



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CRIMINAL APPEAL NUMBER 38 OF 2018**

**JM.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

The Appellant herein was charged with the offence of Attempted Defilement Contrary to Section 9(1) as read with Section 9(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that; on the 7<sup>th</sup> day of March 2006 at [Particulars withheld] area within Embu County, intentionally attempted to cause his genital organ penis to penetrate the genital organ and anus of BM a child aged 5 years.

He also faced an alternative charge of committing an Indecent Act with a Child Contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars being that; on the 7<sup>th</sup> day of March 2016, at [Particulars withheld] area within Embu County, intentionally using his genital organ penis touched the genital organ and anus of BM a child aged 5 years.

He was convicted on the alternative charge and sentenced to 10 years imprisonment.

Being aggrieved by the conviction and the sentence, the Appellant has appealed to this court vide his petition of appeal dated the 28<sup>th</sup> day of September, 2018 and has listed the following grounds of appeal;

1. That the learned trial Magistrate erred in law and in fact when she failed to find that there was non compliance with the law relating to appointment of an intermediary to testify on behalf of the complainant.
2. That the Learned Magistrate erred in law and fact when she relied on inconclusive and contradictory evidence by the prosecution witnesses.
3. The learned Trial Magistrate erred in law and in fact when she relied on hearsay evidence.
4. That the learned trial Magistrate erred in law and in fact when she failed to make an order of “*no finding*” on the main count.
5. That the judgment by the trial magistrate did not comply with Section 169 of the Criminal Procedure Code.
6. That the Learned trial Magistrate erred in law and in fact when she sentenced the Appellant to serve, 10 years in prison despite him being a minor at the time of the offence.
7. That the sentence by the trial court was excessive in the circumstances of the case.

The mother to the complainant who testified as PW1 stated that, on 7<sup>th</sup> day of March, 2016, she was in Embu town when she was called by Rosemary who informed her that the complainant was in the bathroom with M, who is the Appellant herein. She further told her that she heard the complainant shouting from the bathroom and M had lowered his trouser and the complainant was completely naked. That upon seeing Rosemary, Macharia took off. At around 6pm, Rosemary was called by one of her brothers who happened to have seen M and M was arrested and taken to Itabua Police Station.

It was also her evidence that the complainant told her that the accused had asked her if she wanted to use the toilet which she answered to the affirmative and on taking her to the toilet, the accused asked her to lie on the floor of the bathroom. She stated that the complainant further told her that the accused removed his “Kasusu” and started inserting it in her vagina. It was painful and so the accused tried to penetrate her from the anus.

Rosemary Muriithi who gave evidence as PW2 stated that on the material day she had come from town and she went to the tap to wash her hands and upon finishing, she heard noises of a child in distress and on proceeding to the source, she found the minor lying prostrate and the accused was lying above the minor. The minor's tights were down to the feet and the subject had lowered his trousers. She stepped out to pick a stick but the subject took off. She later called the complainant's father and explained what had happened. Later the accused was arrested and taken to Itabua Police Station.

The complainant's father testified as PW3. It was his evidence that he received a call from Rosemary (PW2) regarding how the accused had been found with the complainant in the bathroom and they were half naked. He went to his sister's house to search for the accused who was his nephew but he was not there but at around 7pm, the accused went to PW3's house and on being interrogated by PW3 regarding the incident, he denied any wrong doing and stated that he was assisting the complainant to go for a short call and that is why he had undressed her. He tied the accused with a rope and took him to Itabua Police Station in the company of PW2 and the accused mother where they reported the matter and they were referred to Embu Provincial General Hospital for examination. He also recorded his statement at the same police station.

Doctor Phyllis Muhonja gave evidence as PW4 and produced PRC and P3 forms though she was not the maker. The same had been filled by Dr. Mwititi whom she had worked with, for 2 years at Embu level 5 hospital.

The Investigating Officer who testified as PW5 received the report of defilement and booked it in the OB. The accused had been arrested for defiling the complainant. She escorted the complainant and her mother to Embu Level 5 Hospital where she was examined and a report prepared which did show that defilement had not occurred but there was presence of semen around the genitalia which showed that there was attempted defilement. She charged the accused with the offence of defilement. She produced the birth certificate as an exhibit.

The accused gave sworn statement in his defence. He stated that on the material day he was at Gakwekori at the farm harvesting fodder when he was told by his uncle to go home and upon reaching there his other uncle namely K asked him if he had known that a child had been sexually assaulted. He was told that he was the one who did it and his uncle started beating him. He was later taken to Itabua Police Station and later charged with the offence of defilement.

The Appeal was disposed off by way of written submissions which this court has duly considered. As a first appellate court, I am bound to re-evaluate the evidence on record and come up with my own conclusion. In the cases of *David Njuguna vs. R. (2010) eKLR* the court quoting with approval the sentiments expressed in the case of *Okeno V. R. (1972) E. A 32* stated;

***“... [the duty of the first appellate court is to analyze 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. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the Lower Court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”***

In his submissions, the Appellant submitted that there was non compliance with the law relating to the appointment of an intermediary. He argued that the procedure as provided for under Section 31 and 32 of the Sexual Offences Act was never followed. In this regard, the court has perused the provisions of the said sections.

Section 31(1) provides as follows: -

***“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 a witness is;***

***a. ....***

***b. a child; or***

***c. ....***

***(2) The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in Sub-Section (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. ...***

***c. ....***

***d. ....***

Sub-Section 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. ....
- b. Directing that the witness shall give evidence through an intermediary;
- c. ...
- d. ....

(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.

The court has considered that ground of Appeal. An intermediary for purposes of the Sexual Offences Act means;

**“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, counselor, guardian, children’s officer or a social worker.”**

In this case, the record shows that on the 13<sup>th</sup> July, 2016 when the matter came up for hearing before the Learned Magistrate, the court noted that, having held a brief chat with the minor, **she knows both her names and her school. She is in baby class and only understands very little things and her knowledge is limited to what she perceives, she identified the accused person by pointing and stating that she knows him.**

On the basis of that, the Learned Magistrate opined that the minor could testify through an intermediary. She went ahead to state that in the event one is available the intermediary, if is a witness, will be sworn in to testify first. Having left it at that, PW1 who is the mother to the complainant took the witnesses box and testified.

Looking at the record of the proceedings and the relevant law, in that case, Section 31 of the Sexual Offences Act, the learned Magistrate proceeded under Section 31(2) (a) and (4) in that she on her own initiative declared the complainant a vulnerable witness on account of her age which was 4 ½ years at the material time.

Looking at what the learned Magistrate recorded in the proceedings, two things cannot escape the attention of this honorable court.

(1) Though she exercised her discretion in appointing an intermediary as provided for under Section 31(2) of the Sexual Offences Act, the proper procedure for appointment of an intermediary was not followed. The record does not even show specifically the person who was appointed as an intermediary. Though the mother to the complainant testified as PW1, the record does not show that she did so as an intermediary, if all.

Secondly, the learned Magistrate failed to conduct *voire dire* on the minor. It was not enough for her to merely state;

**“After having a chat with the minor....”**

I say so because the contents of this “chat” are only known to the learned Magistrate but they ought to have been placed on record to form part of the record and anybody looking at the record to appreciate why the learned Magistrate formed the opinion that she did.

It is clear that the complainant in this appeal was a child of tender age and the court had to comply with the provisions of Section 19 of the Oaths and Statutory Declaration Act (Cap 15 laws of Kenya) before receiving her evidence or before forming an opinion on how to proceed in taking her evidence.

How does the court ensure that it complies with the provisions of that Section? The answer to this question is found in the case of **Johnson Muiruri vs. R (1983) KLR 445** where the court stated as follows;

**“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 Kiriga Kiune, Criminal Appeal No. 77 of 1982 (Unreported) we said:**

**“When in any proceeding before any court, a child of tender years is called as a witness, the court is required to form an opinion on *voire 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 later 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 Declaration Act Cap 15). The Evidence Act (Section 124, Cap 80.) It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided, and not be forced to make assumptions”.**

The need for the administration of *voir dire* was also discussed by the court in the case of **DWM vs. Republic (2016) eKLR** as hereunder;

***“[II] the need for the administration of voir dire on minor witnesses before reception of their testimonies especially in criminal trials is entrenched in Section 109 of the Oaths and Statutory Declaration Act Cap 15 Laws of Kenya. This provision does not itself provide for the format to be applied in the course of such administration. The format used has basically evolved through case law. In Sula vs. Uganda (2001) 2EA 556, the supreme court of Uganda approved two formats. The first one is where the trial court can write down the questions put to the witness and the answer of the witness in the first person in the words spoken by the witness in a dialogue form and then make its conclusion after the dialogue. In the second format the court may omit EO record the questions put to the witness but record the answers verbatim in the first person and then make the conclusion thereafter.”***

By reasons of the foregoing and in the circumstances of this case, I find that the trial was vitiated, the conviction cannot stand and the sentence of 10 years imprisonment can also not stand. Both are set aside.

After setting aside both the conviction and the sentence, what next?

This court will consider whether or not to order a retrial. The law as regards what the court should consider on whether or not to order a retrial is now well settled. In the case of ***Ahmed Sumer vs. Republic (1964) EA 481*** the court stated 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, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecutions not to blame it does not in our view follow that a retrial should be ordered.***

The court further stated;

***“We are also referred to the judgment in PASCAL CREMENT BRAGANZA VS. R (1951) EA. 152. In this judgment the court accepted that a retrial should not be ordered unless the court was of the opinion that consideration of the 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”.***

Having considered the said principles, the admissible evidence or potentially admissible evidence in this case, without going to the merits of the case, would on consideration lead to a conviction.

The offence that was allegedly committed was serious and the victim will suffer traumatic busts for the rest of his life. The Appellant is a person well known to the family of the complainant and it will not be difficult to trace the witnesses. I think a retrial can be mounted. The ends of justice would be served by an order of retrial and I so order it.

The appellant will be released into police custody and be produced before any court competent to try him except miss Ndengeri, within (10) days of the date of this judgment.

It is so ordered.

**Dated, Delivered and signed at EMBU this 23<sup>rd</sup> day of October, 2020.**

.....

**L. NJUGUNA**

**JUDGE**

**In the presence of:**

..... **for the Appellant**

..... **for the Respondent**