



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 45 OF 2016

BENARD MAEBA MAISIBA-----APPELLANT

=VRS=

REPUBLIC-----RESPONDENT

{Being an appeal against the conviction and the sentence of Hon. N. Kahara – RM dated and delivered on the 8th day of July 2016 in the Original Keroka Principal Magistrate’s Court Criminal Case No. 1424 of 2015}

JUDGEMENT

On 6th October 2015 at about 4pm FNO then aged four years was on her way home from school when a man emerged from a home besides the road and brutally defiled her. The treatment notes produced at the hearing showed that the child was admitted to Kisii Teaching and Referral Hospital for repair of a tear in her genitalia. The notes also indicate that her hymen was freshly torn and that she was still bleeding when she arrived at the hospital. She stayed in hospital from 6th October 2015 to 14th October 2015 – a period of eight days. The medical examination proved there was penetration. Investigations were instituted and on 16th October 2015 the appellant was charged with defilement contrary to Section 8 (1) as read with 8 (2) of the Sexual Offences Act and in the alternative with committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act.

The particulars on the principal count were that on 6th October 2015 in Masaba North Sub-county within Nyamira County he intentionally caused his penis to penetrate the vagina of FNO a child aged four years.

In the alternative charge it was alleged that on 6th October 2015 in Masaba North Sub-county within Nyamira County intentionally touched the vagina of FNO a child aged four years with his penis.

The appellant pleaded not guilty to the charge but after evaluating the evidence adduced, the trial magistrate found him guilty on the principal charge, convicted him and sentenced him to life imprisonment.

Being aggrieved by the conviction and the sentence, the appellant preferred this appeal. The appeal is premised on grounds that: -

“1. The learned trial magistrate failed to appropriately consider the totality of evidence on record which made it unsafe to convict the accused and thereby arrived at demonstrably wrong conclusions of fact.

2. The learned trial magistrate erred by failing to appropriately and adequately appraise evidence of: -

(1) circumstances surrounding the alleged commission of the offences charged:

(2) circumstances surrounding the arrest of the accused; and,

(3) identification of the accused

3. The learned trial magistrate placed undue reliance on the apparel worn by the accused and the alleged conduct of the complainant on the date of the arrest to the exclusion of other relevant facts surrounding the commission of the offences charged as to make his conviction of the accused unsafe and unsupported in the circumstances.”

By the appeal, the appellant urges this court to: -

“(a) Quash the conviction;

b. Set aside the sentence; and

c. Acquit him of the offences charged.”

The appeal was to be canvassed by way of written submissions but only those for Counsel for the appellant were received. Mr. Nyamurongi, Learned Counsel for the appellant submitted that the appellant’s conviction was unsafe and could not be sustained. He submitted that there was no evidence that the minor had opportunity to get to know the accused during the short time he had worked in her neighbourhood so as to accurately identify him at first glance. He submitted that whereas in the judgement the trial magistrate stated that the child saw the man’s face, the child did not say so in her evidence. Counsel submitted that the trial court did not resolve “grave” inconsistencies in the testimonies of the prosecution witnesses as to who between the child and her grandmother pointed out the home from where the assailant had come. Counsel submitted that the child’s grandfather ought to have been called as a witness to clarify how he knew the home of the assailant. Counsel also stated that the appellant remained in the area for more than 10 days wearing the same clothes purportedly won by the perpetrator which would not have been the case had he been the perpetrator. He submitted that the trial magistrate erred by taking the minor’s account as the gospel truth and ignoring the appellant’s defence. Counsel contended that the results of the examination conducted in respect of the appellant should have been produced in evidence. Counsel urged this court to draw a negative inference from the omission. On case law Counsel relied on four cases: -

- **John Nduati Ngure Vs. Republic [2016] eKLR** - on the need for an identification parade.
- **Shaban Mutua Kiptui Vs. Republic [2017] eKLR** - on the failure to produce the clothes that the child wore at the material time.
- **Guni Musungu Mwandia Vs. Republic [2017] eKLR** - on the need to weigh the evidence of the perpetrator against that of the child and to record the reasons for believing the child over the alleged perpetrator.
- **Benard Oloo Ombewa [2017] eKLR** - on the need for the court to warn itself of the danger of convicting on the evidence of a single witness.

Counsel urged this court to allow the appeal.

As a first appellate court, I am not confined to the submissions. To the contrary I am enjoined to re-evaluate the evidence so as to arrive at my own independent conclusion on whether the appellant committed the offence. I do so bearing in mind and making provision for the fact that I neither saw nor heard the witnesses give evidence and as such did not observe their demeanour. Going through the proceedings, I noted that although the trial magistrate conducted a *voire dire* as required under **Section 19 of the Oaths and Statutory Declarations Act** and confirmed the child did not understand the nature of an oath, the trial magistrate did not satisfy herself as to whether the child was possessed of sufficient intelligence to justify the reception of her evidence and further that the child understood the duty of speaking the truth. Only when a court is satisfied that a child of tender years who does not understand an oath is sufficiently possessed of intelligence and understands the duty of speaking the truth can it be justified in receiving the child’s evidence and treat it as a deposition. As if that was not enough the trial magistrate proceeded to take the evidence of the other witnesses (Pw2, Pw3, Pw4 and Pw7) without administering the oath as required by **Section 151 of the Criminal Procedure Code** which states: -

“Every witness in a criminal cause or matter shall be examined upon oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath.”

In **Samwel Muriithi Mwangi Vs. Republic [2006] eKLR** the Court of Appeal underscored the need to swear the witnesses and held: -

“.....The usual practice of all the courts in Kenya is, of course, to show in the record that a witness has taken an oath before testifying. In the record before us, there is no way in which we can determine, one way or the other, that the witnesses were or were not sworn before they gave their evidence. Most likely, they took the oath before giving evidence. But there is also the probability that they might not have taken the oath and if that be the position, it would mean that the appellant was convicted on evidence which was not sworn. That would be in violation of Section 151 of the Criminal Procedure Code and the other provisions we have set out herein. That, in our view, cannot be a matter curable under Section 382 of the Criminal Procedure Code. To be convicted and sentenced to death on evidence which is not sworn must of necessity, be prejudicial to an accused person. In the event, we are satisfied that the trial of the appellant was a nullity because we are unable to exclude the probability of his having been convicted on unsworn evidence. It does not matter that the issue is being raised for the first time in this appeal. If the trial was a nullity then it does not matter at what stage that issue is raised.”

Although the above two issues were not raised in the petition of appeal it is my finding that they are enough to nullify the proceedings in the lower court and thereby upset the judgement of the lower court.

What about the merits? It is my finding that conviction cannot stand even on the merits. The trial of the appellant appears to have been premised on his alleged identification by the child. The child did not know him prior to the occurrence and the identification of the assailant rested mainly on the T-shirt the child said he was wearing. The record shows that the minor was shown a maroon T-shirt and her answer was that the assailant was wearing that T-shirt. However in her testimony the grandmother (Pw2) of the child gave evidence that what the child told her was that the assailant was wearing a torn T-shirt. If I may quote her she stated: -

“.....The girl said the one who defiled her had a torn T-shirt and the accused was wearing the same T-shirt which the girl

identified – maroon T-shirt – MFI 5.

The accused said that he wore the T-shirt as his.”

Pw3 – the arresting officer on his part stated that the girl told them that the man who defiled her had a red/maroon T-shirt and that he found the accused wearing a maroon T-shirt. It is unlikely that a four-year-old would have been certain of the colour of the T-shirt the attacker was wearing. It is more probable that she described the T-shirt as torn. We are not told that the maroon T-shirt which was put to the child to identify was torn as she had told her grandmother. This must be weighed against the fact that it is not the child who told the other witnesses that the attacker was wearing a maroon T-shirt. If all the child said was that the perpetrator of the offence wore a torn T-shirt, why was the appellant arrested for wearing a maroon T-shirt? This creates doubt regarding the identification of the appellant. The law is clear that the standard of proof in criminal proceedings is beyond reasonable doubt and where any doubt arises the benefit of doubt is given to the accused but not to the prosecution. Accordingly, I would in addition give the appellant the benefit of doubt and find that the charge against him was not proved beyond reasonable doubt either. The appeal is allowed, the conviction quashed and the sentence set aside and unless the appellant is otherwise lawfully held, he shall be set at liberty forthwith.

Signed, dated and pronounced in open court this 14th day of March 2019.

E. N. MAINA

JUDGE