REPUBLIC OF KENYA

AT THE HIGH COURT IN MILIMANI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 92 OF 2017

VINCENT MUCHERA ISALANO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr case 88 of 2014 delivered by Hon. F Mutuku, SRM on 30th June 2017).

JUDGMENT

BACKGROUND

1. The Appellant was charged with a main count of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act. The particulars were that on diverse dates between 7th and 26th of August, 2014 at Kangemi Sodom Area in Nairobi within Nairobi County, intentionally caused his penis to penetrate the vagina of JMM a child of 16 years. In the alternative he was charged with an indecent act contrary to Section 11(1) of the Sexual Offences Act. The particulars were that between 7th and 26th of August, 2014 at Kangemi Area within Nairobi County intentionally touched the vagina of JMM a child of 16 years.

2. Dissatisfied with both the conviction and sentence he preferred the instant appeal. The grounds laid out were that the court erred in fact and law in failing to find that; (i) Sections and 150 200(3) of the Criminal Procedure Code was not complied with; (iii) vital evidence was withheld by prosecution; and (iv) vital exhibits were not produced.

Submissions

3. The Appellant appeared in person. He relied on his written submissions dated 6th March, 2019. He submitted that there was no proof of defilement as the complainant was taken in for examination days after the fact. The report indicated that the hymeneal injuries were old. He argued that the clinical report from Nairobi Women's Hospital was produced into evidence by a person other than the author. Further, he submitted that the P3 Form did not disclose a pregnancy. It was his view therefore that the pregnancy and subsequent removal were not proved.

4. Miss Atina for the Respondent opposed the appeal. She submitted that the elements of the offence of defilement had been proved contrary to the assertions made by the Appellant. She submitted that penetration, age of the victim and identity of the perpetrator were proved. According to her, identification was by recognition as the Appellant was a neighbour to the complainant's brother. Secondly, penetration was proved as the complainant stated under oath to having sexual intercourse with the accused on several occasions. Following these encounters, she went for a pregnancy test and was found to be pregnant. Further, the doctor of Police Surgery confirmed that there were old hymeneal tears which were corroborated by the Post Rape Care (PRC) Form. The PRC form also showed that there was a pregnancy that was termed as ectopic. Finally, she stated that age was proved by the testimony of PW1 and PW2. On proof of pregnancy she referred the court to Exhibit 1, an ultra sound report that determined that there was a three week old ectopic pregnancy.

Evidence

5. This being the first appellate court its duty is to reevaluate the evidence on record and arrive at its independent decision. The must however bear in mind that it has neither heard nor seen the witnesses and give regard for that. **See Okeno v Republic [1972] EA, 32.**

6. The Prosecution called six (6) witnesses to prove its case. PW1, the victim in her sworn evidence testified that she met the Appellant while visiting her brother. He succeeded to convince her to become his girlfriend and proceeded to have sexual intercourse with her on diverse dates between the 7th and 26th of August, 2014. She was thereafter found to be pregnant.

7. **PW2,** a brother to PW1 confirmed that his sister, PW1 had visited him in the month of August, 2014. He testified that a woman came looking for her claiming that she was interfering with a marriage. When confronted she admitted to being involved with the Appellant. **PW3**, an aunt to the victim confirmed that she was 16 years old at the time of the incident. She was the caregiver at the time and identified a Birth Certificate belonging PW1 to corroborate the age of the victim. The Birth Certificate was marked as Exhibit 3. **PW6 Kinuthia Edward Mbuthia**, a Clininical Officer from Nairobi Women's Hospital produced the PRC form on behalf of the author **Dr Yerine Gisamba**. He corroborated the assertion of sexual intercourse and the resulting pregnancy. The report also stated that the assailant was known to the victim. The Appellant chose to be quiet when put on his defence.

Determination

8. The court is enjoined to first address the legal issues raised by the Appellant. He contended that he was not accorded a fair trial as **Section 200(3) of the Criminal Procedure Code** was not complied with**.** The said learned trial magistrate took over the conduct of the trial from Hon. Mwinzi. At that point three witnesses had testified. After being asked how he wished the trial to proceed before Hon. Mutuku, the Appellant stated that he wished that the trial be heard *de novo*. The court then summoned the investigating officer to confirm if the witnesses would be available. The latter came to court four months down the line and informed the court that only PW3 would be available. Earlier, PW3 had been stood down by Hon. Mwinzi on account that the witness was to avail hospital documents showing that the pregnancy was terminated. It was thereafter that the matter was taken over by Hon. Mutuku.

9. Incidentally, when PW3 was availed by the investigating officer, the Appellant refused to cross examinee him on account that he was not ready. The prosecutor then applied that the witness be released from further court attendance. At this point PW5 had already testified. Again, the Appellant refused to cross examine him. He subsequently asked the magistrate to recuse herself, a request she turned down on account that there was no good reason to do so. Thereafter, PW6, the Clinical Officer testified but the Appellant indicated that he had no questions for him.

10. From the foregoing, it is clear that Section 200(3) was duly complied with and the trial magistrate made a ruling based on the availability of the witnesses. The fact that the Appellant failed to cross examine PW3, PW5 and PW6 is not an indicator that the court did not comply with the provision. The mandatory part in the provision is the obligation placed on the succeeding magistrate to inform the accused that he had a choice on how the matter should forthwith proceed, either, that the same be heard *de novo* or request to recall the witnesses who had testified for purposes of cross examining them or that the matter proceeds from where it had reached.

11. It is also the view of the court that the application calling on Hon. Mutuku to recuse herself was unmerited. No bias or partiality had been demonstrated on the part of the learned magistrate.

12. Be that as it may, the record shows that the Appellant was prejudiced from the onset of the trial. It is clear that the two witnesses, PW1 and PW2 were very crucial prosecution witnesses and their recalling would have been advantageous to the Appellant for purposes of testing the veracity of the prosecution evidence. This is more so, in view of the fact that in as much as PW1 may have admitted an illicit affair with the Appellant, there is on the other hand the fact that a pregnancy was terminated prematurely. Not even the doctor availed the documentation to this effect. Indeed, the purpose of recalling PW3 was so as to avail the said documents. Unfortunately, there is no record showing that even if the Appellant failed to cross examine her, she had come to the court with the said documents. This can easily be discerned from the prosecutor's request that the witness be discharged from further court attendance.

13. It can therefore be safely concluded that the main catch in the case were the medical documents confirming that there was pregnancy that was terminated. By extension a failure to conduct a DNA test on the pregnancy obviously cast a big gap in the prosecution case.

14**.** It is my view that if the Appellant was represented by a counsel, he would have been able to mount a good defence from his case. This aligns with the constitutional underpinning that an accused person is entitled to legal representation at the State expense where substantial injustice would arise, See **Article 50 (2) (h) of the Constitution. In** the case of **David Macharia Njoroge v. Republic** the Court of Appeal determined that the phrase substantive injustice meant that the accused faced a capital offence and for which the penalty was loss of life. The Supreme Court in **R V Karisa Chengo and 2 others** associated itself with the sentiments of the Court of Appeal decision of **Thomas Alugha Ndegwa v. Republic C.A No. 2 of 2014(2016)**. The Court made a finding that an accused person who was accused of defilement and faced a sentence of life imprisonment also deserved to be afforded legal representation. The Supreme Court extended it to simply where the interests of justice so require.

15. **In this case, the record shows that the Appellant was not represented. The Appellant submitted that he had difficulty conducting cross-examination. In educating this court on the weakness that attends an accused person during trial,** Lord Denning in **Pett v. Greyhound Racing Association (1968) 2 All E.R 545, at 549** noted the following:

> ***"It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: 'you can ask any questions you like;' whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task?"***

16. Article 50(2)(g) of the Constitution states that a party shall be notified of his right to legal representation at the earliest opportunity. A critical look at the record of proceedings clearly indicates that the Appellant had difficulties representing himself. The court ought to have noted this and undertaken its mandatory obligation of informing the Appellant of his right to legal representation as obvious injustice was being occasioned to him.

17. In as much as the attendant penalty was not life imprisonment, a twenty-year jail term was no mean penalty. Besides, the right to a fair trial is non-derogable. It is the duty of the court to ensure that this right is not violated. In the instant case, the contrary obtained. The Appellant was not informed of this right and hence was denied a fair trial. **Article 25(c) of the Constitution states** that the right to a fair trial

shall not be limited. The offence was serious, the sentence was severe and the charge was complex in nature. I therefore find that the trial court did not accord the Appellant a fair hearing.

18. In this respect, my honest view is that even if the court were to order a retrial, the same would just be aiding the prosecution to fill gaps in their case as evidenced by the failure to conduct thorough investigations. See; **Mwangi v Republic (1983) KLR,522.**

19. Having stated the above, I see no reason to re-evaluate the evidence as a test of whether or not a retrial would result in a conviction. My view is that the Appellant was not accorded a fair trial and the best recourse is accord him much desired freedom. I accordingly quash the conviction, set aside the sentence and order that he be forthwith set free unless otherwise lawfully held.

Dated and Delivered at Nairobi This 26th March, 2019.

G.W.NGENYE-MACHARIA

JUDGE.

In the presence of;

1. Appellant in Person

2. *M/s Sigei for the Respondent*.