



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R. MWONGO, J.

CRIMINAL APPEAL NO. 17 OF 2018

BKW.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment of Hon M Mutua RM delivered on 8th November, 2018 in Naivasha CM/SO No 17 of 2017)

JUDGMENT

Background

1. The appellant was charged with incest contrary to **section 20(1)** of the **Sexual Offences Act** and an alternative charge of indecent act with a child contrary to **section 11(1)** of the said Act. The particulars were that on 13th December, 2017 in Naivasha, he intentionally caused his genital organ to penetrate the genital organ of JWK, his daughter aged 5 years old.

2. The trial court convicted the appellant of incest under section 215 of the **Penal Code** on 8th November, 2018, and sentenced him to life imprisonment. In sentencing the appellant, the trial magistrate noted that his hands are tied by the law, and that he had no discretion or options in sentencing.

3. Dissatisfied, the appellant has appealed against conviction and sentence. He filed seven grounds of appeal which his counsel, Mr Wairegi, amended into eight grounds. According to his counsel's submissions, the issues raised by the appeal are as follows:

a) Whether the trial magistrate erred in law by holding that the prosecution had discharged its legal burden and proved their case beyond reasonable doubt;

b) Whether the trial court misapprehended the facts of the case, applied wrong legal principles and drew erroneous conclusions to the prejudice of the appellant.

4. The appellant's counsel submits that with regard to proof beyond reasonable doubt: the evidence of the complainant was that she was injured by a drawer; that her father did not sleep on her; that she did not cry or feel pain; that it was the doctor who discounted her narrative and insisted that the drawer could not have hit her and thus that it was her father who defiled her; that the complainant's mother did not notice any abnormalities with the complainant. Consequently, counsel asserts that there was no real evidence implicating the accused, and certainly nothing to inculcate him of the offence on a basis beyond reasonable doubt.

5. Counsel also submits that there were too many inconsistencies in the evidence including: that PW3 stated she was the first to examine the complainant, yet she was recorded on 15th December, 2017, two days after the examination; that PW3 did not make reference to the medical treatment notes save for the Discharge summary

6. The DPP opposes the appeal. Like the appellant, he filed written submissions, albeit very brief, supported by authorities. The issue he focused on was whether there was proof of penetration of the complainant by the accused. He argued that the complainant's testimony that she was hit by a drawer was inconsistent with the occurrence of such a situation in actual fact; and that the evidence that she was in fear of speaking the truth due to repercussions explained her erratic evidence. Finally he asserted that the medical evidence had proved penetration.

7. I have carefully considered the parties' submissions, the evidence on record and the documents availed in the lower court file.

8. As the first appellate court, the duty of this court is to ***"...analyse and re-evaluate the evidence which was before the trial court and***

itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court.” (Okeno v R [1972] EA). I must then satisfy myself that the recorded evidence meets the standards for proof beyond reasonable doubt in respect of the offence(s) with which the accused is charged.

9. Having carefully perused the record, the brief facts of the case are as follows. On 13/12/2017, the complainant’s mother was attending hospital for an antenatal clinic with her youngest child, A. She also took her daughter, the complainant, with her. Whilst there, the complainant desired to go and urinate but was unable to. JWK said she had been injured by a drawer. The mother, who had not seen the child with any abnormalities in her genital area, then took the complainant to the doctor who questioned her. The doctor informed PW2 that JWK had been defiled by a young person. JWK was then admitted at the hospital. This was the evidence of PW2, which I have taken first because it tells the chronology of how the alleged crime was discovered.

10. At Naivasha District Hospital, Clinical Officer Tabitha Ndungu (PW3) – who had ten years work experience at the hospital – received JWK. She testified that she examined JWK on 13/12/2017, and found her to present with a whitish discharge. She also found that JWK had abrasions on the vaginal wall which was inflamed and reddish. The hymen was missing. She completed the P3 form on 15/12/2017, and added a comment in it that:

“The history was that she (JWK) was sexually defiled twice by a known person at their home”.

She did not explain how this history came to her knowledge, but that may be presumed from the fact that she interviewed the complainant.

11. PW3 also produced a discharge summary and a PRC Form. These were filled by Dr. Gatheru and Dr. Caren Owuor, respectively, both of whom were unavailable to testify. She further testified that JWK had stated that she was watching TV at home when her father grabbed her and laid her on the seat and had intercourse with her. She stated that JWK said she did not recall bleeding but felt a lot of pain. She further testified that JWK told her to say that she had been hit by a drawer. She also noted that the complainant walked in an abnormal walking style with her legs tightly together.

12. JWK testified as PW1 on 27th March, 2018. Being a child of tender years, she underwent a voir dire trial and the magistrate found her sufficiently intelligent to give unsworn evidence and to be cross-examined. Her testimony was that one night she was in the house with her father whilst her mother was washing clothes outside. The electric lights were on, and as she tried to put utensils up in the cupboard she was injured by the drawer. Her testimony in chief, in material aspects, went as follows:

“My father did not do anything to me. I was injured by the drawer. My father did not sleep on top of me. My father did not promise to hold a birthday party for me. My father did not remove his trouser. He did not sleep on me without clothes. When the drawer hit me I was injured on my private parts. It is true that I told the police that

13. The prosecutor at this stage applied to stand down the witness as she was overwhelmed. There being no objection she was stood down, but the trial court did not record the demeanour of the witness. Three weeks later on 17th April, 2018 JWK was recalled to give evidence and testified in camera. The proceedings do not indicate the reason for the court’s decision to recall her to hold the trial in camera. In his judgment the trial magistrate did not comment on the demeanour of JWK, although he indicated the reason for the prosecution’s application for standing JWK down on 27th March, 2018. These indications would have enabled the court and parties to appreciate the factors and circumstances surrounding the adduction of the child’s evidence and perhaps even her psychological and mental status as a witness.

14. When giving evidence in camera, JWK testified as follows:

“I spoke to the doctor at the hospital. I told him that I was injured by a drawer. It was not my father. I was at home when I was hit by the drawer. It was at night. When the doctor interviewed me she said the drawer could not injure me. She said it must have been my father. But it was not my father..... My dad did not remove my clothes. He did not remove his clothes. He removed his belt. He did not remove his trouser. He did not remove his penis. I told the doctor that my father hit me with his belt twice. I also told the doctor that we were watching TV when I was attacked by my father. I felt pain at my vagina (points at her vaginal area) I did not bleed.

15. When cross-examined by the accused in camera, she said:

“I had been hit by a drawer. You never slept on me. I sleep with J and N (her brothers). You have never attacked or touched my vaginal area. I also told my mother that I was injured by drawer. I cannot recall saying it was you.”

The in-camera re-examination was short:

“It is not my father who injured me.”

16. There is no doubt that, reading this evidence of the complainant, one is left rather nonplussed, somewhat confused about what to make of this child’s evidence. So, how did the trial magistrate treat this evidence? The trial magistrate recognized the difficulty and stated in his judgment:

“In her examination-in-chief, she (the complainant) initially stated that she was hit by a drawer. However on further proceedings she testified that she told the doctor that her father had inserted his penis into her private parts after which she was taken to hospital by her mother.....In the cause (sic) of proceedings the prosecution prayed that she be stood down as she looked

moody and overwhelmed by emotions and the court was obliged to grant the application.”

17. That is not an entirely accurate account of JWK’s testimony in the proceedings. What JWK actually said was that she “*told the police that my father slept on me and inserted his penis into me.....I did not cry.*” The trial magistrate then went on:

“PW1 was later recalled on 17th April, 2018 to testify. She initially stated that she was hit by a drawer but went on to testify that she was attached by her father and she felt pain around her vaginal area of which area she showed the court by way of pointing towards the pelvic area. On cross-examination by the accused she denied having been injured by the accused but insisted that she had been hit by a drawer. However she could not state or show where the drawer hit her.”

This assessment of the evidence by the learned magistrate is correct.

18. The offence of defilement under **Section 8 (1)** of the **Sexual Offences Act** is proved when the accused is shown to have committed an act which causes penetration with a child. In this regard, the trial magistrate cited **Dominic Kibet Mwaren v Republic [2013] eKLR** where it was stated:

“The critical ingredients forming the offence of defilement are: the age of the complainant, proof of penetration and positive identification of the assailant.”

In the end, the trial magistrate dismissed the defence as amounting to mere denials with no probative value, and that it did not rebut the prosecution case. He was thus satisfied that there was proof beyond reasonable doubt and so convicted the Appellant.

19. The one thing I note that the trial magistrate did not do in light of the confusing and contradictory evidence of JWK, was to state how he viewed her being “moody” and “overwhelmed by emotions” so that he stood her down and recalled her to give evidence in camera. Being the sole eyewitness testifying against her father, the trial magistrate should have been more forthcoming on this issue of this witness.

20. Did the trial magistrate view JWK as having been intimidated, or traumatised or unwilling to be the person who would cause her father to be incarcerated as suggested by the Clinical Officer (PW3), who testified:

“The child is in fear that if the child states the truth, the father would stay in jail forever. She needs help seriously.”

Was this the reason for JWK’s flip-flopping evidence? The trial magistrate did not address this, and I think he should have because the full perspective and picture of her evidence is otherwise incomplete.

21. The proviso to **Section 124** of the **Evidence Act** provides that in case of sexual violence where the only evidence is that of the alleged victim, the court may convict the accused if, for reasons to be recorded in the proceedings, the court is satisfied that the victim is telling the truth. The trial court did not invoke this provision, and did not state whether it believed the victim. What the court did do was to accept that penetration having been medically proved and, given the circumstances and the unwieldy evidence of the victim that she was hit by a drawer but also that the accused penetrated her, the learned magistrate concluded that the accused was the perpetrator.

22. In his words the learned magistrate stated:

“Her [the child’s] testimony corroborates (sic) the findings of PW3 and Dr. Caren Owuor who examined her. She only named her father as the perpetrator and she did not name any other person not even her brothers whom she used to sleep with. The consistency in the examination and her testimony only leads to the conclusion that the father was responsible. I must take into account that she is of tender years and cannot mention the father haphazardly without him having attacked her. In my view the only conclusion is that the accused was responsible for the penetration of the complainant’s vagina.”

23. I think the trial court, after noting the emotions of JWK and her flip-flopping on the evidence, should have invoked **Section 31** of the **Sexual Offences Act** and declared JWK as a vulnerable witness. **Section 31** states:-

“(1) A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is -

(a) the alleged victim in the proceedings pending before the court;

(b) a child; or

(c) a person with mental disabilities.

(2) 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. Distribution of a substance by juristic person. Cultural and religious offences. Non-disclosure of conviction of sexual offences. Vulnerable witnesses. 20 No. 3 of 2006 Sexual Offences Act Rev. 2009] 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.

(3) The court may, if it is in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon an intermediary to appear before the court and advise the court on the vulnerability of such witness.

(4) Upon declaration of a witness as a vulnerable witness in terms of this section, the court shall, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures -

- (a) allowing such witness to give evidence under the protective cover of a witness protection box;
- (b) directing that the witness shall give evidence through an intermediary;
- (c) directing that the proceedings may not take place in open court;
- (d) prohibiting the publication of the identity of the complainant or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family; or
- (e) any other measure which the court deems just and appropriate.

(5) Once a court declares any person a vulnerable witness, the court shall direct that an intermediary referred to in subsection (3), be appointed in respect of such witness unless the interests of justice justify the non-appointment of an intermediary, in which case the court shall record the reasons for not appointing an intermediary.

(6) An intermediary referred to in subsection (3) shall be summoned to appear in court on a specified date, place and time to act as an intermediary and shall, upon failure to appear as directed, appear before the court to advance reasons for such failure, upon which the Rev. 2009] Sexual Offences Act No. 3 of 2006 21 court may act as it deems fit.

(7) If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may -

- (a) convey the general purport of any question to the relevant witness;
- (b) inform the court at any time that the witness is fatigued or stressed; and
- (c) request the court for a recess.

(8) In determining which of the protective measures referred to in subsection (4) should be applied to a witness, the court shall have regard to all the circumstances of the case, including -

- (a) any views expressed by the witness, but the court shall accord such views the weight it considers appropriate in view of the witness's age and maturity;
- (b) any views expressed by a knowledgeable person who is acquainted with or has dealt with the witness;
- (c) the need to protect the witness's dignity and safety and protect the witness from trauma; and

(d) the question whether the protective measures are likely to prevent the evidence given by the witness from being effectively tested by a party to the proceedings.

(9) The court may, on its own initiative or upon the request of the prosecution, at any time revoke or vary a direction given in terms of subsection (4), and the court shall, if such revocation or variation has been made on its own initiative, furnish reasons therefor at the time of the revocation or variation.

(10) A court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary.”

24. Invocation of **Section 31** of the **Sexual Offences Act** is discretionary, but it is a critical provision in circumstances where, amongst other things, a witness is a child and the justice of the case demands it. Under **Section 31 (2)** of the **Sexual Offences Act** the court can invoke the provision even on its own initiative. In so doing it may note witness vulnerability based on:

- the age of the witness. (Section 31 (2) (a))
- the trauma facing the witness. (Section 31 (2) (c))
- the possibility of intimidation. (Section 31 (2) (e))
- the relationship of the witness to any party (e.g. the accused) to the proceedings. (Section 31 (2) (i))
- any other factor the court considers relevant.

25. The proceedings show that on 4th January, 2018 the prosecution had applied and obtained an order for JWK:

“.....to be placed in a safe house, since this is the biological father and may interfere with the witness.”

The court had also noted that the child was about five (5) years old. The prosecution would also have known the nature of the evidence the child was going to give as they had interviewed her.

26. As earlier noted, the Clinical Officer and the Doctor had been told by the child, JWK, details and critical information about the incident and the trauma she underwent. PW3 brought out some of it, indicating that JWK was afraid of the possible consequences of her evidence.

27. In my view, where the evidence of a child of tender years involved in a sexual assault tends to be inconsistent or nonsensical - such as that a “*drawer hit me in my private parts*” - or where there appears to be serious trauma, fear or intimidation because of the person who is allegedly the offender, it is imperative for the prosecution to apply for the child to be declared a vulnerable witness, and for a trusted intermediary to give evidence on her behalf. Where the prosecution does not take up this role the court may initiate the declaration process itself. The court should nevertheless be cautious not appear to be entering into the ring.

28. The Court of Appeal in the case of **MM v Republic [2014] eKLR** had this to say with regard to intermediaries:

“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 is difficult for a child or indeed a victim of a sexual attack to publicly relive the most traumatic and humiliating experience of their lives in order to get justice, more so, if they have to be subjected to the rigors of daunting and intimidating cross-examination. The thinking behind the enactment of section 31 was, in our view, to moderate these traumatic effects in criminal proceedings.

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 voir 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.

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..... (Emphasis added)

29. The Court of Appeal went on to describe the role of an intermediary as follows:

“We have seen that in Article 50 (7) of the Constitution an intermediary is a medium through which the accused person or complainant communicates with the court. In our understanding, the evidence to be presented is not that of the intermediary

himself or herself but that of the witness relayed to court through the intermediary. The intermediary's role is to communicate to the witness the questions put to the witness and to communicate to the court the answers from the victim to the person asking the questions, and to explain such questions or answers, so far as necessary for them to be understood by the witness or person asking questions in a manner understandable to the victim, while at the same time according the victim protection from unfamiliar environment and hostile cross-examination; to monitor the witness' emotional and psychological state and concentration, and to alert the trial court of any difficulties.

The key word in sub section 7 is emphasized as shown below to demonstrate the place of the intermediary's evidence.

"If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may;

- a) convey the general purport of any question to the relevant witness.
- b) inform the court at any time that the witness is fatigued or stressed; and
- c) request the court for a recess." (Emphasis supplied)

The word through is used also in subsection 4 (b) in describing the protection of the witness by providing an intermediary through whom his evidence is relayed. It is the witness who gives the evidence which is explained and communicated to the court and the reverse through an intermediary in the manner and style developed between the two.

As a general rule of evidence embodied in section 125 of the Evidence Act, no person is precluded from giving evidence, except to the extent the court may determine. Section 125 provides that:-

"125. (1) All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause.

(2) A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them." (Emphasis added)

30. Finally the Court indicated the critical importance of an intermediary when it stated:

"Because of the reality that a child of tender years, or an extremely old person, or a person affected by disease of the body or mind or even a lunatic may have difficulties relating to the trial court events in a crime, the role of an intermediary in such situations is imperative. Indeed in jurisdictions such as South Africa, England and Wales, intermediaries are professionals whose services are sourced by the court when the need arises. Perhaps that is what the framers of section 2 of our Sexual Offences Act had in mind when they included experts, psychologists, counselors and social workers in the definition of 'intermediaries'.

The whole object of the proceedings through an intermediary is to achieve fairness in the determination of the rights of all the people involved in a trial and to promote the welfare of a child or vulnerable witness." (Emphasis added)

Disposition

31. In my view, the trial court's reliance on the contradictory and irrational evidence of the child JWK was unsafe. However, the medical and other evidence availed by PW3, Clinical Officer; the evidence of the Defendant himself admitting that he went home at lunch break about 1.00pm to prepare lunch for the children giving him the requisite opportunity; and the fact that only a few hours later the child was examined in hospital and found to have been defiled, and had inflamed and bruised vaginal walls and a broken hymen, lead to the irresistible conclusion that the child was defiled. That she gave irrational evidence as to the role of the accused, however, undermined the proposition that it was he who penetrated her.

32. Accordingly, I would set aside the conviction and hereby order that the matter be and is hereby remitted back to the trial court for retrial. The incident occurred only two years ago and witnesses should be readily available.

33. The file shall be placed before the Chief Magistrate for allocation within fourteen (14) days from the date hereof.

Administrative directions

34. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

35. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

36. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 29th Day of October 2020.

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Mr. Wairegi for the Appellant
2. Ms Maingi for the DPP
3. BKW - Appellant in Naivasha Maximum Prison
4. Court Clerk - Quinter Ogutu