REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 45 OF 2018

ROBERT NENGESA.....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(from the original conviction and sentence by Maureen Nabibya, SRM, in Hamisi SRMC Criminal Case No. 1469 of 2015 dated 28/7/2017)

JUDGMENT

1. The appellant was convicted of the offence of defilement contrary to Section 8 (1) as read with Sub-section 8 (3) of the Sexual Offences Act No. 3 of 2006 and sentenced to life imprisonment. He was aggrieved by the conviction and the sentence and filed the instant appeal. The grounds of appeal are that:-

> ***1. THAT the trial magistrate grossly erred in law by failing to note that the prosecution failed to comply with the provisions of article 50 (2) (j) of the Constitution.***
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> ***2. THAT the prosecution's evidence was shroud with contradictions.***
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> ***3. THAT the trial magistrate erred in law by convicting and sentencing the appellant to serve life imprisonment for the offence of defilement yet the age of the complainant was not ascertained beyond reasonable doubts.***
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> ***4. THAT the trial magistrate erred in law by relying on the medical evidence adduced in court which was unsound.***
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> ***5. THAT the trial magistrate erred in law by failing to evaluate the evidence adduced before him.***
>
> ***6. THAT the trial magistrate erred in law by convicting the appellant based on a defective charge sheet.***

2. The prosecution relied on the record of the trial court.

3. The particulars of the offence against the appellant were that on the 4th December, 2015 at [Particulars Withheld] Village Banja Location Hamisi District within Vihiga County he intentionally caused his penis to penetrate the vagina of GA (herein referred to as the complainant) a juvenile girl aged 9 years.

4. The case for the prosecution was that in the year 2015 the complainant was a 9 year old Class 1 pupil. That the appellant was working at a posho mill near the home of the complainant. That on the material day the complainant went to the posho mill of the appellant. The appellant took her to a bed at the posho mill and defiled her after which he gave her Ksh. 10/= and told her to buy mandazi with it. Later on her grandmother PW2 received a report from a boy called Lenin that the complainant had been given Ksh. 10/= by the appellant. Her grandmother beat her up and inquired what the money was for. The girl told her that the appellant had told her and a girl called M to remove their clothes and that he would show them how to do sex. The grandmother took the girl to Serem Health Centre. She was examined by a clinical officer PW3 who found her with slightly bruised vaginal walls and partially torn hymen. They reported the matter at Serem Police Station. PC Maina PW4 investigated the case. He issued a P3 form to the girl. It was completed by the clinical officer PW3. The complainant's age was assessed at Vihiga District Hospital and found to be 8 years. On the 7/12/2015 PC Maina arrested the appellant and charged him with the offence. He denied the charge. During the hearing the clinical officer PW3 produced the treatment notes and the P3 form as exhibits, P.Ex.1 and 2 respectively. PC Maina PW4 produced the age assessment report as exhibit, P.Ex.3.

5. When placed to his defence the appellant stated in an unsworn statement that on the 4/12/2015 he was sick and was at his home. That on 7/12/15 he went for work. He was then arrested by 2 police officers who were in the company of a woman. He was not told the reason for the arrest. On the following day he was taken to Muhende Health Centre together with a child called M where they were examined. He was charged with defiling the complainant in this case. He denied that he defiled the girl.

6. In his written submissions, the appellant raised six arguments: that he was not accorded a fair trial in that the prosecution did not disclose to him in advance the evidence that they were to rely on in the case which was a violation of article 50 (2) (c) and (j) of the Constitution; that the prosecution evidence was full of contradictions; that the trial court did not conduct a *voire dire* examination on the complainant to justify the taking of her evidence; that the age of the victim was not sufficiently proved; that the medical evidence adduced in the case was doubtful; that the charge sheet was defective and that the court failed to re-evaluate the evidence properly.

7. The appellant urgued that the charge was defective in that he was charged under Section 8 (3) of the Sexual Offences Act when the age of the victim was stated to be 8 years.

8. The appellant was charged under Section 8 (1) as read with Section 8 (3) of the Sexual Offences. Section 8 (3) is applicable where the victim is aged between 12 and 15 years. The age of the victim that was stated in the particulars of the charge was 8 years. The charge was thereby defective in that the appellant was charged under Section 8 (3) when the age of the victim was 8 years. The proper charge should therefore have been under Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act. However, failure to cite the correct section of the law did not occasion a failure of justice on the appellant. The error is curable under Section 382 of the Criminal Procedure Code that provides that:-

> ***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***
>
> ***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.***

In the case against the appellant he all along knew that the allegation was that the girl was aged 8 years. The error did not occasion him any prejudice.

9. The appellant argued that the medical evidence adduced in the case was doubtful in that it was alleged that the girl had been defiled before. He wondered how in those circumstances the hymen could have been partially torn. However, none of the prosecution witnesses said that the girl had been defiled before. The complainant said that that was the first time that the appellant did it to her. There is then no reason to doubt the evidence of the clinical officer that the hymen was partially torn.

10. The complainant stated that the defilement took place in a room at the appellant's posho mill. Her grandmother PW2 stated that the girl told her that the incident took place in the bushes. PW2 stated that the girl never told her anything about the incident taking place at the posho mill.

11. In her evidence the complainant testified that on the previous day before the incident she was on the way to the river when she met the appellant in the bushes. That he told her to give her something in the middle. That he invited her to go to his posho mill when her grandmother was away. That on the following day she went to his posho mill and he defiled her.

12. From the narrative given by the complainant I do not find any serious contradiction between her evidence and that of her grandmother. The complainant had met the appellant in the bushes a day before the defilement when he invited her to go to his posho mill when her grandmother was away from home. The complainant was categorical that the appellant defiled her at his posho mill and not in the bushes. The contradiction in the evidence of the complainant and her grandmother as to where she was defiled did not go to the substance of the case as there is evidence that she had been defiled.

13. The age of a person can be proved in various ways as was stated by the Court of Appeal in **Mwolongo Chichoro Mwanyembe –Vs- Republic, Mombasa Criminal Appeal No. 24 of 2015) (UR) -** cited in the case of **Edwin Nyambaso Onsongo –Vs- Republic (2016) eKLR** - where it was stated that:-

> ***"…the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof." "..we thing that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."***

14. In the case against the appellant the complainant stated in her evidence that she was aged 9 years. The clinical officer PW3 who treated her and filled her P3 form estimated her age at 9 years. An assessment of the age of the girl was conducted at Vihiga County Referral Hospital Dental Clinic by examination of her central, lateral and first permanent molars and the age was estimated at 8 years. There is then no doubt that the girl was aged between the age of 8 and 9 years. It was thereby proved that the girl was below the age of 11 years.

15. The appellant contends that he was not accorded a fair trial in that the prosecution did not disclose to him in advance the evidence that they were to rely on in the case.

16. The right to a fair trial is one of the tenets of the Constitution of Kenya 2010 as enshrined in Article 50 (2). Article 50 (2) states 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."

(j)to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.

17. The trial court's record does not indicate whether the appellant was supplied with witness statements and other documentary evidence that the prosecution intended to rely on in the case. It is the right of an accused person to be supplied with such witness statements and documentary evidence so as to prepare for his defence.

18. The complainant was a child of tender years. Before a child of tender years is allowed to testify in court the court is required to satisfy itself that the child understands the duty of speaking the truth and whether he/she is of sufficient intelligence to allow his/her evidence being taken. This is done by conducting a *voire dire* examination before the evidence is taken. In the instant case the trial magistrate did not conduct the same. The question is whether failure to conduct *voire dire* examination was fatal to the case.

19. The position of the law where *voire dire* examination is not conducted is that the court cannot rely on the evidence of such a child to sustain a conviction but that it can convict on some other independently sufficient evidence adduced in support of the charge. In **Lawrence Iria –Vs- Republic (2017) eKLR** Mabeya J. considered the issue and cited the Court of Appeal decision in **Loonkomok –Vs- Republic, Mombasa Criminal Appeal No. 68 of 2015** and held that:-

"… where a minor witness gives evidence without undergoing voire dire and where such a witness does undergo voire but is not cross-examined, such omissions should not render the prosecution case fatally defective. The court should revert to the other independent evidence and consider whether it is sufficient to warrant a conviction. The omission should not lead to an automatic acquittal."

20. The ingredients of the offence of defilement are proof of the age of the victim of the offence, proof of penetration and proof of the identity of the perpetrator – See **Dominic Kibet Mwareng –Vs- Republic (2013) eKLR**.

21. The complainant in the case against the appellant was the only person who testified on the identity of the perpetrator of the offence. Without her evidence there was no other independent evidence as to who the perpetrator was. In the premises the charge was not proved beyond reasonable doubt.

22. Notwithstanding the foregoing, it is my finding that failure by the trial magistrate to first find out in a *voire dire* examination whether the evidence of the child could be received as evidence in the case occasioned a failure of justice and rendered the proceedings a mistrial. The case is therefore declared a mistrial. The question is whether the court should order a re-trial.

23. The general principle in regard to re-trials is that a re-trial should only be ordered where the interests of justice so require and if it is unlikely to cause injustice to the accused. In **Samuel Wahini Ngugi –Vs- Republic (2012) eKLR**, the Court of Appeal considered the issue and held that:-

"It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered …. In this judgment the court accepted that a retrial should not be ordered unless the court was of the opinion that on consideration of the admissible or potentially admissible a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person."

24. The appellant was facing a serious charge of defiling an 8 year old. The prosecution had a strong case against him. He was charged in 2015 and convicted in 2017. It is likely that the witnesses are readily available. An order for a re-trial in the case will not cause any injustice to him. In my view the interests of justice in the circumstances of this case call for a re-trial. I therefore order that the appellant be re-tried of the offence.

25. The upshot is that the prosecution against the appellant was a mistrial for failure by the trial magistrate to conduct a *voire dire* examination on the complainant. The conviction entered against the appellant is therefore quashed and the sentence set aside. The appellant is to be produced before the Hamisi Magistrate's Court to be re-tried of the offence by a Magistrate of competent jurisdiction other than the ones who handled the case. It is needless to remind the trial court that it is of utmost importance to comply with the provisions of Article 50 (2) (c) and (d) of the Constitution during the trial.

Delivered, dated and signed in open court at Kakamega this 25th day of September, 2019.

J. NJAGI

JUDGE

In the presence of:

Miss Kibet for State

Appellant

Court Assistant - George

14 days right of appeal.