REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 37 OF 2017

ISMAEL MOKOBE MUMBI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the conviction and sentence by Hon. M. A. Opanga (SRM) delivered on 30th June, 2015)

JUDGEMENT

1. The Appellant was convicted of the offence of sexual assault contrary to section 5 (1) (a) (ii) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve ten (10) years imprisonment. He also faced an alternative charge of Indecent Act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.

2. He filed this appeal challenging the conviction and sentence and filed grounds of appeal on 7th April, 2017 as follows:

i. That the learned trial magistrate erred in law and facts by invoking section 31 (2) of the Sexual Offences Act No. 3 of 2006 and the proper guidelines contained in section 31 of the Sexual Offences Act were not followed.

ii. That the learned trial magistrate violated the rights of the appellant to a fair trial as enshrined in Article 50 of the Constitution and as supported by Article 25 (c) of the Constitution of Kenya 2010.

iii. That the trial magistrate erred in law and fact by shifting the burden of proof to the appellant contrary to laid down rules.

iv. That the trial magistrate erred in law by basing his conviction on weak and uncorroborated prosecution evidence.

3. The prosecution called three witnesses whose evidence was in brief as follows. On 19th December, 2014, J.K.K. heard her mother PWK (PW1) suggest that a padlock which had got spoilt be taken to the appellant for repair. She then informed PW.1 what happened the previous day. She told her that she had gone to a nearby hotel where she was given tea. On her way back, the appellant whose house was adjacent to PW1's called and ushered her into his house. He touched her breasts, lifted up her dress, removed her pant and inserted his fingers into her vagina. The appellant told her not to cry and that he would buy her sweets and fish. PW1 reported the matter to the police occasioning the appellant's arrest. J.K.K. was taken to Kivaa Health Centre where a p3 form was filled. PW1 produced J.K.K.'s birth certificate as P. Exhibit 1. On cross examination, PW1 denied owing the appellant anything.

4. Police Constable Isaack Nyakundi (PW2) interrogated J.K.K. who informed him that the appellant called her to his house, removed her pant and inserted his finger inside her vagina. That he first touched her breast and went further to remove her pant before inserting his finger inside her vagina. PW2 then escorted J.K.K. to hospital for examination. On cross examination, he stated that J.K.K. identified the appellant as the culprit.

5. Jeremy Ireri Njeru (PW3) a Clinical Officer at Kivaa Health Centre examined J.K.K. on 20th December, 2014. He found that she had a urinary tract infection but stated that it was hard to establish whether she was penetrated using a penis or finger. He confirmed that her hymen was broken. She had whitish discharge. HIV test was done and the result was negative. He filled the p3 form which he produced as P. Exhibit 2 and the laboratory tests as P. Exhibit 3. On cross examination, PW3 stated that J.K.K's labia minora and majora were normal.

6. The appellant's evidence on defence was that on 18th December, 2014 he went to repair a certain man's car locks until 1.00 O'clock when he went to the Mosque for prayers. He left the Mosque at 2.00 pm and went for lunch at his house and later returned to work until 5.30 pm. He was later called by the said man to go and affix the alternator. There he worked until 7.00 pm after which he went to worship. The next day he went to work as usual and was arrested at around 11.00 pm. He was taken to Kivaa Dispensary where his urine was tested.

7. It was the appellant's submission that the trial magistrate misdirected himself by invoking subsection 2 of section 31 Sexual Offences Act without pronouncing himself on subsection 4 and 5. That the appellant was thereby prejudiced by the trial magistrate allowing PW1 to testify. The appellant further argued that his Constitutional right to fair trial was infringed since J.K.K.'s evidence on what transpired was not taken and her evidence was not tested as required in a criminal trial. That by allowing PW1 to testify without an intermediary, her evidence was mere hearsay and the appellant's rights under Article 50 (2) (k) and 25 (c) was infringed. It was submitted that even in the event that PW1 was an intermediary, her evidence ought to have been corroborated which he submitted was not the case. In support of his argument, the appellant cited **Simon Ndichu Kahoro v. Republic [2016] eKLR**.

8. The appellant submitted that the burden of proof lies on the prosecution and does not shift to the appellant. That he had no duty to call any witness rather it was the prosecution's duty to prove the case beyond reasonable doubt and stated that the offence against him was not proved to the required standard.

9. The prosecution on the other hand submitted that the evidence of the intermediary PW1's was corroborated by PW2's evidence who interrogated J.K.K. That J.K.K. ably identified the appellant as the person who assaulted her since he was well known to her and her evidence was corroborated by PW3. It was submitted that section 31 of the Sexual Offences Act permits the use of intermediary to convey testimony of a vulnerable witness. The case of **M.M. v. Republic NRD CA Criminal Appeal No. 41 of 2013 [2014] eKLR** was cited in support of the argument thereof. That after voire dire examination was conducted, the learned magistrate considered that this was a proper case where an intermediary was appropriate and that there was no error in the procedure adopted. It was contended that the appellant's right under Article 50 of the Constitution was not infringed since after the intermediary testified, the appellant was granted an opportunity to cross examine her which he did. It was submitted that in determining whether the prosecution have discharged their burden of proof, the trial court will have to evaluate the entire evidence after the accused has not offered any evidence to determine whether the case has been proved to the standard before entering such judgment or conviction on the evidence. That the right to presumption of innocence or to remain silent in criminal trials is therefore not infringed and further the burden of proof was never shifted to the appellant.

10. This is a first appeal. This court is thereby under duty to analyze and consider the evidence afresh with a view of arriving at its own independent conclusion bearing in mind also that it did not have the chance to see the demeanor of the witnesses. I find that the issues this court is to determine are whether or not the trial magistrate erred in invoking section 31 (2) of the Sexual Offences Act and infringed on the appellant's right under Article 50 and 25 (c) of the Constitution, whether or not the trial magistrate shifted the burden of proof to the appellant and whether or not he was convicted on uncorroborated evidence.

11. Addressing the issues seriatim, an assessment of the record reveal that the trial magistrate conducted voire dire examination. The same was recorded and an opinion formed that J.K.K. was a vulnerable witness. The statutory provision for an intermediary is Article 50 (7) of the Constitution and the same constitutes a right to fair trial. The same provides:

> **"(7) In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court."**

Section 31 (2) of the Sexual Offences Act provides that:

> **(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 –**
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> ***(a)* age;**
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> ***(b)* intellectual, psychological or physical impairment;**
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> ***(c)* trauma;**
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> ***(d)* cultural differences;**
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> ***(e)* the possibility of intimidation;**
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> ***(f)* race;**
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> ***(g)* religion**
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> ***(h)* language**
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> ***(i)* the relationship of the witness to any party to the proceedings;**
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> ***(j)* the nature of the subject matter of the evidence; or**
>
> ***(k)* any other factor the court considers relevant."**

The trial magistrate's opinion was informed by the trial magistrate's observation of J.K.K. and consideration of her age being 5 years old. It is upon the said consideration that the trial magistrate ordered that PW1 testify on her behalf.

Section 2 of the Sexual offences Act, defines an intermediary to mean:

> **"...a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counselor, guardian, children's officer or social worker."**

Bearing the above provisions, it is my considered view that the trial magistrate did not err in invoking section 31 (2) of the Sexual Offences Act and no prejudice can be claimed for allowing PW1 to testify.

12. The last two issues shall be addressed together. It emerged from the prosecution evidence that the appellant inserted his fingers into J.K.K.'s vagina. PW3 confirmed her hymen to be broken and that she had an infection. In my view, PW1's evidence is to that extent corroborated by PW3. The appellant however stated that he was at the time of the incident away at work and at some intervals visited the mosque for prayers. Weighing the appellant's evidence and that of the prosecution, I find the appellant's evidence not to be credible particularly bearing in mind that J.K.K. knew him as a neighbour and mentioned to PW1 the moment she heard the appellant's name being mentioned. The trial magistrate weighed the prosecution evidence and that of the appellant and found that the evidence of the appellant not to hold water. In the circumstances, I find that the trial magistrate did not shift the burden of proof to the appellant rather he weighed the evidence on record and found that the prosecution evidence to be corroborated. It also transpired from the evidence presented by the prosecution that there was no grudge between the Appellant and the Complainant's parents so as to suggest a frame up. It is highly unlikely that the mother of the complainant would use her young daughter as a victim of sexual assault to get at the accused with whom they had no differences before since they had lived as neighbours prior to the incident. I am satisfied that the trial court properly convicted the Appellant and that his alibi evidence did not shake that of the prosecution which was quite overwhelming against him. The sentence imposed upon the Appellant was the minimum possible under Section 5(1) (a) (ii) of the Sexual Offences Act No.3 of 2006.

13. In the end, I find no merit in this appeal and it is hereby dismissed and I accordingly uphold the conviction and sentence of the trial court.

Orders accordingly.

Dated and Delivered at Machakos this 15th day of August,2018.

D. K. KEMEI

JUDGE

In the presence of:-

Ismael Mokobe Mumbi - the appellant

Miruka for Gikonyo - for the Respondent

Josephine- Court Assistant