



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 153 OF 2015

DAVID KITHINJI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence in the

Chief Magistrate's Court at Makadara Cr. Case 2489 of 2012

delivered by Hon. L. C. Kosgei, RM on 28th August 2015)

JUDGMENT

Background.

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. The particulars of the offence were that on 5th May, 2012 in Kasarani within Nairobi County, committed an act by inserting his male genital organ (penis) into the genital organ of the female(vagina) of O.N., a child aged 14 years which caused penetration. He was charged in the alternative with committing an indecent act in that he placed his male organ (penis) on the surface of a female (vagina) of O.N. a child aged 14 years.

2. The Appellant was found guilty of the main offence and sentenced to serve 20 years imprisonment. Dissatisfied with both the conviction and sentence he lodged the present appeal. He set out his grounds of appeal in an amended petition of appeal filed 4th December, 2018. In summary, he was dissatisfied that the charge sheet was defective, that Section 151 of the Criminal Procedure Code was not complied with, that the elements of the offence charged were not established, that the prosecution evidence was inconsistent and contradictory and that the trial magistrate erred in failing to find that this defence was not adequately evaluated.

Submissions.

3. The appeal was canvassed by way of filing written submissions. Learned counsel, Mr. Amutallah represented the Appellant whilst Ms. Kimiri represented the Respondent. Both counsel highlighted the submissions. With respect to non-compliance with Section 151 of the Criminal Procedure Code, Mr. Amutalla submitted that the law required that all evidence must be adduced on oath. In the present case, after the *voire dire* examination was carried out on PW1 the court ruled that she understood the nature of an oath and she would therefore give sworn evidence. However, the witness was never sworn before her evidence was received. This, according to the counsel, vitiated the entire trial. He relied on **Rashid Wachilu Kasheka v. Republic[2015] eKLR** and **Johnson Muiruri v. Republic[1983] KLR 445** to buttress this submission. He submitted that the provision imposed a total bar to unsworn evidence as per the Court of Appeal's decisions in **May v. Republic[1981]** and **Mwangi v. Republic[2006] 2 KLR 94**.

4. Counsel poked holes in the manner the Appellant was arrested. He questioned his arrest by officers from Kasarani police station yet the offence occurred within the jurisdiction of Githurai Kimbo police station. He submitted that this pointed to "window shopping" for evidence which gave credence to the Appellant's case that the offence was fabricated on him for ulterior motive of settling a personal vendetta.

5. Counsel also faulted the failure by the learned trial magistrate to consider the Appellant's defence, which if he had would have arrived at different verdict.

6. Ms. Sigei in opposing the appeal submitted that the prosecution proved the offence of defilement beyond a reasonable doubt, more so that the three ingredients of the offence namely; penetration, age and identity of the perpetrator. With regard to the failure to consider the Appellant's defence she submitted that the defence was an afterthought and a pure denial as he did not cross examine PW1 or PW2 on issues that he raised in his defence. The trial court was also emphatic in its judgment that it had adequately considered the Appellant's defence before arriving at a guilty verdict. With regard to contravention of Section 151 of the Criminal Procedure Code, she submitted that in **Moses Munene Ngurani v. Republic [2017] eKLR** it was held that the general common law rule is that the testimony of a witness taken *viva voce* was not admissible unless the witness had previously been sworn to speak the truth. That the court had pointed to an exception to the provision under the Oaths and Statutory Declarations Act. This regarded the manner of taking the evidence of a child of tender years. She conceded that the court ruled that PW1 would give sworn statement although this did not happen. The same case applied to PW2 but that both witnesses were cross examined by the defence to test the veracity of their evidence. As such, no prejudice was occasioned to the Appellant. She submitted that it was cognizant that the court heavily relied on the evidence of PW1 which was found credible in accordance with the proviso to Section 124 of the Evidence Act. On sentence, she submitted that the same was legal and proper. She urged the court to dismiss the appeal and uphold the conviction and sentence of the trial court.

7. In highlighting submissions, counsel for both parties reiterated the issues they had set out in the written submissions. I shall not therefore duplicate the oral submissions.

Determination.

8. I have accordingly considered the evidence on record and the respective rival submissions. I shall reevaluate the evidence on record before arriving at an independent finding. I will first consider whether a proper *voire dire* examination was conducted, which, if it was not, vitiated the entire trial. The purpose of the examination as provided under Section 19(1) of the Oaths and Statutory Declarations Act, Cap 19, Laws of Kenya is so that the court can satisfy itself that the child understands the nature of an oath and the essence of reception of an oath on the one hand and of speaking the truth on the other hand. The examination in the instant case was carried out as follows:

"PW.1 O.N

I am 13 years old

Question: What is your name?

Answer: O. N

Question: How old are you?

Answer: 13 years old.

Question: Where do you go to school?

Answer:[redacted]

Question: In what class are you?

Answer: Standard 7.

Question: What is the name of your mother?

Answer: [redacted]

Question: What is the name of your dad?

Answer: I do not have

Question: Do you go to church?

Answer: Yes I do. [name of church redacted]

Question: Do you go to church everyday?

Answer: I do.

Question: Are you told to say the truth or lies in Church?

Answer: The truth.

Question: If you do not say the truth what will happen?

Answer: We will go to Satan.

Question: Do you know the importance of speaking the truth.

Answer: Yes.

Question: At school and home you are told the consequences if not telling the truth is?

Answer: You are a child of Satan.

Court: Vire dire examination conducted on the witness.

The court finds that the witness is possessed of sufficient intelligence to testify and thus will give sworn evidence and understands the nature of an oath.”

9. The requirements were expounded in the case of **Nyasani s/o Bichana v. Regina[1958] EA 190** in the following words:

“It is clearly the duty of the court under that section to ascertain, first, whether a child tendered as a witness understands the nature of an oath, and, if the finding on this question is in the negative, to satisfy itself that the child

“is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.”

This is a condition precedent to the proper reception of unsworn evidence from a child, and it should appear upon the face of the record that there was due compliance with the section.”

10. From the excerpt of the proceedings, it is clear that the examination fell short of what constitutes a proper *voire dire* examination under Section 19 of the Oaths and Statutory Declarations Act. The court did not seek or establish whether the complainant, PW1, understood the nature of an oath. This notwithstanding, the court went ahead and made a ruling that she understood the meaning of an oath and would accordingly give a sworn statement of evidence. That conclusion was not based on the examination conducted. The error was compounded by the failure to swear the witness.

11. I am in agreement that although Section 151 of the Criminal Procedure accords exception to Section 19(1) of the Oaths and Statutory Declarations Act, the failure to accord with the latter entirely vitiated the trial. The situation was even exacerbated by the failure to swear PW2 who was an adult (although in typed proceedings it is indicated she was sworn). I conclude that Section 151 was not complied with. Ultimately, the Appellant’s right to a fair trial was violated.

12. In view of the foregoing, the court has the option of either ordering a retrial or setting the Appellant free. It is now settled law that some of the factors to be considered in ordering a retrial are whether a retrial is likely to result in a conviction, whether any prejudice would be occasioned to the Appellant, the retrial should not aid the prosecution to fill up gaps in their case and whether the interests of justice will be served. See **Mwangi v Republic (1983) KLR, 522, Ekimat v Republic (2005),1 KLR, 1982.**

13. I have considered the admissible and potentially admissible evidence and it is clear that the Appellant contends that there were inconsistencies in the evidence which watered it down. Briefly, the prosecution’s case was that the complainant was at home asleep where the Appellant, her step-father, was also staying. That in the middle of the night he got her from her bed and took her to the sofa set where he proceeded to defile her.

14. I concur that inconsistencies with the complainant’s evidence vis a vis the medical evidence existed. The medical practitioners who had examined the complainant, PW3, PW5 & PW6, testified that the hymenal tears were old and could not have been occasioned on 5th May, 2012. They also did not find injuries on the complainant’s genital organs. This flows counter to the complainant’s evidence that she bled subsequent to the defilement which would be occasioned either by a hymenal tear or injuries to the genital organs. The two examinations carried out on 5th May, 2012 had very deferring results. PW5 testified that a speculum examination at around 9.00-11.00 a.m. found that PW1 had semen. When she was examined on the same day at Nairobi Women’s Hospital no discharge was found and a swab from her vagina only indicated the presence of pus cells.

15. Another contradiction related to where the offence occurred. According to the complainant the Appellant grabbed her from her bed and put her on the sofa where he proceeded to defile her. However, the evidence of PW2 was that there was no sofa set but plastic chairs in the house. PW4, the investigating officer, when re-examined testified that although the complainant told her that she was defiled on the sofa set when she asked to go and see it she was informed by PW1 that there was no sofa. When she asked PW1’s mother she informed her that the sofa set had been taken away before the defilement. That that is when PW1 changed the narrative and said that she was referring to the plastic chairs as a sofa set. Though the court is cognizant that a child may confuse a chair for sofa set, the age of PW1 exonerates her from this bracket. I conclude that this inconsistency was major and heavily weakened the prosecution case.

16. The court also found inconsistencies surrounding when PW2 found out that PW1 was defiled. PW2 informed the court that her daughter did not disclose what had happened when she called her and that when she arrived back from Meru she finally opened up and informed her that she had been defiled by her father which according to PW2 led to a huge fight that made her leave the house. This was contrary to the evidence of PW5 who testified that the complainant was brought to the hospital by two women who suspected that she had been defiled. That the girl was denying this fact but after she was counseled and a speculum examination conducted which disclosed the presence of semen she

agreed that she had been defiled by her father. This evidence flew in the face of the complainant and her mother's evidence regarding the disclosure. It must be noted that the complainant and her mother did not report the matter at Githurai Kimbo Police Station that was located close to their residence but at Kasarani Police Station that was located a huge distance from their house. It begs questions whether PW1 and 2 were merely out to fetch fabricated evidence to settle personal differences with the Appellant.

17. No doubt, this is a case unlikely to result in a conviction if a retrial is ordered. And even if a conviction were to be sustained it would be the result of the prosecution being accorded an opportunity to fill up gaps in their case. This would be prejudicial to the Appellant and fetters serving the interests of justice. I accordingly quash the conviction, set aside the sentence and orders that the Appellant be forthwith set free unless otherwise lawfully held. It is so ordered.

DATED and DELIVERED this 17th day of **April, 2018**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Amutalla for the Appellant.
2. Miss Sigei for the Respondent.