REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 105 OF 2018

(From Original Conviction and Sentence in Criminal Case No. 80 of 2016 by the Chief Magistrate's Court at Kakamega)

BRIAN WETOTO ONGUNYA..................APPELLANT

VERSUS

REPUBLIC...RESPONDENT

JUDGEMENT

1. The appellant was convicted by Hon. B Ochieng, Chief Magistrate, of defilement contrary to section 8(1), as read with section 8(3) of the Sexual Offences Act, No. 3 of 2006, Laws of Kenya, and was accordingly sentenced to twenty (20) years imprisonment. The particulars of the charge against the appellant were that on divers dates between the 23rd day of July and 2nd August 2016 at [Particulars Withheld] Village, [Particulars Withheld] Sub-Location, Nambacha Location, Navakholo Sub-County of Kakamega County, he intentionally and unlawfully caused his penis to penetrate the vagina of JMM, a girl aged fifteen years.

2. He had also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the alternative charge were that on the same date and at the same place stated in the main count, he had intentionally and unlawfully committed an indecent act with the same child.

3. The appellant pleaded not guilty to the charges before the trial court, and the primary court conducted a full trial. The prosecution called six (6) witnesses.

4. NOA was the first to take the witness stand, as PW1. He was the grandfather of the complainant, who lived with her. He testified that she disappeared from home, and was traced to the house of the appellant. He stated that she was born in August 2001. PW2, JMM, the complainant, testified as PW2, she gave unsworn evidence but was cross-examined by the appellant. She said she was a Standard 6 pupil. She explained how she met the appellant on 23rd July 2016, and he had lured her to follow him. She explained that they stayed together in his house until they were arrested by the police. She stated that during that period they would have sex. Diberio Wechuri (PW3) was among the persons who played a role in the arrest of the appellant. Raphael Otoyi Andera (PW4) was the clinical officer who presented the medical evidence. He stated that PW2 had spermatozoa cells and her hymen was torn. Administration Police Constable Daniel Nyahenyo, testified as PW5. He was the police officer who rearrested the appellant after he had been arrested by an Assistant Chief. He handed him over to officers from the Navakholo Police Station. Corporal Joseph Ngaira (PW6) rearrested the appellant from PW5.

5. The appellant was put on his defence. He gave a sworn statement and did not call witnesses. He merely denied the offence.

6. After reviewing the evidence, the trial court convicted him of the main charge, and sentenced him as stated in paragraph 1 of this judgement.

7. Being dissatisfied with the sentence, the appellant appealed to this court and raised several grounds of appeal. He largely averred that he was not afforded a fair trial as Articles 2(4), 49(1)(f), 50(j)(4) and 50(2)(c)(g)(w)(j) of the Constitution were not complied with. He further argued that the court did not take into account that there was no proof of penetration. He also said that the trial court relied on certain fluids from the vagina of the victim despite the fact that the same had not been medically examined. He said that the prosecution's case was not proved to the required standard, and that his defence statement was not taken into account. He argued that crucial witnesses were not called. He also averred that PW2 was child of seventeen years of age.

8. Being the first appellate court, I have re-evaluated all the evidence on record. I have drawn my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the witnesses as they testified. The Court of Appeal's decision in the case of ***Okeno vs. Republic* (1972) EA 32** has consistently been cited on this issue. In its pertinent part, the decision is to the effect that: -

> "*An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the*

appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

9. The appeal was canvassed on 20th June 2019. Both the appellant relied on written submissions that he had placed on record, while Mr. Ng'etich, Senior Prosecution Counsel, made oral submissions.

10. In his written submissions, the appellant to the averred that his rights as an arrested person were violated tote extent that he was not brought before a court timeously as required under the Constitution, he was not supplied with the witness statements as required under the Constitution, crucial witnesses were not summoned, his age was not considered, the evidence on record was inconsistent, no forensic tests were done the evidence relied on by the court to convict, and the burden of proof was shifted to him. Mr. Ng'etich submitted that the fact that a suspect was held beyond the required time before being presented in court did not entitle him to an acquittal, the appellant never asked to be furnished with statements, the state was entitled to call the number of witnesses it wished to establish its case, the appellant never alleged at any time that he was a minor so that he could be afforded the facilities required for a minor, the prosecution's evidence was adequately corroborated, if there were any inconsistencies then the same were minor, the appellant had been properly been identified as perpetrator of the offence and there was no need to subject any of the evidence to forensics, penetration had been proved by PW4, and that the burden of proof was not shifted to the appellant at any stage. .

11. I will start by considering the fair trial principles first to assess whether or not they were violated.

12. The first one that the appellant raises is with regard to Article 49 of the Constitution. He says that upon being arrested on the morning of Wednesday 2nd August 2016, he was not taken to court until 4th August 2016. He argues that he was not taken to court within the twenty-four hours prescribed by the Constitution, and his rights as an arrested person were violated.

13. Article 49(1)(f) of the Constitution states as follows:

"*49. (1) An arrested person has the right—*

(a) …

(b) …

(c) …

(d) …

(e) …

(f) to be brought before a court as soon as reasonably possible, but not later than—

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

(g) …

(h) …"

14. That constitutional provision is all about the right to liberty and freedom, which is an inherent fundamental right. It is recognized in Article 29 of the Constitution in the following terms:

"*29. Every person has the right to freedom and security of the person, which includes the right not to be—*

(a) deprived of freedom arbitrarily or without just cause;

(b) detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;

(c) …

(d) …

(e) …

(f) treated or punished in a cruel, inhuman or degrading manner…"

15. The courts have time and again emphasized that there is s constitutional duty to jealously protect the right to liberty and freedom. It was said in *Republic vs. Danson Mauna & Another* [2010] eKLR:

> *"Liberty is precious and no one's liberty should be denied without lawful reasons and in accordance with the law. Liberty should not be taken for granted … We must interpret the Constitution in enhancing the rights and freedoms granted and enshrined rather than in a manner that curtails them."*

And the Indian Supreme Court said in *Neeru Yadav vs. State of UP & Another* Criminal Appeal No. 2587 of 2014:

> *"… we are not oblivious of the fact that the liberty is a priceless treasure for a human being. It is founded on the bedrock of constitutional right and accentuated further on human rights principles. It is basically a natural right, in fact, some regard it as the grammar of life. No one would like to lose his liberty or barter it for all the wealth of the world. People from centuries have fought for liberty, for absence of liberty causes sense of emptiness. The sanctity of liberty is the fulcrum of any civilised society. It is a cardinal value on which the civilization rests. It cannot be allowed to be paralyzed and immobilized. Deprivation of liberty of a person has enormous impact on his mind as well as body. A democratic body polity which is wedded to rule of law, anxiously guards against liberty, but, a pregnant and significant one, liberty of an individual is not absolute. The society by its collective wisdom through process of law can withdraw the liberty that it has sanctioned to be an individual when an individual becomes a danger to the collective and to the societal order."*

16. The court in *Michael Rotich vs. Republic* [2016] eKLR, decried the habit of the police of rushing to arrest suspects before completing investigations and holding them in custody without charge or on a holding charge. It declared that that conduct was unconstitutional, and that it was unlawful for the police to have a person who has been arrested to continue being in custody without a formal charge being laid in court.

17. The charge sheet on record indicates that the appellant was arrested on 2nd August 2016, and was arraigned in court on 4th August 2016, which tallies with the averments made in his submissions. 2nd August 2016 was a Tuesday while 4th August 2016 was a Thursday. That would mean that that the appellant was indeed held in excess of twenty-four hours before being presented in court.

18. What is the effect of such a violation? There is ample case law in such decisions as *Julius Kamau Mbugua vs. Republic* Criminal Appeal No. 50 of 2008, *Patrick Kirimi M'bura vs. Republic* [2015 e KLR, *Mwalimu vs. Republic* [2008] KLR 111, *Wandera Peter vs. Republic* [2018] eKLR, among others, where it was held that such violations ought to be raised at the earliest possible time before the trial court, for an explanation of the delay, and in any event the available remedy would be damages in a civil action. That would mean that the fact of the violation would have no impact on the trial unless it is considered, cumulatively, with other constitutional fair trial violations. It would appear that the position taken in the decisions referred to above has something to do with the fact that Article 49 has more to do with rights of an arrested person and less to do with fair trial rights. Consequently any violation of that provision should have a minimal impact on the trial.

19. The other violation that the appellant points at is of Article 50(2)(c)(j) with respect to advance disclosure of prosecution evidence and provision of time and facilities to prepare defence. The relevant portions of the Constitution say as follows:

> *"50(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 …"*

20. Violation of Article 50 with respect to pretrial disclosure of prosecution evidence has been addressed in several cases. In in *Simon Githaka Malombe vs. Republic* [2015] eKLR it was held that failure to furnish the accused with such evidence amounted to violation of fair trial rights. It was emphasized that provision of such evidence to accused persons was particularly critical where the accused were unrepresented. The court in that matter quashed a conviction where witness statements had not been availed to the accused. The Court of Appeal in *Joseph Ndungu Kagiri vs. Republic* [2016] eKLR, stressed that the right of accused persons to be furnished with such evidence ought to be taken together with the right in Article 50(2)(c) which refers to a right to fair trial as including the right to adequate time and facility to prepare defence. It was stated that the right in Article 50(2)(c) cannot be met unless the accused was furnished with the evidence of the prosecution ahead of the trial. The court underscored the fact that fair trial rights are among those that cannot be limited under Article 24 of the Constitution, and urged the courts to be keen in ensuring that those rights are not violated.

21. In the instant case, it would appear from the record the appellant was not furnished with the prosecution evidence ahead of trial. Indeed, the entire record is silent on the advance disclosure of the state's case. It would appear that the appellant never raised the issue at all during the trial, neither did the trial court address the matter. It would appear that it is on account of that that Mr. Ng'etich argued that the same was an afterthought to the extent that it was not raised at the trial.

22. Pretrial disclosure of evidence is commanded by the Constitution, the supreme law in the land of Kenya. The disclosure is not to be made only when the accused person asks for it. It is mandatory requirement of the law, and the state is mandated to avail the evidence, whether the accused person raises the matter or not. Failure on the part of the state to furnish the accused with such evidence ahead of trial means that the state has disobeyed or overlooked or ignored the command in Article 50(2)(j), and it means that the accused person's right to fair trial has been violated, which in effect would mean that he has not been accorded adequate facilities to prepare for trial, in violation of Article 50(2)(c), rendering his trial unfair. If the trial court in the instant case failed to ensure that Article 50(2)(j) was complied with, it would mean that it

failed in the duty cast upon it by the Court of Appeal in *Joseph Ndungu Kagiri vs. Republic* (supra).

23. It is my conclusion, therefore, that as the appellant herein was not furnished with the evidence that the prosecution was to present at the trial ahead of the said trial, his fair trial rights were violated, and that his trial was unfair.

24. The other issue raised by the appellant is that the prosecution failed to call some crucial witnesses. He mentioned several potential witnesses whose evidence he submitted was crucial, and who, he felt, the omission to call them had a critical effect on the credibility of the evidence tendered. He cited *Bukenya and others vs. Uganda* [1972] EA 549, to make the proposition that that an inference ought to be made that where crucial witnesses were not called it should be presumed that they would have tendered evidence adverse to the prosecution's case. However, that position has to be counterbalanced against the position stated in section 143 of the Evidence Act, Cap 80, Laws of Kenya, and restated in such cases as *Keter vs. Republic* [2007] EA 135 and *Republic vs. George Onyango Anyang' & Another* [2016] eKLR, that the prosecution must call such number of witnesses as are sufficient to prove their case, and, therefore, there is no obligation to call any specific number of witnesses.

25. The prosecution called six witnesses, the question that I ought to ask myself is whether the six witnesses established the case against the appellant for the offence that he faced? PW1, the grandfather of PW2, said he did not know the appellant and had no contact with him at any stage until his arrest. He had no firsthand knowledge of what happened between PW2 and the appellant, if at all anything happened. PW2, the complainant, identified the appellant as the person with whom she was with during the period she was said to have had disappeared. She gave unsworn evidence. PW3 was one of the persons involved in the arrest of the appellant. He did not see PW2 and the appellant together, he arrested the appellant at a barbershop where it was alleged the appellant worked. PW2 was not arrested at the barbershop, together with the appellant, nor was she found at his house, but in the house of some woman who was not called as a witness. PW3's evidence connecting the appellant to PW2 was based on what he alleged he was told by some villagers and by PW2. PW4 was a clinical officer. PW5 and PW6 were police officers, they did not arrest the appellant, he was arrested by civilians and taken to them. That is the totality of the prosecution's case.

26. Is that evidence sufficient to sustain a conviction? Can it be said that from that evidence it was established beyond reasonable doubt that the appellant defiled PW2? Of all the six witnesses who testified, the only critical witness was PW2. The rest did not place the appellant and PW2 together. They never saw them together nor arrested them at the same place. They talked of having heard of or of being told about the two being seen together by others who did not come forward to testify. The only evidence, therefore, that links the appellant to PW2 is the testimony of PW2 herself. She identified him in court as the person who defiled her, and got into details as to how they related over the period material to the charge. Her testimony alone should be sufficient to warrant a conviction so long as there is other evidence to corroborate it. Unfortunately, she gave unsworn evidence. What is curious is that she was fifteen years of age at the time. The question in my mind is whether it was justifiable, and even legally right, for a child of fifteen years to give unsworn evidence.

27. Generally, in criminal trials evidence ought to be taken on oath. The Criminal Procedure Code, Cap 75, Laws of Kenya, gives guidelines on the taking of evidence from witnesses in criminal trials. Section 151 requires that evidence be taken in criminal matters on oath, and appears to impose a total bar to unsworn evidence. The provision states as follows:

> "*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.*"

28. There is exception though where unsworn evidence may be received with respect to a child of tender years who does not understand the nature of the oath but is possessed of sufficient intelligence to justify reception of her evidence under section 19 of the Oaths and Statutory Declarations Act, Cap 15, Laws of Kenya. Section 19 states as follows:

> "*19 (1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence , any child of tender years called as witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth …*"

29. The Court of Appeal in *Johnson Muiruri vs. R* [1983] KLR 445, addressed itself to the matter of evidence of a child of tender years and said:

> "*Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which (case) his sworn evidence may be received. If the court is not so satisfied, his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.*"

30. The issue then is was PW2 a child of tender years so that her evidence could be received unsworn? The secondary question is who is a child of tender years under Kenyan law? The Children Act, No. 8 of 2001, defines, at section 2, a child of tender years to mean a child aged ten and below. Then there is section 14 of the Penal Code, which defines immature age with respect to criminal responsibility. It could be a pointer to what tender age could mean. The provision states:

> "*14. (1) A person under the age of eight years is not criminally responsible for any act or omission.*
>
> *(2) A person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.*

(3) A male person under the age of twelve years is presumed to be incapable of having carnal knowledge."

31. From the provisions above, it should be clear that a child of tender years would be someone in the age of up to ten years and below, ages eleven and twelve would be borderline. Definitely, a teenager, someone of age thirteen and above, cannot be a child of tender years. A person of fifteen years is certainly not a person of tender years, and his testimony cannot be subject to section 19 of the Oaths and Statutory Declarations Act. Such a person need not be subjected to a *voire dire* examination. Consequently, there cannot be any basis for receipt of the unsworn evidence of such a person, unless there is proof that the person has mental disability. The trial court was, therefore, not justified to receive the unsworn testimony of PW2.

32. As PW2 gave unsworn evidence, I need to answer questions such as, what is the probative value of unsworn evidence? What is the effect of unsworn evidence? In *May vs. Republic* [1979] eKLR, the Court of Appeal stated that an unsworn statement was strictly not evidence and the rules of evidence could not be applied to it. It was said to be of no probative value, but could be considered in relation to the whole of the evidence. Its potential was said to be persuasive rather than evidential, and for it to be of any value it must be supported by the other evidence recorded in the case. That position should be compared with the position stated in *Odongo vs. Republic* [1983] KLR 301, that the unsworn statement of an accused person was not evidence and the same could not be used against a co-accused person. The overall effect of it all is that the unsworn evidence of a witness, who should have been sworn, is worthless, and cannot be relied on to found a conviction. It would also mean that receipt of such unsworn evidence is an illegality that renders the trial defective. See *Rashid Wachilu Kasheka vs. Republic* [2015] eKLR.

33. The Court of Appeal in *Mwangi vs. Republic* [2006] 2 KLR 94, declared a trial a nullity where it was unable to find that the witnesses had been sworn, and ordered a retrial. The court stated:

> *"The usual practice of all courts in Kenya is, of course, to show in the record that a witness has taken oath 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 evidence. Most likely, they took the oath before giving evidence. But there is also the possibility that they might not have taken oath and if that is 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 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 a trial was a nullity, then it does not matter at what stage that issue is raised."*

34. It follows, therefore, that the central plank of the prosecution's case in the instant cause, the testimony of PW2, should collapse, to the extent that she gave an unsworn statement, which in law did not amount to evidence, as it was of no probative value whatsoever. The reception of that evidence, as stated above, was an illegality that rendered the trial a nullity.

35. The other issue raised by the appellant is that his age was not considered at the trial. He submits that he was a child as at the date of the commission of the alleged offence, and he should have been tried as a child and the fact of his age ought to have been a factor to be considered during the sentencing process. I have gone through the record of the trial court. I note that the charge sheet indicates that the appellant's apparent age was adult. The appellant did not raise the issue of his age at the trial, and it was equally not raised when he filed his initial petition of appeal. It was raised for the first time in his amended petition of appeal and written submissions that he placed before the court on 20th June 2019. Nothing could possibly turn on this this, which I believe to be an afterthought.

36. On the question of contradictions and inconsistencies in the evidence. I have gone through the record, and I have not noted any such. If there were any then they must have been minor. It was held in *Richard Munene vs. Republic* [2018] eKLR that not every inconsistency or contradiction is material.

37. He has argued that the spermatozoa found inside PW2's vagina was not subjected to forensic testing to connect or link him with the offence. Under normal circumstances, such a submission would not hold, so long as there is sufficient evidence to place the accused person at the scene. In this case, the appellant makes a sensible argument. His conviction was founded on very shaky, evidence an unsworn statement of the victim. That statement required corroboration, to the effect that the appellant had been sighted living with PW2 for the duration alleged, in circumstances that gave opportunity for him to defile PW2. None of the witnesses, apart from PW2, gave evidence that placed the two in close proximity. Therefore, it cannot be said that her unsworn testimony was sufficiently corroborated. A forensic examination or testing of the spermatozoa that was found in PW2's vagina would have perhaps provided the much needed corroboration. But as found above, the unsworn statement was, in any event, of no probative value, and no amount of corroboration would have been of any value.

38. Finally, the appellant argued that the court had shifted the burden of proof to him. I have read through the record of the trial court over and over, and I have not seen material upon which it can be concluded that the trial court shifted the burden of proof on the appellant. The appellant himself has not sought to demonstrate the basis of that submission.

39. In view of everything that I have said above, it is my finding that the appellant herein did not get a fair trial for his fair trial rights were infringed, and the said trial was a nullity to the extent that the trial court received unsworn testimony which formed the foundation of his conviction. That amounted to a mistrial. Upon that finding, I should consider whether or not to order a retrial. The offence charged is a heinous one, which is prevalent in Kenya today. It was alleged that the offence was committed in 2016, some three or so years ago. I do not think that retrial will be rendered impossible by unavailability of witnesses or by impairment of their memory on account of passage of time.

40. Following *Otieno & Another vs. Republic* [1991] KLR 493, I do hereby set aside the conviction and the sentence imposed on the appellant by the trial court, and I order that the appellant shall be retried by a competent court at Kakamega Chief Magistrate's Court differently constituted by a magistrate other than Hon. B Ochieng, Chief Magistrate. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 20th DAY OF SEPTEMBER, 2019

W MUSYOKA

JUDGE