



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAROK
CRIMINAL APPEAL NO. 13 OF 2017

[From the original conviction and sentence in Criminal Case No. 961 of 2014 of the Chief Magistrate's Court at Narok, R. v. Gerrison Maina Miriu]

GERISSON MAINA MIRIUAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of life imprisonment in respect of the offence of defilement of a girl aged 6 years contrary to section 11 (1) (2) of the Sexual Offences Act No. 3 of 2006.
2. The State has supported both the conviction and sentence.
3. The appellant was convicted on the evidence of a single witness namely the complainant (PW 1). She was allowed to make an unsworn statement after the court found that she was incapable of giving sworn evidence following a *voire dire* examination. The complainant was subjected to a 2nd *voire dire* examination by the court on 21/9/2015. The result of the 2nd *voire dire* examination was that the trial court found her capable of giving sworn evidence. The 2nd *voire dire* examination was done after she was recalled by the trial court and was done in the chambers of the trial court.
4. The appellant has raised 5 grounds in his petition of appeal to this court. In ground 1, the appellant has faulted the trial court both in law and fact for convicting him on the evidence of a single identifying witness namely the complainant, which identification he states was not positive. The evidence of the complainant in this regard was that, she was with her brother V M and they were sleeping at the material time. The time was 7 p.m. She also testified that her mother had gone to look for money to buy potatoes. As they were sleeping, the appellant whom she had known before entered the room in which they were sleeping through the unlocked door. It was also her evidence that in that room there was a source of lighting at that material time from a wicker lamp. She further testified that the appellant went over to her and carried her out of that room while still her eyes were closed.
5. The appellant carried the complainant on his back up to the compound of a primary school which was nearby. When they reached the school, the complainant was awake. The appellant then put her on the ground and then removed her pant. Thereafter: *"he did bad manners to me. Then he used his thing that he urinates with to insert into my anus. He was on top of me as he inserted his male organ into my anus. I felt pain to the anus. I screamed. He put his fingers into my mouth to stop me from further screaming. He then left me there and went away walking."*

6. Furthermore, the complainant went on to testify that Mama Elijah found her at that primary school. This mama Elijah cooks food and is a cleaner in that school. She picked her and took her to the hospital. It was also her evidence that she told Mama Elijah what had happened to her. And from the hospital, they went to the police station. While under cross-examination, she told the court that what she had testified to is what her grandmother told her to tell the court. She further testified that her grandmother told her to tell the court that it is the appellant who removed her from their house. She further testified under cross-examination that her grandmother did not tell her what to tell the court. She went further to testify that she saw the appellant at their home when he picked her. Additionally, she also testified that she did not see the appellant because she was asleep.

7. Finally, the complainant testified that she was taken to the school where Mama Elijah found her. She added that Mama Elijah in company of her mother found her there. She continued to testify that she saw the appellant after the appellant had woken her up from her sleep.

8. The complainant was examined by Hillary Kiptoo (PW 2), who was a clinical officer attached to Narok District Hospital. PW 2 is not the one who medically examined the complainant, the actual examination was done by Edwin Kiprotich, who was a fellow clinical officer. PW2 came to testify in place of Edwin Kiprotich because he knew his handwriting and signature. He read the report of Edwin Kiprotich. The report was put in evidence as exhibit P exb 1. Laboratory test results were put in evidence as exhibit P exb 2. According to that report, the clothes of the complainant were bloodstained. She looked sickly, confused and quite depressed. Her lower abdomen was painful. She had difficulty in walking and walked with legs apart. Her private parts were examined. The clinical officer noted bruises and a torn hymen. The girl's vulva was swollen, painful laceration and had cuts. The anus was ruptured and there was bleeding from her private parts with white pus seen. An HIV and syphilis tests showed negative. This report confirmed that the 6 years old girl was defiled.

9. There was further evidence from No. 92756 PC (woman) Juliet Ruto (PW4) who took over as the 2nd investigating officer on behalf of PC Lydia Wanja, who had been transferred from Narok Police station and was on the material time on leave. According to the evidence of PW4, the complainant was found abandoned a day after she went missing from their home. The complainant also named her offender. It was also the evidence of PW4 that the appellant had earlier on been at the home of the complainant. The mother of the complainant (PW4, CIC) testified that the appellant had gone to her home at about 3 pm carrying mandazi and some sweets and he looked drunk. He then gave her daughter, the complainant, the mandazi and sweets. In response she rebuked him and was forced to take back the mandazi and sweets and told to go away. At about 7 p.m. the complainant's mother went to look for money and thereafter returned back to her house. Upon her return, she discovered that the complainant was not there. She also discovered that her hoe, which she usually kept under the bed was also missing. She suspected that her daughter had been kidnapped. She then raised an alarm and members of the public came to her residence. The following day, while walking away from the police station, she met Mama Veronica carrying the complainant on her back. The complainant could not walk. Mama Veronica then told the mother of the complainant that it was Mr. Kerian, the teacher, who had found her daughter.

10. Furthermore, she talked to her daughter who then told her that it was the man who had come with mandazi and sweets that had carried her away from her bed and he did bad manners to her. The mother then realized that it was Maina, now the appellant, who had given her daughter the mandazi and sweets. She further testified that when she left her house, she left the wicker lamp on. She also testified that the complainant was taking tea with her brother V M. She confirmed not having locked the door from outside. Finally, she testified that her missing hoe was recovered from the house of the appellant, although the person who recovered it is not a witness. She concluded her evidence that she had never quarrelled with the appellant and that she did not participate in the recovery of her lost hoe.

11. Furthermore, there was evidence of D S M (PW5). PW5 testified that he knew the complainant as the daughter of one of his casual labourers. He further testified that acting on information while on his way to the market he organized for the safety of the appellant, who had been arrested by members of the public and taken to Ndorobo market, by a crowd of violent civilians. He went there and restrained them. He then calmed them until the police and the chief arrived, who then arrested the appellant for allegedly

defiling the complainant.

12. Upon being put on his defence, the appellant made an unsworn statement. He stated that on 30/5/2014, he woke up and went to work on his farm. In the process of working on his farm, civilians approached him and accused him of raping a small girl, which he denied. They demanded that he accompanies them to the scene of the crime and proceeded to that scene. Upon arrival, they did not find the complainant, because she had been taken to hospital. Apparently, while at the scene, members of the public wanted to beat him but a male civilian intervened and was rescued, before the police arrived and arrested him. Furthermore, he testified that the complainant was coached by her mother to accuse him falsely. Finally, he testified that the school teacher and Mama Veronica did not come to testify in court.

13. The appellant has raised 5 grounds in his petition of appeal to this court. In ground 1, he has faulted the trial court for convicting him on the evidence of a single identifying witness, when the circumstances favouring identification were unfavorable. In this regard, the complainant (PW1) testified that she was able to recognize the appellant through light from the wicker lamp. She further testified that she was asleep with his brother V M. She further testified that she was asleep when the appellant carried her out of their room. She also testified that her eyes were closed. I find from this evidence that the source of light was not strong. This is clear from the evidence of complainant under cross-examination. In this regard she stated under cross-examination that she did not see the appellant because she was asleep.

14. Furthermore, she testified under cross-examination that her grandmother told her what to tell the court. She contradicted herself by testifying that she did not know what her grandmother told her to tell the court. She further testified that her grandmother told her that it was the appellant who removed her from the house. Furthermore, she testified that her grandmother did not say anything else. She went further to testify that her grandmother did not teach her what to say. In the light of this evidence, I find that the visual recognition of the appellant by PW1 was not positive. I further find that the evidence of the complainant is not corroborated by any other evidence. I further find that the complainant appears to have been coached by her grandmother on what to tell the court. In the circumstances, I find that there is merit in this ground of appeal which I uphold.

15. In ground 3, the appellant has faulted the trial court both in law and fact for convicting him in the absence of essential witnesses, who were not brought to court to testify. In this regard, I find that PW1 was with her brother V M, when she was taken away from their house. V M was not called as a witness. There are no reasons given as to why he was not called as a witness. This was a material witness. Furthermore, there is another potential witness, Mama Elijah, who cooks food and was a cleaner at the school where the complainant was abandoned. It is this Mama Elijah who took her to hospital. Additionally, it is this Mama Elijah who the complainant told what had happened to her before being taken to hospital. For unknown reasons, this Mama Elijah was not called to testify.

16. Furthermore, there is evidence from the mother of the complainant (PW4) that her hoe which she kept under her bed was stolen. Surprisingly, the person who recovered this hoe was not called to testify. This was equally an essential witness, who could have provided corroborative evidence in respect of that of visual recognition of the appellant by the complainant. There is yet another witness by the name Mr. Karian who was a teacher, who had found the complainant in that school. Again this witness was not called as a witness. There are no reasons on record as to why this essential witness was not called. In terms of section 150 of the Criminal Procedure Code (Cap. 75), Laws of Kenya, the court is entitled to call a witness on its own motion, if the evidence of that witness appears essential to the just decision of the case. The trial court did not exercise its discretion to call these essential witnesses to testify. This was a proper and fit case in which the trial court should have exercised its discretion to call these essential witnesses.

17. In the light of the foregoing evidence, I find there is merit in this ground of appeal which I also uphold.

18. The law in respect of calling witnesses according to *Bukenya v. Uganda (1972) E. A 549* requires the prosecution to make available all witnesses to establish the truth even if their evidence is inconsistent. In

this regard I find that the prosecution failed in his duty to call the essential witnesses whose evidence was necessary to prove the charge against the appellant. It is troubling that this was not done in view of the grave injuries sustained by the complainant.

19. It is important to point out that in her recalled evidence the complainant materially contradicted herself by testifying that the appellant used a fork to open the door and thereafter he carried her away. The evidence of the mother in this regard is that she did not lock the door from outside. It is equally important to point out that the witness statement of the complainant was read to her. It was then followed by what she told the court. In terms, it is recorded as follows: *“Pros- May the interpreter read out page 1 line 12 of her statement (done)*

T. A. SITATI SRM

I said that the room had lighting from a wicker lamp. (page 1 line 12 states that there was lighting from a wicker lamp – “kanyiritira”) he had a jacket on and I know him well.”

This passage clearly shows that the complainant told the court what the interpreter had read out to her. This is also improper and this is not the way the evidence of a witness is taken in chief. Leading questions were put to the complainant, when in law, it is the accused or his advocate who is allowed to put leading questions to a witness under cross examination in terms of section 151 of the Evidence Act [Cap 80] Laws of Kenya.

20. In the light of the foregoing evidence, I find that the appellant’s appeal succeeds in respect of grounds 1 and 3. I therefore find it unnecessary to consider grounds 2, 4 and 5 of his petition.

21. The upshot of the foregoing is that the appellant’s appeal is hereby allowed. The conviction and sentence are hereby set aside. The appellant is hereby ordered released and set free unless otherwise held on other lawful warrants.

Judgement delivered in open court this 31st day of March, 2017 in the presence of Appellant and Mr. Mwangi for Respondent.

J. M. Bwonwonga

Judge

31/3/2017