure that the accused person has in his possession and or has reasonable access to all the evidence that will be used against him. The duty is placed on the prosecution to avail the evidence to the accused person. No duty or obligation is placed on the accused to ASK or APPLY for the same. It is my view that the moment the prosecuting agency decides the charge and brings the charge to court, on the day of the plea, and upon taking plea, they ought to avail to the accused person the charge sheet and the evidence, and make indication on how the accused can have access to the evidence not availed. It is my considered view that the state which is bringing these charges, and has collected and compiled the evidence, cannot be allowed to stand behind the excuse that there was no court order for the statements or evidence to be supplied. There is nowhere in that constitutional or any procedure set out that requires that an accused person must first obtain a court order so as to get access to the evidence against him. It is upon the prosecution to supply the material before and in reasonable time before they rely on it. This is not one of those rights that can be limited by conditionality.

21. Unlike the judge in **Dominic Kariuki**, my view is different, and I am more in agreement with the Judge in **John Mutisya Mbeetu**. The duty to supply, without any order, to an accused person, who is already facing charges, approved and brought to court, is upon the prosecution. The trial court's role is to ensure that these rights are protected by ensuring that the case does not proceed until the state has fulfilled its constitutional mandate. Hence, it is true that the appellant's right to fair trial was violated.

22. Did that vitiate the trial? Criminal trials pit the State against the accused individual. The State machinery runs to not only protect society against persons with criminal tendencies, but also to ensure that the same runs on the oil that are the Constitutional protections and obligations. Our Criminal Justice System has to be awakened, and consciotised every day to the plight of the majority of persons without legal representation, or any supporting systems once they are charged with the offence. The right to be presumed innocent until proven guilty must be seen to be protected, respected and fulfilled. In this case the record does not show that the appellant was ever supplied with the witness statements, in fact it is clear that even when the doctor came to testify he had not been supplied with the P3, while the Doctor was in the witness stand and had to ask to look at it while proceeding with the case. There is no doubt accused's right to fair trial was violated.

23. Does the fact that he cross examined the witnesses excuse the failure? No. In this I associate myself with the words of Mativo J in **Joseph Ndung'u Kagiri vs Republic [2016] eKLR** cited in **Dominic Kiragu**.

I find that failure to provide the appellant and his co-accused with the prosecution witness statements in advance as provided for under Article 50(2)(j) violated their constitutional right to a fair trial and vitiated the entire trial and its immaterial that they were ultimately acquitted. In my view, under no circumstances should a fair trial be jeopardized. These were the key witnesses and their evidence was crucial and the accused persons were entitled to be supplied with the said statement prior to the trial. It is immaterial that they were able to cross-examine the prosecution witness as learned counsel Mr. Njue for DPP submitted. The fact that they were able to cross-examine the witnesses does not take away their constitutional rights provided in the constitution nor can it be the yardstick for measuring a fair trial. In fact, failure to provide the accused persons with the witness statements prior to the trial was an illegality and a breach of their rights to a fair trial. I find that failure by the prosecution to provide the accused persons with prosecution witness's statements amounted to a violation of their constitutional rights to a fair trial.

24. The second ground points to the contradictions in the evidence on the case for prosecution were pointed out. PW1 testified how the appellant told her brother to leave her and go collect the milk. She also said that after the defilement she caught up with her brother and they both went home together. Her brother on the other hand told the court that upon seeing the appellant doing tabia mbaya on his sister he ran home and told his mother PW6 who went to look for DM. To the contrary PW6 told the court that when the two (2) children took longer than the usual ten (10) minutes to come back with the milk, she sent her older daughter E to go fetch the children and that the three came home together. It was also her testimony that PW3, told her that when the complainant was pulled into the maize he returned back home.

25. It was also pointed out that PW6 contradicted herself. She, on cross examination denied having seen the appellant at the hospital on 5th October 2014 yet on re-examination she confirmed seeing him at the hospital, inside a police motor vehicle and on inquiry was told he had been brought for medical examination, an examination that never took place. The court was urged to consider her an unreliable witness. The counsel for appellant urged the court to see these contradictions as creating doubt in the case for the prosecution.

26. On its part, the state's response was that these inconsistencies were immaterial and the trial court has considered them and found them so.

27. In addition, it was also argued that the medical evidence was unreliable. The first issue was the reason why the Doctor who filled the P3 was not available to produce the evidence. On the it is indicated that he had been transferred to Rongai, yet the PW5 stated under oath that he had gone for further studies. There was the claim that the complainant was admitted in hospital for three days from 3rd to 6th October 2014 yet the evidence of that was not brought to court. No treatment notes, no PRC form. The complainant's mother, PW4 and PW6, stated this in their testimony yet PW5 testified that the child was taken to the hospital on 8th October 2014. The also testified that the injuries were 24

hours old on 8th October, 2014, and on cross examination testified that he never said that the complainant was admitted in hospital. This was the doctor, producing the evidence on this crucial issue. He could not confirm that the child had been admitted in hospital as alleged. The panty alleged to have brown stains was not produced in court. His testimony was that his evidence and that of the P3 did not connect the appellant to the offence.

28. Regarding the medical evidence, the prosecution submitted that the record showed the evidence in the P3 and there was nothing wrong with that evidence.

29. In addition to these contradictions, the investigating officer told the court that she was assigned the case on 4th October 2014, but that the accused was arrested on 3rd October 2014. If that was so she did not explain why the appellant was not taken for examination. Secondly she said that she visited the scene but did not tell the court how she identified the scene, when she did so and who took her there. She alleged that the complainant was in admitted hospital but strangely she never visited her there wherever that was and did not obtain or avail the discharge summary. Clearly her testimony demonstrates that she did not conduct any investigations in the case but simply did the barest minimum.

30. PW1 the complainant and PW3 her brother were minors who gave unsworn evidence. They required the corroboration of sworn evidence. In **Jamaal Omar Hussein v Republic [2019] eKLR** the Court of Appeal had this to say:

This Court addressed the evidentiary value of unsworn statements, in **May v Republic (1981) KLR (Law Miller & Potter, JJA.)** as follows;

“An unsworn statement is not, strictly speaking, evidence and the rules of evidence cannot be applied to an unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential value is persuasive rather than evidential. For it to have any value it must be supported by the evidence recorded in the case.”

*In other words, unsworn evidence can still be relied on but it would require corroboration before it can form a basis for conviction. In more recent decision, this Court in **Mwangi v Republic (2006) 2 KLR 94** held that it is prejudicial for an accused person to be convicted on the basis of unsworn evidence.*

31. In this case the trial court had the evidence of the two minors, which was inconsistent. The rest of the evidence had its own flaws as demonstrated herein hence the trial court could not have relied on the proviso to s. 124 of the Evidence Act. The evidence of PW6 and that of PW5 were both rendered unreliable due to contradictions and inconsistencies.

32. All these gave some credence to the appellant's testimony that the charge may have been fabricated

Was there penetration by the appellant?

33. In the P3 there was a description of injuries. As pointed out earlier it indicated that these were 24 hours old as on 8th October 2014 yet the offence was alleged to have been committed on the 3rd of October 2014. This put the injuries as described outside the time the appellant was alleged to have committed the offence, effectively exonerating the appellant.

May be this could have been averted by production of the primary documents? Failure to produce such crucial documentary evidence raised the presumption that they would not have supported the case for the prosecution. Even though it is trite that defilement can be proved by evidence other than medical evidence, one cannot ignore the medical evidence when it has been produced or alluded to. This resonates with the **T N M v Republic [2017] eKLR** where Meoli J, in stated as follows:

“The learned trial magistrate also failed to note that the victim was not physically examined by the doctor who completed the P3 form and that the corresponding PRC forms were never produced at the trial. In this case the PRC forms could have been used as primary medical evidence, if produced.

This is an unfortunate case. The victim's teachers rose to the occasion in the protection of the minor and her welfare but were let down by the police who seemingly conducted routine investigations in the matter. The most unfortunate and heart breaking fact is the uncooperative stance by PW2, considering the age of the victim and her health condition.

In the clear absence of proper medical or other evidence in proof of the offence, however, the court ought not to have anchored a conviction on mere suspicion. For these reasons, I do find that the conviction in this case cannot stand and agree with the decision of the Director of Public Prosecutions to concede the appeal the conviction is quashed and the Appellant is set at liberty unless otherwise lawfully held.”

34. Surely the prosecution cannot just be allowed to produce evidence for the sake of it. If they chose to bring evidence, it is expected to get together as the case for the prosecution to prove the case beyond a reasonable. The investigating officers have an obligation to rise to the high standard set out by the Constitution to uphold the innocence of the accused person until he is proven guilty, to do otherwise is to create room for violation of the right to liberty of innocent persons. They have to exercise caution, in arresting before investigations charging before investigations, and ODPP approving charges without sufficient evidence.

35. In this case, I am persuaded that the appeal has merit. The conviction was unsafe. The same is quashed. The sentence is aside and the appellant be set at liberty unless otherwise legally held.

Dated and Signed and Delivered at Nakuru this 3rd day of August, 2020.

Mumbua T. Matheka,

Judge

In the presence of: VIA ZOOM

Martin Court Assistant

For state: Ms Wambui

Appellant: Present

Mumbua T. Matheka,

Judge.