REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 103 OF 2017

DANIEL MATETE ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(from the original Judgment and conviction by F. Makoyo, SRM, in Butere SRMC Criminal Case No. 775 of 2010 delivered on 4/8/2017)

JUDGEMENT

1. The appellant was convicted of the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006 and sentenced to a life in prison. He was aggrieved by the conviction and the sentence and filed this appeal. The grounds of appeal as per the petition of appeal dated 12th September, 2017 are:-

(a) That the learned trial magistrate grossly erred in law and fact in taking the appellant through an unfair trial that infringed provisions of Article 50(2)(g) and (j) of the Constitution.

(b) That the learned trial magistrate grossly erred in law and fact in holding that the penile penetration had been sufficiently proved without considering that medical evidence did not reveal corresponding medical results on both P3 forms especially regarding infections.

(c) That the learned trial magistrate erred in law and fact in convicting the appellant as charged without observing that evidence on record revealed blood relations hence the offence of incest.

(d) That the learned trial magistrate gravely misdirected himself in law and fact in finding the appellant guilty when medical evidence of the P3 had shown a presumed defence of intoxication.

(e) That the learned trial magistrate gravely erred in law and fact in exempting the testimonies of the prosecution witnesses from doubt in light of inconsistencies, fabrications, contradictions and presumptions.

(f) That the learned trial magistrate grossly erred in law and fact in shifting the burden of proof of the appellant and in rejecting the appellant's defense.

2. There were also supplementary grounds of appeal filed together with the submissions which were that:-

(1) The trial court failed to appreciate that the prosecution evidence pointed at a case of sexual assault and not defilement as was preferred in the charge.

(2) The trial court erred in law by shifting the burden of proof on the appellant.

(3) The trial court failed to appreciate the provisions of Article 50 (2) (g) (h) of the constitution.

3. The State opposed the appeal.

4. The particulars of the charge against the appellant were that on the 29th October, 2016 in Mulwande location of Khwisero Sub-County within Kakamega County he intentionally caused his penis to penetrate the genital organ of PA (herein referred to as the complainant/child) namely vagina, a child aged 3 years.

Case for Prosecution

5. The evidence for the prosecution was that the child herein, PW2, was staying with her mother, LA PW1. That on the material day PW1 left the child at home with another child FO, PW3, aged 12 years and went to buy a match box at some nearby shops. While she was away FO was sweeping inside their house. The child was outside the house. FO then heard the child crying. He went to check. He found the child behind the house with the appellant. He saw the appellant putting his penis inside the child. When the appellant saw him he took the child to a basin of water and started bathing her. The mother to the child returned home and found the appellant bathing the child. The water in the basin was bloody. The mother examined the child and saw her bleeding from her vagina. She went and called her husband PW4 who was working at another home in the vicinity. She reported to her husband. PW4 set for home. On the way he met with the appellant. He arrested him and took him to his home. They took the child to Khumusalaba Police Patrol base and reported to PCW Dorcas Chepchirchir PW7. She issued her with a P3 form. She was taken to Khwisero Health Centre where she was examined by a Clinical Officer PW6. PW6 found her hymen broken with bleeding and pain in the vagina. He filled the child's P3 form and Post Rape Care form. The appellant was also taken before him. He was smelling of alcohol. He filled his P3 form.

6. PC Dorcas PW7 investigated the case. She went to the home of the child. She was given the clothes that the child was wearing at the time of the assault – a dress and a blue panty. They were blood stained. She was also given the children's birth notification certificate. It showed that she was born on 15/12/2013. The appellant was charged with the offence. He denied it. During the hearing the clinical officer PW6 produced the child's P3 form, treatment notes and Post Raped Care form as exhibits – Exhibits 2–4 respectively. He also produced the appellant's P3 form and treatment notes-Exh. 5 and 6 respectively. PC Dorcas produced the child's birth notification certificate and clothes as exhibits, Exh.1, 7 and 8 respectively.

Defence Case

7. When placed to his defence the appellant gave an unsworn statement. He stated that he is an electrician and a cobbler. That on the material day he had visited his step-mother. On the way home he took a shortcut through the complainant's home. He found the complainant crying while seated inside in a basin of water. He asked her what was wrong. As he was talking to her, her mother arrived. She accused him of having defiled the child. The child was bleeding from the vagina. The mother to the child became noisy. He left the home. On the way he met with the child's father who returned him to the home. He also accused him of defiling the child. A crowd gathered. He took himself to the police as he feared for his life.

Findings of the trial Court

8. The trial magistrate found that the clinical officer had proved penetration on the child as he had found the child with broken hymen, laceration and bleeding. He held that the age of the complainant was proved by the birth notification certificate that showed that she was born on 15th December, 2013 which put her age at 3 years. The magistrate held that the child knew the appellant before and identified him during the hearing as the person who had defiled her. That the offence was committed in day time. That the brother to the child PW3 and the child's mother PW1 gave corroborative evidence that they found the appellant committing the offence. The magistrate dismissed the defence of the appellant that he had found the girl in a basin of water while bleeding from her vagina.

Submissions

9. The appellant made written submissions. He submitted that the trial court failed to accord him the right to be represented by an advocate as provided for in Article 50 (2) (g) (h) of the constitution.

10. The appellant further submitted that he was not given enough time to prepare his defence contrary to Article 50 (2) (c) of the Constitution. He submitted that the trial court erred in relying on unsworn evidence of PW2 and PW3 to convict him without considering that the same had no probative value to incriminate him. He cited the case of **Amber May –Vs- Rep. (1979) KLR 38**, where the Court of Appeal held that an unsworn statement is not evidence as the term generally understood because it has no probative value.

11. The appellant faulted the trial court for failing to find that the sexual assault was caused by an accidental piercing by a sharp object during the child's playing time. He submitted that the breakage of hymen and laceration alone could not have resulted in the large amount of blood which was allegedly seen by the witnesses. That his defence that he found the mess that way was not challenged. He submitted that there was no evidence linking him to the sexual intercourse since neither spermatozoa nor the epithelial cells were seen yet the examination was done after one hour. Further that his unsworn defence was not shaken by the prosecution yet it was dismissed without giving it due consideration. That he was not under any obligation to prove his innocence.

12. The prosecution counsel, **Mr. Ng'etich** submitted that the ingredients of the offence were proved. That the appellant was caught in the act. That the victim was found bleeding. That she was taken to hospital immediately and the clinical officer PW6 confirmed the bleeding. Therefore that there was prove of penetration. That the appellant was arrested on the same day. That identification on the appellant was positive.

Analysis and Determination

13. This being a first appeal, the court is to be guided by the principles set out by the Court of Appeal in **David Njuguna Wairimu –Vs- Republic (2010) eKLR** where it was stated that:-

> ***"The duty of the first appellate court is to analyse 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 appellant 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 has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."***

14. The second ground of appeal is that there was no medical evidence to support penetration. The victim herein was a child aged 3 years. She gave unsworn evidence and was cross-examined by the appellant. Her brief evidence was that her mother had gone to buy matchbox. That she was outside their house. That the appellant went there and pieced her with his "*dudu*".

15. FO PW3 gave unsworn evidence and was cross-examined by the appellant. He testified that he saw the appellant removing the clothes the complainant was wearing and putting his "*dudu*" inside the complainant. That at the time he had his trousers to his ankles. That when the appellant saw him he took the child to a basin of water and started to bathe her.

16. The mother to the complainant stated that she found the appellant bathing the complainant in a basin of water. That the water in the basin was bloody. She examined the child and found her bleeding from her vagina.

17. A neighbour to PW1, PW5 testified that she was called by PW1 and went to her home. She went to the house of PW1. She found her examining her child's vagina. The child was bleeding from the vagina. She asked the child what had happened and she kept on saying "Matete" (the accused) who was standing outside the house. She asked him whether he had defiled the child and he denied it.

18. The appellant submitted that there was no presence of spermatozoa to prove penetration. However presence of spermatozoa was not the only thing that could have proved penetration. The position of the law is that defilement can be proved by both oral and circumstantial evidence and not necessarily by medical evidence. In **AML –Vs- Republic (2013) eKLR** the Court of Appeal held that:-

> ***"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."***

19. The court upheld the same in **Kassim Ali –Vs- Republic in Mombasa Criminal Appeal No. 84 of 2005** where it stated that:-

> ***"(The) absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of the victim of rape or by circumstantial evidence."***

20. According to the clinical officer PW6 who completed the child's P3 form and post rape care form the child was taken to their facility by a policewoman in the company of her parents. That the history given to her was that the child was penetrated by use of fingers and that when the child started bleeding the assailant dipped her into a basin of water trying to wash the child. The clinical officer did not state as to who gave her this information. However the information must have been given to her by the parents who had received the information either from the child or from FO PW3. That would mean that at that stage neither the child nor FO had claimed that the appellant had penetrated the child by use of his penis. PW1 stated that she had left the child with FO. It was then natural for her to have questioned him as to what had happened to the child. When FO testified in court he stated that he saw the appellant insert his penis into the vagina of the child. If this was the case why didn't he give this kind of information to the parents of the child before they took the child to hospital? If on the other hand FO did not give the parents of the child this information where did they get the information from?

21. When the clinical officer examined the child she found her with lacerations on the vaginal wall with tenderness, blood stained discharge and broken hymen. Going by the evidence of the clinical officer there was no doubt that there was penetration into the vagina of the child. The question is whether the penetration was done by use of fingers or by the use of penis. The clinical officer never found evidence of penile penetration. The evidence therefore boils down to the credibility of witnesses as to whether penetration was by use of fingers or penis.

22. The child was taken to hospital in an hour's time after the act. If the parents at the time alleged that the appellant had inserted fingers into the vagina of the girl then they must have changed their evidence to indicate that the accused had used his penis. There was thereby no credible evidence that the accused had penetrated the child by use of his penis. He must have done it with his fingers as reported to the clinical officer.

23. The fourth ground of appeal was that the trial court erred by finding the appellant guilty of the offence when medical evidence in the P3 form had shown a presumed defence of intoxication. The appellant was examined by the clinical officer PW6 on the same day of the commission of the offence and the clinical officer observed that the appellant was smelling of alcohol. The appellant in his defence did not raise a defence of drunkenness. That ground of appeal therefore has no substance.

24. The fifth ground of appeal is that the prosecution evidence was full of inconsistencies, fabrications, contradictions and presumptions. The appellant in his submissions did not elaborate what these were. However upon examination of the evidence I do find that there were some inconsistencies. One of these is what is stated above as to whether penetration was caused by fingers or by penis. It is the duty of the trial court to resolve any contradictions in a case. The way to treat various contradictions in a case were stated by the Court of Appeal in **Jackson Mwanzia Musembi –Vs- Republic (2017) eKLR** where the court cited with approval the Ugandan case of **Twahangane Alfred – Vs- Uganda, Criminal Appeal No. 139 of 2001 (2003) UG CA,6** where the court held that:-

> ***"with regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."***

25. In **Sahali Omar –Vs- Republic (2017) eKLR** the Court of Appeal held that:-

> ***"We note that there may have been a few contradictions between the complainants on whether fingers were used or not. We hold the view however that those contradictions were very minor and did not negate the proven fact that indeed there was penetration into the complainant's private parts."***

The inconsistencies in this case did not negate the fact that there was penetration which the appellant himself admitted that he saw the child bleeding from the vagina. The appellant did not pin-point any other material contradiction or inconsistency apart to what I have referred to above.

26. The fifth ground of appeal was that the trial court shifted the burden of proof to the appellant by rejecting his defence without giving it due consideration. This was not elaborated in the appellant's submissions. The judgment of the learned trial magistrate shows that the court considered the accused's defence and stated that:-

> ***"The accused does not deny that he was at the scene or that PW1 found him with the complainant who was inside a basin of water or that she was bleeding from the vagina. He simply states that he found her that way. That is a mere denial. Given the evidence by the prosecution, there is no other conclusion to be arrived at other than the accused person's guilt."***

The trial court therefore did consider the appellant's defence and did not believe it. Indeed there was no reason to believe the appellant's defence that he had found the child bleeding. FO said that the appellant was bathing the child. Though the evidence of FO was unsworn it was in that respect corroborated by the evidence of the child's mother who said that she found the appellant bathing the child. Why would the appellant have gone ahead to bathe the child if he had found her bleeding from her private parts? The natural thing he would have done was to raise alarm. That he was bathing the child invited the conclusion that he is the one who had committed the offence and that he was bathing the child to erase evidence. Unfortunately he was unable to do so. There was then no truth in the appellant's defence. The trial court was right in dismissing it.

27. The appellant contended that the trial court did not accord him a fair trial in that the trial infringed on his rights in Article 50 (2) (g), (h) and (j) of the Constitution. The Article provides that:-

> ***"(2) Every accused person has the right to a fair trial, which includes the right—***
>
> **……**
>
> ***(c) to have adequate time and facilities to prepare a defence;***
>
> **…….**
>
> ***(g)to choose, and be represented by, an advocate, and to be informed of this right promptly;***
>
> ***(h)to have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;***
>
> **…….**
>
> ***(j)to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;***
>
> **……"**

28. The right to a fair trial is one of the rights that cannot be limited under Article 25 of the Constitution. It is therefore the duty of a trial court to comply with the provisions of Article 50 (2) of the Constitution. While addressing the issue of legal representation, the Court of Appeal in **Karisa Chengo & 2 Others –Vs- Republic,** held that:-

> ***"Constitution is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This Court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arise in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise."***

This holding would also apply in a case of defilement. In the case of **Erick Ochieng v Republic [2015] eKLR**, Sitati J quashed a sentence of twenty years that the appellant therein had been handed down in a case of defilement where he had not been supplied with witness statements.

29. It is on record that on 31/10/2016, the prosecution counsel stated that:

> ***"I wish to supply accused with copies of the investigation diary, five witness statements, birth notification."***

To which the appellant replied:

"I confirm."

30. On 8/3/2017, the appellant stated that he had lost the statements and the trial magistrate ordered that the Executive Officer photocopies the statements for the appellant before the next hearing date which was on 19/4/2017. On that day, the learned trial magistrate stated that:-

> ***"The accused has been handed copy of charge sheet and investigation diary, five witness statements, P3 form and treatment notes."***

The appellant was clearly supplied with witness statements and the documents aforementioned by the prosecution before the trial began and after he had lost the same. Thus the appellant's claim that his right under Article 50(2)(j) was infringed is untrue and cannot stand.

31. At the close of the prosecution's case, Section 211 of the Criminal Procedure Code was read out to the appellant to which he elected to give unsworn testimony and not call any witnesses. From the record he stated: **"I am ready"**. This clearly indicates that the appellant was ready to proceed with his defence and had he not been ready, nothing would have prevented him from stating otherwise. Similarly, I find his assertion that he was not given adequate time and facilities to prepare a defence untrue and lacking in merit.

32. On the issue of choosing and being represented by an advocate, and to be informed of this right promptly and having an advocate assigned to the appellant by the State, there is nothing to demonstrate that the instant case involves complex legal issues that the appellant could not comprehend. In **Republic –Vs- Karisa Chengo & 2 Others (2017) eKLR**, the Supreme Court held that the right to legal representation is not open ended but is only available "***if substantial injustice would otherwise result***." In this case there is no evidence that indicates that public interest warranted the state to appoint an advocate at the state's expense. In my view, substantial injustice did not occur because the appellant was fully aware of the charges leveled against him and even cross-examined witnesses. At no point did he exhibit difficulty in understanding the severity of the matter or the legal ramifications of his actions to warrant the trial court to direct that an advocate be appointed by and at the expense of the state to defend him in the interests of justice and a fair trial.

33. The third ground of appeal is that the offence disclosed in the case is that of incest and not defilement. In the supplementary grounds of appeal the appellant contended that the evidence pointed to a case of sexual assault and not defilement. PW1 stated that the appellant was her brother-in-law. That would mean that the child victim was a niece to the appellant.

34. As stated above there was no evidence to prove penetration by penis. There was thereby no evidence to prove defilement or incest. There was however evidence of penetration into the vagina of the girl. This was proved by the lacerations on the vaginal wall, tenderness, bleeding from the vagina and the absence of hymen. The question is whether the offence committed could be substituted to any other offence under the Sexual Offences Act.

35. Section 5 of the Sexual Offences Act states that:-

> ***"(1) Any person who unlawfully –***
>
> a. ***penetrates the genital organs of another person with –***
>
> ***(i) any part of the body of another or that person; or***
>
> ***(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;***
>
> b***. manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body,***
>
> ***is guilty of an offence termed sexual assault.***
>
> ***(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life."***

36. It is evident that the appellant unlawfully penetrated the vagina of the complainant with his fingers. Section 179 of the Criminal Procedure Code provides that:-

> ***"(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.***
>
> ***(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."***

37. The charge of sexual assault is a minor and cognate offence to the offence of defilement. The appellant may therefore be convicted of the offence of sexual assault although not charged with it. In **John Irungu –Vs- Republic, Mombasa Criminal Appeal No. 20 of 2016 (2016) eKLR**, the Court of Appeal stated that:-

> ***"We are satisfied the offence of sexual assault can be committed against a child. Where for example there is cogent evidence of penetration of a child by the accused but the age of the child is not proved, the perpetrator may properly be convicted of sexual assault …the offence of sexual assault is a cognate and minor offence of the offence of defilement which the appellant was charged with…."***

38. I find the offence committed to have been sexual assault contrary to Section 5 (1) (a) (i) of the Sexual Offences Act. I substitute the offence committed to sexual assault contrary to Section 5 (1) (a) (i) as read with Section 5 (2) of the Sexual Offences Act.

39. The minimum sentence for the offence of sexual assault is 10 years imprisonment. I am of the view that a sentence of fifteen years would be sufficient punishment for the offence committed by the appellant. The sentence of life imprisonment imposed on the appellant is thereby set aside and substituted with one of fifteen years imprisonment.

Delivered, dated and signed in open court at Kakamega this 29th day of May, 2019.

J. NJAGI

JUDGE

In the presence of:

Mr. Juma for State

Appellant - present

Court Assistant - George

14 days right of appeal