REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 174 OF 2013

MICHAEL KARANJA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal

Magistrate's court at Githunguri in Cr. Case 506 of 2013 delivered

by Hon. B. M. Nzakyo Ag. PM, on 27th August, 2013).

JUDGMENT

Background

Michael Karanja alias Samson, was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. In the alternative he was charged with committing an indecent act with a child contrary to Section 11 of the Sexual Offences Act. The particulars of the main charge were that on 4th December, 2012 at [particulars withheld] in Githunguri District within Kiambu County, intentionally and unlawfully caused his penis to penetrate the vagina of SWN, a child aged 12 years.

The particulars of the alternative charge were that on 4th December, 2012 at [particulars withheld] in Githunguri District within Kiambu county, committed an indecent act with a female child namely SWN, aged 12, by intentionally and unlawfully touching the vagina of the said child with his penis against her will.

After the trial, the appellant was found guilty, convicted and sentenced to 20 years imprisonment. He was however dissatisfied with both the conviction and the sentence as a result of which he preferred this appeal. In his amended supplementary Grounds of Appeal filed on 13th March, 2017 on which he relied, he was dissatisfied that the case was not proved beyond a reasonable doubt, that the evidence of the complainant was not corroborated, that he was not furnished with prosecution witness statement and exhibit before the trial commenced, that the appellant was not properly identified, that his defence was not considered in the judgment and that the sentence was harsh and excessive in the circumstances.

Submissions

The appellant filed written submissions dated 13th March, 2017. In summary, he submitted that his right to a fair trial was contravened in that the prosecution failed to furnish him with witness statements as well as the exhibits they were relying on in their case. With regard to the exhibits, he stated that he was not provided with the P3 Form which was a crucial document in the case. He also faulted the fact that the hearing was rushed which did not give him ample time to prepare himself to mount a defence. According to him, he was arrested on 3rd June, 2013, he took plea on the following day 4th June, 2013 and the trial commenced on 5th July, 2013. He was of the view that a period of only one month since he took the plea before the trial commenced was too short and did not guarantee him a fair trial. Under this head, he also complained that the trial, especially the plea was taken in the English language which he did not understand.

On prove of the case, the appellant submitted that he was not properly identified and that his arrest and subsequent arraignment in court was based purely on circumstantial evidence and suspicion. Further, he faulted the fact that the evidence of the complainant was not corroborated thereby offending the provisions of Section 124 of the Evidence Act. He further submitted that the evidence of the complainant was contradictory and did not support the charge. He gave reference to the fact that the complainant testified that she was defiled on three different occasions whereas the charge stated that the defilement only took place on one day. Furthermore, penetration was not proved as the P3 Form which is a medical examination report was not part of the prosecution exhibit. Respectively, he submitted that the prosecution evidence was weak and could not be relied on to convict him. He emphasized the fact that the investigations were shoddy and shallow and did not crystalize a strong case against him.

The appellant went on to submit that the judgment of the learned trial magistrate did not conform to Section 169(2) of the Criminal Procedure Code. The same provides that the trial must give the reasons for the decision arrived at. Finally, the appellant submitted that the sentence passed against him was harsh and excessive in the circumstances. He was of the view that had the learned trial magistrate duly considered his mitigation and the circumstances of the case, he would have passed a more lenient sentence.

Learned State Counsel, Ms. Nyauncho opposed the appeal. She submitted that crucial elements of the offence of defilement were proved namely; identification of the Appellant, penetration and age of the victim. With regard to identification, counsel submitted that the appellant was well known to the complainant being an uncle and at the same time being employed as a house servant. He indeed warned the complainant of dire consequences if she revealed what had happened. The complainant kept mum until PW3, a matron in her school noticed that she suffered stool and urine incontinence. PW3 then escalated the matter to PW2, her uncle after which the matter was reported to the Police and the complainant taken to hospital. Medical examination did in fact show that the complainant had suffered a perforated hymen and had fungal discharge. Necessary medical report including a P3 Form was adduced in court. With regard to the age of the complainant, a Birth Certificate being Exhibit 1 was produced by PW6, the investigating Officer.

On sentence, Miss Nyauncho submitted that the same under the Sexual Offences Act is determined by the age of the victim. The victim's age having being proved at twelve years, meant that the sentence fell under Section 8(3) of the Act which provided for a mandatory sentence of not less than twenty years imprisonment. The sentence imposed was therefore legal. Counsel urged that the appeal be dismissed.

In rejoinder, the appellant conceded that he used to work at PW1's home as a servant. He thereafter changed employment after PW2, the uncle to the victim failed to pay his dues. When he demanded the payment, he implicated him with the offence.

Before I evaluate the evidence, I have noted that before the complainant (PW1) gave a sworn statement of defence without the court conducting a *voire dire* examination. Whereas it is not mandatory that this examination be conducted in respect of all children, it is a requirement for children of tender years. There has not been a clear definition of who a child of tender years is for purposes of a *voire dire* examination. But case law has attempted to define this bracket of children. Before I cite the case law, it is important to highlight the genesis of conducting the *voire dire* examination. The same is clearly spelt out under

Section 19(1) of the Oaths and Statutory Declarations Act which provides that:

> ***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 a 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; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that section.***

It is therefore a prerequisite requirement that before a child of tender years testifies the *voire dire* examination must be carried out. The rationale is to test whether the child understands the essence of taking an oath and of telling the truth. Once the court is satisfied that the child understands the meaning of taking the oath may direct that she or he testifies under oath. So then, who is a child of tender years? In the case of ***Kibangeny arap Kolil v. Reginum[1959] EA 92,*** *it was defined as:*

> ***"There is no definition in the Oaths and Statutory Declarations Ordinance of the expression "a child of tender years" for the purpose of section 19. But we take it to mean, in the absence of special circumstances, any child of an age or apparent age, of under 14 years; although as was stated by GODDARD C.J in R vs Campbell(1956) 2 All ER 272***
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> ***"Whether a child is of tender years is a matter of the good sense of the court."***

Whereas under Section 2 of the Children Act number 8 of 2001, a child of tender years is defined as "***a child under the age of 10 years***" for purposes of conducting a *voire dire* examination, courts have departed from this definition and seem to follow the observation in the Kibangeny case (ibid). Apart from the Kibangeny case, in the case of **Samuel Warui Karimi vs Republic (2016) eKLR** the court held as follows:

> ***"On our part, we have no good reason to depart from this well-trodden path, as we are in agreement the purpose of undertaking voire dire examination in a criminal trial is to protect the guaranteed right of a fair trial. Where the witness as in this case was aged 12 years and that essential step was not taken in a criminal trial, that trial becomes problematic."***

From the foregoing, it is clear that a voire dire examination ought to have been carried out on PW1 who was the complainant as she was aged twelve years. The record of proceedings clearly shows that the learned trial magistrate directly called her to give a sworn statement of evidence without first ascertaining that she was possessed of adequate intelligence to testify under oath or that she knew the essence of taking the oath and of telling the truth. The deviation from this mandatory requirement meant that the entire trial vitiated and rendered a nullity. Accordingly, only a retrial would cure the defect. But again, the court must be satisfied that if a retrial is ordered , the same would result in a conviction, would be in the interest of justice, would not prejudice the appellant and would not aid or enable the prosecution to fill gaps in its evidence. See the cases of **Ekimat vs Republic [2005] 1 KLR,1982** and **Opicho vs Republic [2009] KLR, 369**.

The prosecution called a total of six witnesses. Upon reevaluation of their evidence, it is clear that the appellant was properly identified having lived with the complainant and being their servant at home. It is also factual that the complainant failed to report the offence on time as the appellant had threatened her with death if she told anyone. The matter was picked up by PW3 the matron to the complainant after noticing that she had both stool and urine incontinence. Medical evidence adduced in court by PW5 was positive and confirmed that indeed there was penetration which was proof of defilement. The age of the complainant on the other hand was established by production of a Birth Certificate by PW6 the, Investigating officer.

I take into account that the offence of defilement is serious and a menace to the society. It is one that, not only the victim but her relatives and the public would wish is concluded in a just manner. The interest of justice would therefore be served if the matter is heard afresh. I do not think that any prejudice will be occasioned to the appellant if a retrial is ordered because the trial commenced on 4th June, 2013 when the Appellant took the plea and was concluded on 27th August 2013. It is only about three and a half years since the commencement of the trial and if convicted, the appellant will serve a minimum of twenty years imprisonment. On the part of the prosecution case, I agree that the complainant testified that she was defiled more than once. Amongst the dates that she was defiled was 4th December, 2012 which is reflected in the charge sheet. That discrepancy does not lessen the fact that she was defiled on 4th December, 2012 and that the perpetrator was the appellant himself. During the trial, the prosecution would be at liberty to include other dates as they deem fit.

In the result, the appeal partially succeeds. I quash the conviction, set aside the sentence and order that a retrial be conducted. The appellant shall be escorted to Githunguri Police Station not later than 28th April, 2017 for purposes of preparing him to take plea which shall be taken not later than 2nd May, 2017. It is so ordered

DATED AND DELIVERED THIS 20TH DAY OF APRIL, 2017

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. The Appellant in person.

2. Miss Aluda for the Respondent.