



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**HCCRA NO. 109 OF 2015**

**SA .....APPELLANT**

**V E R S U S**

**REPUBLIC.....RESPONDENT**

*( from the original conviction and sentence by F. Makoyo, Rm, in Kakamega CMC's S.O. Case No. 18 of 2015 dated 25/9/2015)*

**J U D G M E N T**

1. The appellant herein was convicted of the offence defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve a jail term of 20 years. He was aggrieved by the conviction and the sentence and hence filed this appeal.

2. The particulars of the charge against the appellant were that on the 27<sup>th</sup> February ,2015 in Kakamega East District within Kakamega County he intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of CK ( herein referred to as the complainant). a girl aged 12 years.

3. The appellant attacks the judgment of the lower court on the grounds that he was not positively identified as the perpetrator of the offence; that the trial court relied on contradictory evidence to convict him and that the medical evidence adduced against him was from Shinyalu Health Centre while the complainant alleged that she was treated at Kakamega County Hospital.

4. The appeal was opposed by the state.

**The prosecution Case**

5. The prosecution case was that the complainant ( PW1 in the case) was living with her grandmother PW2. That the appellant is a grandson to PW2. He and his wife had been living in the same compound with PW2 but had moved out because of bad blood between him and PW2.

6. That on the material day at 11 pm the complainant and some other children were sleeping in the Kitchen of her grandmother's house. Her grandmother was sleeping in a nearby house. A person entered into the house where the complainant was sleeping through the window, tied a lesa around the complainant's eyes and a rope around her neck. The person carried her out of the house into a banana plantation. When they reached there he asked for a knife. The complainant told him that she had not taken his knife. The person proceeded to remove her clothes. He defiled her. She tried to cry out but he grabbed her neck and threatened to beat her. When he finished with her, he let her go. She walked back home crying. Her grandmother came out of her house. She told her what had happened. Her grandmother screamed. Villages responded. The complainant was on the same night taken to Shinyalu Health Centre. She was examined by a Clinical Officer PW3 who found her bleeding from the vagina which had tears. The hymen was absent. The Clinical Officer referred her to Kakamega County Hospital.

7. The complainant's grandmother took her to Shinyalu Police Station where they reported the incident. They then went to Kakamega County Hospital.

8. It was the evidence of the complainant that she had identified the person who had defiled her as the appellant. PC Okiru PW4 of Shinyalu Police Station investigated the case. He issued a P3 form to the complainant. It was later on the 3/3/15 completed by the Clinical Officer PW3 who also completed a Post Rape Care Form. At that time the clinical officer noted that the tears on the vagina had been stitched. PC Okiru recovered a rope and the complainant's dress. He took the complainant's birth certificate that indicated that she was aged 12 years. On the 4/3/15, the appellant was arrested. He was charged with the offence. He denied it. During the hearing PC Okiru produced the birth certificate, the rope and the dress as exhibits, Ex 4-6 respectively. The Clinical Officer PW3 produced the treatment notes, the P3 form and the Post Rape Care Form as exhibits – Ex 1-3 respectively.

9. The grandmother to the complainant stated that the cause of her bad blood with the appellant was that he used to steal her chicken. That a week before the incident the appellant had sent threats to her for alleging that he had stolen from her.

## Defence Case

10. When placed to his defence the appellant gave sworn evidence. He stated that PW2 is his grandmother. That he left her home in January 2015 and went to live in a rental house at Makacha . That on the 2/3/15 he was arrested by a village elder and taken to the Ap camp. He did not know why he was arrested. He was then taken to the Police Station where he found PW1 and PW2 . He was locked up. He was taken to hospital for examination.

The appellant said that he has never returned to the home of PW2 since the time that he left. He said that the charges are framed up due to the disagreement with his grandmother.

## Submissions

11. The appellant made written submissions. He contended that the evidence of the prosecution witnesses was inconsistent, unreliable and contradictory. That there was no evidence of identification. That the voice identification was not reliable. He urged the court to acquit him.

12. The prosecution counsel, **Mr. Ng'etich** on his part submitted that the complainant knew the appellant as a relative. That she could not have erred in identifying him. That penetration on the complainant was proved by the evidence of the Clinical Officer to the effect that the complainant had tears on the vagina. That the age of the complainant was proved by PW2. Further that the trial magistrate considered the defence of the appellant and cautioned himself before convicting the appellant. That the charge was proved beyond reasonable doubt and should be dismissed.

## ANALYSIS AND DETERMINATION

13. This is a first appeal. The duty of an appellate court was set out in the case of **Okeno Vs Republic(1972) E.A as page 36 where the court of Appeal said that :**

***“ An appellant on a first appeal is entitled to expect 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 magistrate’s findings should 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 witness.”***

14. The complainant testified in the lower court that she was aged 12 years. Her grandmother PW2 was not asked about her age. The age indicated in part I of the P3 form is 12 years. The estimated age indicated in Part 11(C) of the P3 form is 12 years. The Clinical Officer PW3 testified that the complainant and her grandmother told him that the girl was aged 12 years.

15. The age of a person can be proved by both documentary and oral evidence as was held by the Court of Appeal in **E dwin Nyambaso Onsongo Vs Republic (2016) eKLR** cited in the case of **Mwolongo Chichoro Mwanyembe Vs Republic , Mombasa Criminal Appeal NO. 24 of 2015) ( UR)** 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 think 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.”***

In **Maripett Loonkomok Vs Republic (2016) eKLR** the Court of Appeal held that the age of a child can even be proved by a child of a certain age. Said the court:

***“We can only reiterate what has been said before that at a certain age and in this day a child of a certain age bracket is able to give his/her age accurately...”***

16. A birth certificate was produced in this case. The birth certificate was however procured after the incident had taken place. The document indicated that the complainant was born on 7/10/2002. This corresponded with the evidence that was already before court that the complainant was aged 12 years at the time that the offence was committed. The complainant was a child big enough to know her age. She was in class 5. Such a child is mature enough to know her age. The prosecution did thereby prove that the complainant was aged 12 years at the time the offence was committed.

17. There was no doubt from the evidence adduced before the lower that the complainant was defiled on the evening of 27<sup>th</sup> February 2015. The complainant was examined by a Clinical Officer PW3 at Shinyalu Health Centre who found her with tears on the vagina. The medical findings corroborated the evidence of the complainant that she indeed had been defiled. The question that was before the court was whether the appellant was the perpetrator of the offence.

18. The complainant testified that her grandmother’s chicken had been stolen from their home. An accusing finger was pointed at the appellant. The appellant then sent a word to them on two occasions that he will do something bad to them.

19. It was the evidence of the complainant that the person who attacked her got access into the house by breaking the window. In her

evidence- in- chief she had stated that she had identified the person who had attacked her as the appellant as she had seen his face. However when cross- examined by the appellant she stated that she did not hear the person breaking into the house. She said that she did not see the person before the person tied a lesa around her eyes. She said that she identified the person as the appellant as she recognized his voice.

20. The issue then was whether the complainant had recognized the voice as that of the appellant. The grandmother to the complainant PW2 told the court that the complainant first mentioned the appellant as the person who had defiled her when they went to report the matter at Shinyalu Police Station.

21. Before a court convicts on the evidence of identification, it has to be satisfied that the evidence is free from the possibility of error. The trial magistrate in this case was aware of that as he stated the following in his judgment.

***“ Our case law calls for caution in receiving identification evidence because of the grave possibility of a miscarriage of justice occasioned by misidentification.”***

The trial magistrate then referred to the holdings in **Roria Vs Republic 1967 E.A 583** , **Kiarie VS Republic** and **Charles Maitanyi Vs Republic ( 1986) 1KLR 198** for guidance on the evidence of identification.

22. In **Wamunga Vs Republic (1989) KLR** the Court of Appeal held the following on the evidence of identification.

***“ It is trite law that where the only evidence against a defendant is evidence of identify of recognition , a trial court is enjoined to examine such evidence carefully and be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of conviction”.***

23. In **Lesarau Vs Republic ( 1988) KLR 783** , the same court cautioned that even where identification is based on recognition by reason of long acquaintance, the court should be wary of the possibility of mistaken identity. The court in the case referred to the English case of **R Vs Turnbull ( 1976) 3 A11 ER 551** where Lord Widgery C.J observed that :-

***“ recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows , the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”***

24. The evidence in the case also touched on identification by a single witness. Before the court convicts on such evidence it is required to warn itself of the dangers of relying on such evidence as mistakes can be made. In **Roria vs Republic (supra)** , the court of Appeal held that:

***“ A conviction resting entirely on identity invariably causes a degree of uneasiness .. That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification ... a witness may be honest yet mistaken.”***

25. The trial court herein considered the evidence on voice identification and cited the law as stated in the case of **Karani Vs Republic ( 1985) KLR** and restated in **Libambula Vs Republic (2003) KLR 683** where the Court of Appeal held that :

***“Normally, evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person’s voice, the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it. See Choge Vs Republic 1KLR 985***

The learned trial magistrate then concluded:

***In the instant case, it was not in dispute that the accused was the complainant’s cousin. They were, in fact, at some time lived within the same compound. In his defence the accused claims to have been living there up to about a month before the incident. This was someone very well known to her and it is therefore safe to say that the complainant’s identification of the accused person’s voice is free from error.***

26. The trial magistrate therefore convicted the appellant on the basis of voice recognition because the appellant was a person well known to the complainant and that there was no possibility of the complainant mistaking the appellant’s voice. The question then is whether the trial magistrate was correct in arriving at such a conclusion.

27. The Court of Appeal in **Wambua Muthoka Vs Republic (2017) eKLR** stated that the caution that is in built in the principles set out in **Karani Vs Republic (Supra)** are “depending on the circumstances”. The court ought to therefore examine the circumstances and see whether the evidence of voice identification carries any weight.

28. The complainant did not state in her evidence whether the person who had attacked her told her anything else apart from asking her where the knife was. If those were the only single words uttered by the attacker, it means that the attacker was hiding his identify from the complainant. Were these very few words sufficient evidence on which the court could form the basis that the complainant had identified the attacker’s voice as that of the appellant? The trial court did not enquire whether there were other words uttered by the attacker. The

complainant had been blind folded and a rope placed around her neck. Her grandmother said that the complainant did not mention the name of the attacker until when they reached the police station during which time she had regained her composure. This indicated that the complainant was traumatized by the attack. Was she then in a position to identify the attacker's voice in the circumstances of the attack?

29. I am of the considered view that the evidence of voice identification was insufficient. That the witness did not tell her grandmother immediately who the attacker was weakens the evidence of the complainant that she had identified the attacker. The evidence of voice identification was therefore not free from the possibility of error. It has to be noted that there was bad blood between the complainant and her grandmother on the one hand and the appellant on the other. This might have led to the complainant mistakenly concluding that the attacker was the appellant.

30. There was no other evidence, circumstantial or otherwise to support the evidence of voice identification. There was danger in relying on the evidence of single identifying witness to convict the appellant. The appellant might have been convicted on mistaken identity. The case was therefore not proved beyond all reasonable doubt.

31. In the foregoing, I have come to the conclusion that the appellant was convicted on insufficient evidence. The conviction is accordingly quashed and the sentence set aside. I order the appellant to be set at liberty forthwith unless lawfully held.

**Delivered, dated and signed at Kakamega 26<sup>th</sup> this day of July, 2018**

**J.NJAGI**

**JUDGE**

In the presence of :

Appellant .....Appearing in person

Juma .....for respondent

George.....court assistant

14 days Right of Appeal.