



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 94 OF 2016

GK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from conviction and sentence in Kapsabet Senior Principle Magistrate's Court in Criminal Case No. 1781 of 2014 delivered by Kesse M. Cheronoh Senior Resident Magistrate on 4th August, 2016)

JUDGMENT

1. **GK**, the appellant herein was the accused before the Senior Principle Magistrate's Court at Kapsabet in Criminal Case No. 1781 of 2014. He was charged with the offence of defilement contrary to Section 8(1) (2) of the Sexual Offences Act no.3 of 2006. The particulars of the charge were that on the 24th day of May 2014 in Kombe location within Nandi County intentionally and unlawfully did cause his penis to penetrate the vagina of VJ (*particulars withheld*), a child aged 11 years. The appellant also faced an alternative count of Committing an Indecent Act with a Child Contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 24th May 2014, at Kombe location within Nandi County, he intentionally and unlawfully caused his penis to come into contact with the vagina of VJ(*particulars withheld*) a child aged 11 years.

2. The appellant pleaded not guilty to the above charges and the case proceeded to full hearing. The appellant was later found guilty and convicted on the main count and sentenced to 20 years imprisonment. He was dissatisfied with the judgment and filed this appeal raising the following grounds:

- i. That the learned trial magistrate erred in matters of law and fact by convicting the Appellant on PW1's evidence which was incredible.***
- ii. That the Hon. Trial magistrate erred in matters of law and fact by convicting the Appellant on prosecution's testimonies which were full of contradictions.***
- iii. That the learned trial magistrate erred in both matters of law and fact by not noting that the reception of PW1's evidence was not justified, since the mandatory provisions of section 19(1) were contravened.***
- iv. That the learned trial magistrate erred in both matters of law and fact by not noting that the Age of the Complainant was not proved beyond reasonable doubt.***
- v. That the learned trial magistrate erred in both matters of law and fact by failing to note that his constitutional rights were violated as enshrined in Article 49(f) of the Constitution of Kenya.***
- vi. That the trial Magistrate erred both in law and fact by failing to note that the failure to explain the provisions of section 211 C.P.C prejudiced the Appellant.***
- vii. That the trial magistrate erred in law and facts by not noting that the investigations done by the investigation officer were shoddy.***

3. A summary of the case is as follows: PW1 was VJ the complainant herein. Upon conducting a *voire dire* examination on the complainant, the trial court formed the opinion that she was audible and courageous enough hence she gave sworn evidence. She testified that on 24th May 2014 at 7p.m, her grandmother sent her to Appellant's shop, which shop was located about 60 meters from her grandmother's house, to buy sugar and cooking oil. On arrival at the shop, the Appellant told her to take the items she had purchased home and then come back later for the change. The complainant complied and returned to the appellant's shop at about 7:30pm but no sooner had she asked for the change than the appellant grabbed her by her hand, pulled her to his shop and took her to a room behind the shop where he defiled her. The complainant

tried to scream but the appellant covered her mouth and threatened her with dire consequences if she made any noise. The complainant went back home after the ordeal but feared to wake up her grandmother.

4. The following day, she informed her mother and grandmother about what had transpired and they escorted her to Kapsabet District Hospital for treatment before going to the police station to record a statement.

5. PW2, **ES**, was the complainant's grandmother, confirmed that she noticed that the complainant was bleeding from her private parts and on enquiring from her what had happened, she learnt that the complainant had been defiled. PW2 immediately called her neighbours who apprehended the appellant and escorted him to the police station at Kapsabet. PW2 confirmed that the Appellant was her nephew.

6. PW3, **Edwin Kiptoo Tuwei**, is a community officer testified that he went to the home of PW2 where he found PW1 bleeding and her clothes soaked in blood. PW1 confirmed to him that the Appellant had defiled her.

7. **PW5 Inspector Agubina Lugonzo** of Kapsabet Police Station investigated the case issued the complainant with a P3 form and recorded her statement. He testified that the appellant was brought to the police station as the public wanted to lynch him.

8. PW6, **Silas Kipkoech Lagat**, was the clinical officer attached to Kapsabet County Hospital. He recalled that on 28th May 2014, PW1 was brought to him for the purposes of age assessment. He explained that he assessed her age to be 11 years 10 months. He produced the age assessment report as **(PEXB3)**.

9. **PW7 Danson Gichangi** is a clinical officer at Kapsabet District Hospital. He examined the Appellant on 28th May 2014 and noted that he was aged about 30 years He produced the Appellant's P3 form (PEXB.4) and treatment notes (PEXB.5).

10. **PW8 Silas Ruto** is a clinical officer at Kapsabet Hospital. He examined the complainant and noted that there was presence of excessive fresh blood oozing from the lower part of the vagina with a tear of approximately 2 cm. There were also fresh bruises on labia minora and labia majora. He stitched PW1 to stop the bleeding. He produced the treatment notes as (PEXB. 2 'a' & 'b' 'c') and P3 form (PEXB.2).

11. The Appellant elected to give a sworn statement in his defence and did not call any witnesses. He confirmed that the complainant came to his shop to buy some items on the material day at about 5:00p.m.

12. At the hearing of the appeal, the Appellant submitted that the complainant was not a credible witness and that the trial court failed to comply with provisions of section 19(1) of the Oaths and Statutory Declarations Act and section 125(2) of the Evidence Act as the trial magistrate failed to record questions that she had put to PW1 during the *voire dire* examination. He argued that the trial court did not state, the terms in which she was persuaded and satisfied that the complainant understood the nature of oath. The appellant relied on the decision in the case of **Johnson Muiruri v Rep (1983) KLR 445**.

13. The Appellant further submitted that that complainant's age was not certified as the document used by the prosecution did not have the name, signature and stamp of the doctor who filled it. He also submitted that his constitutional rights under Article 49 (1) (f) were violated as he was not brought to court within 24 hours after his arrest.

14. He contended that the trial magistrate breached the law when she failed to explain the provisions of section 211 to him. He also submitted that the investigation officer failed to visit the scene of crime in order to collect information from neighbours and that the prosecution also failed to avail crucial witnesses mentioned by the prosecution witnesses.

15. On her part, Miss. Mumu, learned counsel for the state, opposed the appeal and submitted that the age assessment by PW6 confirmed that the complainant was 11 years at the time of the incident.

16. On penetration, she submitted that the treatment notes and the P3 form confirmed the injuries and that PW8 confirmed penetration.

17. On identification, she submitted that the complainant knew the Appellant very well as a shopkeeper and that PW1 was sent to the shop where Appellant took advantage of her and defiled her.

18. This is a first appeal and this court has a duty to re -evaluate and reconsider the evidence adduced and arrive at its own conclusion. It has also to bear in mind that it did not see or hear the witnesses and give an allowance for that. This was the holding in the celebrated case of **Okeno vs Republic (1972) EA 32** where the Court of Appeal stated:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandaya v R, [1957] E.A 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v R,) [1957] E.A 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post, [1958] E.A 424.”

19. In the case of **Muthoko & Anor v Republic [2008] KLR 297** it was held as follows:

“it was the duty of a first appellate court to analyze the evidence and come to its own independent conclusion bearing in mind that it did not hear or see the witnesses and making allowance for that.”

20. I have considered the evidence on record, the grounds of appeal, the submissions by both parties and the cited authorities. The appellant has raised a total of 5 grounds of appeal that give rise to the following issues for determination:-

- i. Whether the Appellant's constitutional rights were violated as expressed in Article 49(1) (f) in that he ought to have been brought to court within 24 hours after his arrest**
- ii. Whether the evidence of the child V.J (PW1) was properly recorded, admitted and considered by the trial court.**
- iii. Whether the ingredients of the offence of defilement proved?**

21. With regard to the first issue of consideration, Article 49. (1) provides that *an arrested person has the right*

(f) to be brought before a court as soon as reasonably possible, but not later than—

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day.

22. The subject of the 24 hour period within which an arrested person ought to be arraigned in court has been the subject of several decisions. The correct position in law, on this issue was set out in the case of *Julius Kamau Mbugua v Republic (2010) eKLR*, where the Court stated that the violation of the Appellant's right to be produced in court within twenty-four hours would not automatically result in his acquittal. Instead, the Appellant would be at liberty to seek remedy, in damages, for the violation of his constitutional rights. (See *Albanus Mwasia Mutua v Republic [2006] eKLR* and *Evans Wamalwa Simiyu v Republic [2016] eKLR*). On this basis, I do not consider the issue relevant to the appeal at hand or fatal to the prosecution's case.

23. With regard to the second issue of determination, PW1 was a minor aged 11 years. The trial court had a duty to satisfy itself that she was intelligent enough to testify and she understood the oath. This is done by way of *voire dire* examination. Section 19 of the Oaths & Statutory Declarations Act (Cap 15) Laws of Kenya provides:

(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.

(2) If any child whose evidence is received under subsection (1) willfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of an adult with imprisonment.

24. What needs to be done during a *voire dire* exam has been set out in various decisions. The Court of Appeal in the case of *Opicho v Republic 2009 KLR 372-374* explained this as follows:

“The Construction of that section is now well grounded in many previous decisions and it is surprising that trial courts still get it wrong. The correct procedure for the court to follow is to record the examination of the child witness as to the sufficiency of her intelligence to satisfy the reception of evidence and understanding of the duty to tell the truth.”

25. The following year in *Kibangeny Arap Kolil v R [1959]EA 92*, the court stated:

“In the present case, the learned trial judge, so far as appears from the record, made no such investigation before affirming either of the two boys witnesses. Such an investigation need not be a lengthy one, but it must be mad and, when made, the trial judge ought to record it.

The investigation should precede the swearing and the evidence and should be directed to the particular question whether the child understands the nature of an oath rather than to the question of his general intelligence.”

26. The procedure for investigation, or preliminary examination of a witness, otherwise referred to in old French and Anglo-Norman as the “*voire dire*” or “*voir dire*” is taken in two steps as summarized in *Kinyua v Republic [2002] 1 KLR 256*:

“(a)The court should first ascertain whether the child understands the nature of an oath. An investigation to this effect must be done by the court immediately the child witness appears in court. The investigation need not be a long one but it has to be done and it has to be directed to the particular question whether the child understands the nature of an oath. If upon investigation it appears that the child understands the nature of the oath, then the court proceeds to swear or affirm the child and to take his or her evidence

(b) If the child does not understand the nature of the oath, he or she is not necessarily disqualified from giving evidence. The court may still receive the evidence if it is satisfied, upon investigation, that the young person is possessed of sufficient intelligence and understands the duty of speaking the truth. This investigation must be done and when done, it must appear on record. Where the court is so satisfied then the court will proceed to record unsworn evidence from the child witness.”

27. Further in **John Muiruri v R [1983] KLR 445** this Court re-emphasized, inter alia, that:-

“2. 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.

3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child’s ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.

6. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of oath. The failure to do so is fatal to the conviction.

9. The correct procedure for the court to follow is to record the examination of the child witness as to the sufficiency of her intelligence to satisfy the reception of evidence and understanding of the duty to tell the truth.”

28. In the case before me PW1 was the complainant. The proceedings taken before the court on 24th July 2014 were as follows:-

i. 15/9/11

ii. Before – Hon. C.M Wattimah(RM)

iii. Pros –Cpl Wekesa

iv. CC- Samburumo

v. Accused – present

vi. Court Prosecutor – I have four witnesses. I am ready.

vii. Accused:- I am ready

viii. C.M WATTIMAH

RESIDENT MAGISTRATE

ix. VOIRE DIRE

x. I am called VC. I stay at [particulars withheld] in Nandi County. I go to [particulars withheld] Primary School. I am in Standard three. My class teacher is called JB. I attend A.C.K Church at [particulars withheld]. The Sunday School Teacher is called BC. I have come to Court. I will tell the Court the truth. If you speak lies, you will burn in hell.

xi. C.M WATIMMAH

xii. RESIDENT MAGISTRATE

xiii. 24/07/14

xiv. COURT: On conducting voire dire I have established that the minor is aware that she is in Court. She knows the value of speaking the truth. She is audible and courageous enough. I order that she gives sworn evidence.

xv. C.M WATIMMAH

xvi. RESIDENT MAGISTRATE

xvii. 24/07/2014

29. From the above record, it is clear that PW1 was properly examined and I am satisfied that the evidence of PW1 was taken in accordance to the law.

30. With regard to whether the charge of defilement was proved, this Court is mindful of the ingredients of defilement which were highlighted in **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013** as follows:

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

31. PW1 was said to be a minor. PW6 gave a detailed explanation as to how he assessed the age PW1 to be 11years and produced an age assessment report (PEXB No.3). She was therefore 11years and 10 months at the time of the alleged offence. The trial court confirmed that PW1 was a child of tender years and was subjected to a *voire dire* examination. I am therefore satisfied that age was proved.

32. It was the evidence of PW1 that the Appellant held her hand and pulled her to a room behind his shop, put her on a sack, set her legs apart, removed her panties as he removed his and proceeded to put his penis into her vagina. The complainant testified that the appellant only released her after he realized that she was bleeding.

33. PW8 the doctor who examined PW1 on 26th May 2014, found excessive fresh blood bleeding from her vagina with a tear approximately 2cm and that there were fresh bruises on both labia minora and labia majora.

34. Section 8 (1) of the Sexual Offences act states that:

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

“Penetration” under 2 of the said Act is defined to mean the partial or complete insertion of the genital organ of a person into the genital organ of another person.

35. The evidence of PW8 confirmed the evidence of PW1 that the child was indeed penetrated. There was blood oozing on her lower part of the vagina and both her labia minora and labia majora had bruises. I therefore find that penetration was proved.

36. On whether the appellant was identified as the culprit, I find that the Appellant was not a stranger to PW1 as he operated a shop about 60m away from where PW1 resided with PW2. In fact PW2 testified that the appellant was her relative. I am therefore satisfied that the appellant was well known to the complainant and that she properly identified him as her attacker on the fateful day. I further find that the evidence tendered by the appellant, when placed on his defence, amounted to mere denial that did not dislodge the otherwise watertight evidence of the prosecution witnesses and I hereby reject the appellant’s testimony as a mere denial of the offence.

37. Lastly, I note that the trial court sentenced the Appellant to 20 years imprisonment. From the record the accused faced a charge of defilement contrary to section 8(1) of the Act. The victim of the defilement was found to be aged 11 years old. The appropriate sentence on conviction is provided in Section 8(2) of the Act to be mandatory life imprisonment. The learned trial Magistrate therefore did not consider and pay due regard to the minimum legislated sentence for the offence of defilement. I would have enhanced the appellant’s sentence to life imprisonment had it not been that he was, at the hearing of this appeal not warned of the risk of enhancement of his sentence that he stood to suffer in the event that his appeal turned out to be unsuccessful. In the case of **EGK vs Republic [2018]eKLR** the court of Appeal held as follows on enhancement of sentence where there is no cross appeal or notice to the appellant of the possibility of such enhancement:-

“.....we note that the first appellate court enhanced the appellant’s sentence from 40 years imprisonment to life imprisonment. In so doing, the 1st appellate court cited the provisions of section 354 (3) of the Criminal Procedure Code. In our view, the trial magistrate had no discretion to sentence the appellant to 40 years as opposed to a sentence of life imprisonment. The sentence for incest under S. 20 (i) of the Sexual Offences Act is life imprisonment. In our view, the 1st appellate court had no jurisdiction to enhance the sentence without any cross appeal and without warning the appellant.”

38. For the above reasons, I hereby confirm the conviction and 20 years imprisonment sentence imposed by of the trial court. In a nutshell, I find that the present appeal lacks merit and I hereby dismiss it.

Orders accordingly.

Dated and signed at Nairobi this 18th day of January 2019

W. A. OKWANY

JUDGE

Dated, signed and delivered in open court at Eldoret this 30th day of January 2019

H. A. OMONDI

JUDGE

In the presence of:

Mrs Mumo for state

Appellant present

