



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 49 OF 2017

ELIJAH GICHANGI.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

1. The appellant herein, was on the 21st April, 2016 charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. It was alleged that on or before the 19th day of April, 2006 at [Particulars Withheld], Embu town, within Embu County, unlawfully and intentionally caused his penis to penetrate the vagina of YM a child aged 7 years.
2. Upon hearing the case, the trial court convicted and sentenced the appellant to serve life imprisonment. Being dissatisfied with that judgment, the appellant has appealed to this court vide the petition of appeal dated the 8th day of November 2017 wherein he has listed fifteen (15) grounds of appeal.
3. The appeal was canvassed by way of written submissions. In his submissions, the appellant submitted that the judgment was not founded on proper legal principles and that the trial court fell into serious misdirection and failed to accord the appellant a fair trial.
4. The appellant urged that, the trial court misdirected itself by shifting the burden of proof and that it failed in admitting hearsay evidence as a consequence whereof, it arrived at the wrong decision. He argued that by way of the matters complained of, he was deprived of his basic constitutional rights under Article 50 of the Constitution and that he was wrongly convicted hence his prayer that the conviction be quashed.
5. It was also his submission that the charges were defective as they were too general in terms of time and want of specificity which prejudiced him. He submitted that it is an accepted principle in criminal law that the charge sheet must always be clear so that the accused understands what they face. It was his case that the court failed this test and prejudiced him in that, he could not define the time period in which to prepare his defence as the accepted period was over four (4) months.
6. The appellant further argued that he was not accorded a chance to cross-examine the complainant and thus the trial was a nullity; that the trial court failed to consider his defence and that the trial court failed to comply with the provisions of Section 211 of the Criminal Procedure Code all of which constituted a violation of his right to a fair trial.
7. The appellant contended that the evidence was scanty to justify a conviction citing the contradictions in the evidence of PW2, PW3 and PW4. He argued that in view of original and persistent denials by PW1 that she had not been defiled by the appellant, the court ought to have been alarmed so as to take caution in dealing with the evidence. Reliance was made on the case of **Ndungu Kimanyi Vs the Republic [1979] KLR 282.**
8. Further, the appellant submitted that the court shifted the burden of proof to him when it stated that he ought to have produced minutes of meeting held on 19/04/2016 and failed to have regard to the presumption of innocence and the right of the appellant to remain silent if he chose. That the trial court failed to consider the appellant's defence and that it treated the defence extremely casually to the prejudice of the appellant.
9. It was the appellant's further submission that the trial court failed to properly consider his alibi defence which was to the effect that on the said date; that is to say, on the 19/04/2016, he was at [Particulars Withheld] having left home at 7.00 a.m. for a meeting that ended at 5.00 p.m. and was in company of DW2, DW3 and DW4. He relied on the case of **Victor Mwendwa Mulinge (Court of Appeal Nairobi Case No. 357 of 2012)** which re-affirmed the decision of **Karanja Vs Republic** to the effect that, the burden of proving falsity or otherwise of an alibi defence is on the prosecution as the accused never assumes the burden.
10. It was the appellant's contention that the court erred in convicting him when the evidence fell far too short of reaching the burden of proof in a criminal case. Reliance was made on the case of **Okethi Okale Vs Republic [1965] EA 555** in which the court stated that the

burden of proof does not shift. He argued that PW1 lacked credibility and was never cross-examined and being a single witness the court ought to have treated her evidence with caution. That the way she changed her versions with abandon should have made the court to be wary of her evidence.

11. It was also the appellant's submission that there was misdirection in treatment of medical evidence by the trial court in that, it justified the conviction for the reason that P3 and PRC forms proved defilement. He added that the court also wrongly held that the evidence of PW3 showed that the complainant's vagina was mildly inflamed and that the hymen was broken; and by ignoring the evidence of PW3, on cross-examination, that the medical documents did not indicate age of the injuries and whether the breakage of hymen was new or old yet, hymen can be broken by other factors than sexual intercourse. He relied on the case of **Peter Kariuki Wachira Vs Republic (Court of Appeal Nyeri Case No. 186 of 2020)** on other causes of breakage of hymen.

12. The appellant also submitted that the trial court erred in making up its own theories not in evidence by stating that the offence occurred before the meeting that took place at [Particulars Withheld] if such meeting took place. He relied on the case of **Okethi Okale Vs Republic [1965] EA 555** in which the court stated that it is dangerous and inadvisable for a trial court to put forward a theory not canvassed in evidence or in counsel's speeches.

13. Finally, it was the appellant's contention that the court erred in failing to consider material contradictions in the prosecution's case yet, it is an accepted principle in criminal law that any doubt should be resolved in favour of the appellant; that the court erred in admitting and relying on hearsay evidence and that there was failure to comply with Section 211 of the Criminal Procedure Code.

14. On the part of the respondent it was submitted that the appellant did not demonstrate how the charge sheet was defective, if at all. They cited Section 134 of the Criminal Procedure Code. It was submitted that PW1 gave a coherent account of how she was defiled by the appellant and her testimony was corroborated by PW3, the medical doctor. They contended that the appellant was convicted rightly in that, the prosecution was able to prove the ingredients of the offence of defilement which are: -

- i. Age of complainant
- ii. Proof of penetration
- iii. Positive identification of the assailant

15. On whether the evidence was contradictory, it was submitted that the appellant has not demonstrated how the evidence was contradictory. They contended that all the prosecution evidence was corroborative and substantiated.

16. The case of **Jackson Mwanzia Musembi Vs Republic [2017] eKLR** was relied on wherein the court cited the case of **Twahangane Alfred Vs Uganda Criminal Appeal No. 139 of 2001(UG CA) 6** on how the court should treat contradictions in a case.

17. On whether the defence of the appellant was considered, it was submitted that the same amounted to an alibi which was never raised in the course of cross-examination of the prosecution witnesses. Reliance was placed on the case of **Ali Mkaru Mwero Vs Republic (Mombasa Criminal Appeal No. 50 of 2007)** and argued that the defence of alibi was an afterthought which could not and should not be considered by the court. Besides, the appellant's defence was time barred because it did not give the prosecution a chance to rebut or cross-examine in order to establish its truthfulness.

18. The respondent prayed that the conviction be upheld and requested the court to take into account the circumstances under which the offence was committed, the age of the complainant and the seriousness of the offence in reviewing the mandatory sentence of life imprisonment set out by the Sexual Offences Act. They relied on the case of **Dismus Wafula Vs Republic [2018] eKLR**.

19. As the first appellate court, I am bound to re-evaluate the evidence on record and come up with my own conclusion as was stated in the case of **David Njuguna Vs Republic [2010] eKLR** quoting with approval the sentiments expressed in the case of **Okeno Vs Republic [1972] EA 32**.

20. However, before I can delve into re-evaluation of the evidence, I wish to consider grounds 6 and 7 of the appeal, as the court's finding in those grounds may dispose of the appeal without having to consider the other grounds.

21. The appellant has argued that his fundamental right to a fair trial was violated by the court for the reason that he was not accorded an opportunity to cross-examine the complainant and therefore, the trial was a nullity.

22. In the case of **How Vs Republic [2014] eKLR**, the Court of Appeal dealt with the question of cross-examination of prosecution witnesses by an accused person and noted;

“The first such matter which is the main one is on point of procedure in law, we feel fundamentally prejudiced the entire case and the appellant. This is that the complainant JJ who was a minor was taken through voire dire examination and this was proper in law for whatever evidence was given on age, she was not above twelve (12) years in age. The learned trial magistrate found as a result of voire dire examination that she did not know the normal duty of telling the truth and its normal consequences. She was ordered to give unsworn statement and she did so. That evidence seriously implicated the appellant, but at the end of it, for some reasons unrecorded, it was not subjected to cross-examination by the appellant who was present in court. There was no indication or any record to show that the appellant was accorded an opportunity to cross-examine this witness and no reasons were recorded as to why that procedure was not done”.

23. Also in the case of Nicholas Mutula Wambua Vs Republic (Criminal Appeal No. 373 of 2006, the Court held;

“Accordingly, all prosecution witnesses are liable to be cross-examined in order to test the credibility and the veracity of the witnesses. The trial courts should always observe that requirement of the law in all criminal trials to obviate an otherwise stable case from being lost on that omission.”

24. A careful perusal of the original record of the proceedings of the trial court shows that the complainant who is a minor testified as the first prosecution witness. She gave unsworn evidence after the trial magistrate carried out *voire dire* examination and noting his observations in regard to the competence of the child to testify.

25. From the record, the appellant does not seem to have been given an opportunity to cross-examine the complainant YM. The record shows that after YM gave evidence on the 27th October, 2016, the case was adjourned and the next witness (PW2) testified on the 25th January 2017. Regardless of whether YM gave sworn or unsworn evidence, the appellant had the right to cross-examine her and challenge the evidence adduced against him. Failure to accord him this opportunity was prejudicial to him and a violation of his rights to a fair trial under Article 50(2)(k) of the Constitution.

26. The appellant also complained that the provisions of Section 211 of the Criminal Procedure Code were not explained to him. The court has perused the record in this regard. It shows that the prosecution closed its case on the 15th June 2017 and on the same day, a ruling was given putting him on his defence. When the matter came up for defence hearing, on the 14th July 2017, the trial magistrate recorded that the appellant would give sworn evidence and call five (5) witnesses. He gave his evidence on the same date. On the said date, he was represented by counsel who informed the court that the appellant would give sworn evidence. Looking at the proceedings that took place on 14th July, 2017, the appellant elected to give sworn evidence which meant that he was aware of the other options available to him. This gives the court the impression that Section 211 was explained to him. In any event, the appellant was represented by a counsel and there is no failure of justice and the appellant’s complaint in that regard lacks merit and I reject it.

27. Given the foregoing, the question for this court to determine is whether, as a consequence of the omission, the court should acquit the appellant or disregard the complainant’s evidence and determine the appeal on the basis of other witnesses’ evidence, or whether to declare a mistrial and remit the case back to the trial court for rehearing.

28. As to whether the court should order an acquittal, it does not follow that a lapse in the trial process would result in an acquittal. The appellant is facing a serious charge of defilement of a child who was of a tender age at the time. Having regard to the circumstances of the case, my considered view is that an acquittal would not be in the best interest of the child.

29. In the alternative, should the court disregard the evidence of YW and proceed to determine the appeal on the basis of other witness evidence, the complainant would lose her right to present her case yet she is entitled to have her day in court, and to seek vindication through the justice process.

30. In the case of Muiruri Vs Republic [2003] KLR 552 the court outlined the factors to be taken into account when faced with a question of whether or not to order a retrial and it held thus;

Generally, whether a retrial should be ordered or not must depend on the circumstances of the case. It will only be made where the interest of justice requires it and if it is unlikely to cause injustice to the appellant. Other factors include, illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistake leading to the quashing of the conviction was entirely the prosecution making or not.

31. In the case of John Njeru Vs Republic [1980] eKLR the Court of Appeal held;

“In general, a retrial should be ordered only when the original trial was illegal or defective, as otherwise an order for retrial would give the prosecution an opportunity of filling gaps in its case”.

32. In applying these principles, the record shows that the appellant was arraigned in court, on the 21st April, 2016. He was convicted and sentenced on the 27th October, 2017 which means a period of about four (4) years to date after the appellant was charged. In my view, this is not an inordinately long period. The complainant and the appellant are relatives and this court does not envisage any serious challenges in tracing the witnesses should this court order a retrial.

33. As such, this court allows the appeal, quash the conviction and set aside the sentence of the appellant by the trial court. The court directs that the appellant be retried on the same charges before a different magistrate. He shall remain in custody and be taken before a competent court to plead to fresh charges within 14 days from the date of this order. The case to be heard on priority basis.

34. It is so ordered.

Delivered, dated and signed at Embu this 16th day December, 2020.

L. NJUGUNA

JUDGE

In the presence of: -

.....for the Appellant

.....for the Respondent