REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. 21 OF 2018

RMM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal arising from the original conviction and sentence in Kithimani Principal Magistrate's Court (Hon. E.W Wambugu, RM), in Criminal Case No. SO 17 of 2015 and judgement delivered on 6th February, 2018)

REPUBLIC.....PROSECUTOR

VERSUS

RMM.....ACCUSED

JUDGEMENT

1. The appellant, **RMM**, was charged before the Kithimani Principal Magistrate's in Criminal Case No. SO 17 of 2015 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***. The particulars were that the appellant, on the 24th day of march, 2015 in Mwala Subcounty, within Machakos County intentionally caused his penis to penetrate the vagina of JMM, a child aged 10 years. Alternatively, he was charged with the offence of indecent act with a child contrary to section 11(1) of the same Act, the facts being that on the said day at the said place, he intentionally touched the buttocks and rubbed his penis on the vagina of **JMM**, a child aged 10 years.

2. Upon being found guilty, the appellant was convicted of the offence of defilement and was sentenced to life imprisonment.

3. In support of the prosecution's case the prosecution called 4 witnesses.

4. When the complainant was called, she apparently declined to answer the questions put to her. Accordingly, the prosecution applied under section 31 of the ***Sexual Offences Act*** that she be treated as a vulnerable witness.

5. In this case after the said directions of the court, PW1, **VM,** the complainant's mother was sworn in and proceeded to testify. According to her the complainant was 11 years old at the time of her testimony on 27th January, 2016. It was her testimony that on 24th march, 2015 at 3.00pm she was doing casual work far from home when she was called by one **MM**, a person married with her in the same home. The said person told her that the complainant had slept with the appellant, who was PW1's brother in law. When she arrived home, she only found the young chidren and she was informed that the complainant had gone to Mama Kanisa.

6. She then proceeded to the said MM who informed her that she had seen the complainant across the river entering a thicket with the appellant following her. When the said MM and another woman went where they had seen the complainant, they met the complainant leaving the thicket alone. From where they were to the scene took them 20 minutes to walk. Upon asking the complainant who she was with, the complainant declined to answer. They then proceeded with the complainant home where she gave then water to drink. Later the complainant opened up and told them that the appellant had told her they meet in that thicket. Upon checking the complainant's vagina they found it watery. According to the complainant, that was not the first time the appellant was doing the same thing to her as he had done it several times before. The complainant then removed her clothes and went to Mama Kanisa called Alice where PW1 found her playing with the other children but the complainant did not tell her anything.

7. PW1 then took the complainant to the hospital. Later a family meeting was called and the appellant was summoned at which it was decided that the matter be reported to the police and they proceed to Mumbuni Police Station where the appellant was arrested and locked up. The next morning PW1 took the complainant to Mwala District Hospital where she was examined and given medication. Upon being examined it was found that her hymen was broken though it was not wide enough. According to PW1 the complainant disclosed to the doctor that the appellant used to insert his finger into her vagina and then place his penis on top. According to PW1, the complainant had not opened up to her though she would do so when asked by other people.

8. PW2's evidence was that on 24th March, 2015, she saw the complainant in the thicket and upon asking what she was doing there, the complainant informed them that she was with the appellant but refused to disclose to them what had happened though she was clam. It was her evidence that they never saw the appellant.

9. PW3, **Riziki Zainabu**, a clinical officer at Mwala subcounty hospital examined the complainant but found no injuries on her body. By that time she had already cleaned her clothes and did not have them. She had no lacerations or rapture or discharge or blood in her private parts. She was not found to be having any sexually transmitted infection either. There was no trauma in her private parts.

10. PW4, **PC Geoffrey Njuguna** was the investigating officer. According to him the incident was narrated to him by PW1. According to him, the complainant told him that the appellant inserted his fingers in her private parts and thereafter inserted his penis after she removed her panty and raised her clothes. According to him, it seemed that the complainant and the appellant had some agreement. He then charged the appellant with the said offences.

11. Upon being placed on his defence the appellant testified that the charges were false. According to him, on 23rd March, 2015, MM went to their home and alleged that she saw him in the bush at 12 pm. It was his evidence that at the alleged time he had taken his child for treatment and returned home at 6pm. He then suggested that they go to Mumbuni Police Post so that the lady could explain herself. However, the said lady went underground. According to him, he did not defile the complainant.

12. I have considered the grounds of appeal as well as the submissions made on behalf of the parties herein. **Miss Mogoi**, learned prosecution counsel based on the decision of the court of appeal in **John Kinyua Nathan vs. Republic [2017] eKLR** conceded the appeal.

13. Article 50(7) of the Constitution which protects fair trial provides thus:

> ***In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.***

14. Section 31 of the ***Sexual Offences Act*** that she be treated as a vulnerable witness. The said section provides that:

> ***(1) A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is -***
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> ***(a) the alleged victim in the proceedings pending before the court;***
>
> ***(b) a child; or***
>
> ***(c) a person with mental disabilities.***
>
> ***(2) The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of -***
>
> ***a. age;***
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> ***b. intellectual, psychological or physical impairment;***
>
> ***t. trauma;***
>
> ***d. cultural differences;***
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> ***e. the possibility of intimidation;***
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> ***f. race;***
>
> ***g. religion;***
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> ***h. language;***
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> ***i. the relationship of the witness to any party to the proceedings;***

j. the nature of the subject matter of the evidence; or

k. any other factor the court considers relevant.

(3) The court may, if it is in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon an intermediary to appear before the court and advise the court on the vulnerability of such witness.

(4) Upon declaration of a witness as a vulnerable witness in terms this section, the court shall, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures -

(a) allowing such witness to give evidence under the protective cover of a witness protection box;

(b) directing that the witness shall give evidence through an intermediary;

(c) directing that the proceedings may not take place in open court;

(d) prohibiting the publication of the identity of the complainant or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family; or

(e) any other measure which the court deems just and appropriate.

(5) Once a court declares any person a vulnerable witness, the court shall direct that an intermediary referred to in subsection (3), be appointed in respect of such witness unless the interests of justice justify the non-appointment of an intermediary, in which case the court shall record the reasons for not appointing an intermediary.

(6) An intermediary referred to in subsection (3) shall be summoned to appear in court on a specified date, place and time to act as an intermediary and shall, upon failure to appear as directed, appear before the court to advance reasons for such failure, upon which the court may act as it deems fit.

(7) If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may -

a. convey the general purport of any question to the relevant witness;

b. inform the court at any time that the witness is fatigued or stressed; and

c. request the court for a recess.

(8) In determining which of the protective measures referred to in subsection (4) should be applied to a witness, the court shall have regard to all the circumstances of the case, including -

(a) any views expressed by the witness, but the court shall accord such views the weight it considers appropriate in view of the witness's age and maturity;

(b) any views expressed by a knowledgeable person who is acquainted with or has dealt with the witness;

(c) the need to protect the witness's dignity and safety and protect the witness from trauma; and

(d) the question whether the protective measures are likely to prevent the evidence given by the witness from being effectively tested by a party to the proceedings.

(9) The court may, on its own initiative or upon the request of the prosecution, at any time revoke or vary a direction given in terms of subsection (4), and the court shall, if such revocation or variation has been made on its own initiative, furnish reasons therefor at the time of the revocation or variation.

(10) A court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary.

(11) Any person, including a juristic person, who publishes any information in contravention of this section or contrary to any direction or authority under this section or who in any manner whatsoever reveals the identity of a witness in contravention of a direction under this section, is guilty of an offence and liable on conviction to imprisonment for a term of not less than three years or to a fine of not less than fifty thousand shillings or to both if the person in respect of whom the publication or revelation of identity was done is under the age of eighteen years and in any other case to imprisonment for a term of not less three years or to a fine of not less than two hundred thousand shillings or to both.

(12) Any juristic person convicted of any offence under this section shall be liable to a fine of one million shillings.

(13) An accused person in criminal proceedings involving the alleged commission of a sexual offence who has no legal

representation shall put any questions to a vulnerable witness by stating the questions to the court and the court shall repeat the questions accurately to the witness.

15. The procedure for conducting proceedings through an intermediary was dealt with *in extenso* in **John Kinyua Nathan vs. Republic [2017] eKLR** where the Court of Appeal cited the decision in **M. M. vs. Republic [2014] eKLR** and expressed itself as hereunder:

"In this case, the High Court appears to propound the legal position that a child of tender years lacks capacity to testify and is thus not required to give evidence at all. With respect, this is erroneous. The error, in our view, arises from a misapplication of the decision of this Court (differently constituted) in *M. M. v. Republic [2014] eKLR* which we must re-examine *in extenso*. In that case, the child was aged 4 years and was, unlike this case, called to testify. However, the trial court stood her down after conducting the *voire dire* and making a finding that she was *"too tender and does not comprehend what she is being asked…..She cannot adduce any evidence."* There was, nevertheless, direct and independent evidence from the mother of the child who found the defiler lying on top of the child with his trousers down to his knees. There was also medical examination of the child a few hours later which confirmed she was defiled. That was sufficient evidence linking the appellant with the offence, even without the evidence of the infant. . In the *MM case (supra),* the Court, examined at length the existing provisions of the law relating to the testimony of children and other vulnerable groups through intermediaries and stated:

"The whole object of the proceedings through an intermediary is to achieve fairness in the determination of the rights of all the people involved in a trial and to promote the welfare of a child or vulnerable witness."

In the end the Court stated the law on intermediaries as follows:-

"It is clear from sections 31 (2) and 32 that, first and foremost it is the duty of the prosecution to ascertain the vulnerability of the witness and to apply to the court to make that declaration before appointing an intermediary. In addition, the court, as we have earlier observed, can on its own motion, through voire dire examination, declare a witness vulnerable and proceed to appoint an intermediary. Any witness (other than the one to be declared vulnerable) can likewise apply to the court for the declaration. The application must not be granted merely because the victim is young or too old or appears to be suffering from mental disorder. The court itself must be satisfied that the victim or the witness would be exposed to undue mental stress and suffering before an intermediary can be appointed. It is clear from what we have said so far that the procedure of appointing an intermediary preceeds the testimony of the intended vulnerable witness even where the court does so suo motu. It is also clear that an intermediary can be an expert in a specified field or a person, who through experience, possesses special knowledge in an area or a social worker, or a relative, a parent or a guardian of the witness.

The expertise, possession of special knowledge or relationship with the witness must be ascertained by the trial court through examination of the prospective intermediary before the court appoints him or her. It goes without saying, in view of that role, that an intermediary must subscribe to an appropriate oath ahead of the witness' testimony, undertaking to convey correctly and to the best of his/her ability the general purport of the evidence. The trial court must then give directions to delineate the extent of the intermediary's participation in the proceedings".

It was clear in the mind of the Court that the evidence presented by the intermediary to the court is that of the witness and not the intermediary's.

"The intermediary's role is to communicate to the witness the questions put to the witness and to communicate to the court the answers from the victim to the person asking the questions, and to explain such questions or answers, so far as necessary for them to be understood by the witness or person asking questions in a manner understandable to the victim, while at the same time according the victim protection from unfamiliar environment and hostile cross- examination; to monitor the witness' emotional and psychological state and concentration, and to alert the trial court of any difficulties".

For the above reasons, the Court concluded with the passage cited out of context by the High Court in this matter, thus:-

"From what we have said, we conclude that it was in error for the two courts below to treat the evidence of the complainant's mother as that of an intermediary, the steps leading to such appointment having not been followed. It was sufficient to rely on her direct evidence as an independent eye witness.

***Any requirement that insists on a child victim of defilement, irrespective of his or her age to testify in order to found a conviction would occasion serious miscarriage of justice. What fair hearing would a child victim aged six (6) months, like that in the case of Robinson Tole Mwakuyanda V. R. H. C. Cr. Appeal No. 227 of 2007, get if the courts were to insist on the evidence of such a child, who on account of his/her tender age cannot speak."* (Portion cited by the High Court emphasized)**

16. In agreeing with the decision in MM's case the court held that:

"There can be no argument about the stress child complainants in sexual offences suffer when they testify in courts where they are required to relive the horror of the crime in open court. At times they are subjected to the most brutal and humiliating treatment by being asked to relate the sordid details of the traumatic experiences that they had gone through. In many countries of the world including South Africa, this apparent treachery on the child has been mitigated by Constitutional, statutory, judicial and administrative reforms. See for example the South African Constitutional Court case of *Director of Public Prosecutions, Transvaal versus Minister For Justice and Constitutional Development & Others. Case CCT*

***36/08 [2009] ZACC 8*.** **Kenya is also progressively making efforts of her own through the Constitution, statutes and administrative reforms to project the paramountcy of the rights and interests of the child which are universal. Various legal enactments including the *CPC*, the Children *Act, the Witness Protection Act, the Victim Protection Act*, the *SOA* and the *Constitution* itself, attest to that effort. Nevertheless, the Kenyan child is still obligated to undergo the *voire dire* under *Section 19* of the *Oaths and Statutory Declarations Act* when called to testify to determine *whether the child understands the nature of an oath; or if the child, in the opinion of the court does not understand the nature of an oath, whether the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.* In either case the child is liable to cross examination. They must also appear before the court for determination of any issue on the appointment of an intermediary. In the case before us, the child was a necessary witness both in determining the third element of the offence as to whether the appellant was responsible, and also in determining whether she was a vulnerable witness and therefore needed an intermediary to speak on her behalf. No reason was given for the failure to call the complainant in this case and the trial court made no finding on that crucial aspect of the case. The High Court on its part, as already stated, misdirected itself. If PW2 was to be believed, the child was able to inform her about her injury and the person responsible and so, as argued by the appellant, she was capable of stating so to the court directly or through an intermediary. In the circumstances, the evidence of PW2 was at best hearsay as she was not the appointed intermediary. Only, part of her evidence was corroborated by medical evidence and findings thereon correctly made."**

17. In the present case I agree with **Ms Mogoi** that the evidence of PW1 did not meet the threshold of an intermediary. Her evidence was purely hearsay evidence based not on what she had been told by the complainant but by third parties. The said parties themselves did not witness the commission of the offence and the complainant never disclosed to them what transpired between her and the appellant. The medical evidence itself did not show that there was penetration, an essential ingredient of the offence of defilement.

18. I therefore agree that the learned trial magistrate erred in convicting the appellant. The said conviction was based on unsound evidence and cannot stand.

19.In the premises, I allow the appeal, set aside the appellant's conviction and quash the sentence. I direct that the appellant be set at liberty forthwith unless otherwise lawfully held.

20. It is so ordered.

Judgement read, signed and delivered in open court at Machakos this 26th day of July, 2019.

G V ODUNGA

JUDGE

In the presence of:

Appellant in person

CA Geoffrey