



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 9 OF 2017

HASSAN YARE OSMAN.....APPELLANT

VS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Garissa Chief Magistrate's

Criminal Case No. 1106 of 2014 – M. W Wachira CM)

JUDGEMENT

The appellant was charged in the Chief Magistrate's Court at Garissa with attempted defilement contrary to Section 9(1) as read with Section 9(2) of a Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 16th June, 2014 in Dadaab District within Garissa County intentionally and unlawfully attempted to cause his penis to penetrate the vagina of A I A a girl aged 9 years. In the alternative he was charged with indecent act contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the same day and place did commit an indecent act to A I A a girl child aged 9 years by touching her vagina. He denied both counts. After a full trial, he was convicted of the main count of attempted defilement and sentenced to serve 10 years imprisonment.

Dissatisfied with the decision of the trial court, he has now come to this court on appeal. His appeal was filed by counsel Paul Mugwe & Company Advocates and is on the following grounds:-

1. That the trial court erred in law by failing to conduct a voire dine examination of the complainant who was aged 9 years at the time when she testified.
2. That the trial magistrate erred in law and in fact by failing to find that the prosecution did not call crucial witness.
3. That the trial magistrate erred in law and fact by convicting the appellant on the basis of uncorroborated evidence of an intermediary contrary to Section 31(10) of the Sexual Offences Act.
4. That the trial magistrate erred in law and fact by failing to find that the mother of the complainant was an unreliable intermediary, having previously testified herself in the same manner and being the initial reportee.
5. That the trial court misdirected itself on the procedure set by Section 200 of the Criminal Procedure Code with regard to how a new court takes over a part heard matter.

6. The trial court erred in law and facts by relying on the uncorroborated evidence of a witness with mental disabilities.
7. The trial court erred in law and facts by failing to appreciate the material contradiction in the prosecution case.
8. That the trial court erred in facts and in law by dismissing the appellant's defence.
9. That the trial court erred in law and in fact by failing to find that the prosecution case was not proved beyond reasonable doubt.
10. That the trial court erred in law by shifting the burden of proof on the appellant.

At the hearing of the appeal, Mr. Nyaga advocate for the appellant made submissions at length and relied on two case authorities. He started by stating that the trial court declared the complainant as a vulnerable witness and applied Section 31 of the Sexual Offences Act as the complainant was said to have mental disabilities. The court then appointed an intermediary from the Refugee Consultant of Kenya but later changed and appointed the mother of the complainant as the intermediary. However, counsel complained that the mother did not perform that function as the court took evidence directly from the complainant though the mother stated clearly that she was the only person who could understand the witness through reading her moods and also her behaviour of pointing at a person when upset. Counsel submitted thus that the procedure adopted by the trial court was a mistake and relied on the case of WALTER WANDAI OSIMBO -VS – REPUBLIC (2015) eKLR. Counsel emphasized that it was not clear how the trial magistrate was able to understand the complainant directly, in the circumstances of the case.

With regard to corroboration and the failure to call crucial witnesses, counsel submitted that the prosecution called only 3 witnesses. One of the witnesses was a doctor PW2 Dr. Abdullahi who did not confirm any attempted defilement, stated that the complainant had no stains of blood and her clothes were clean.

Counsel submitted also that the investigating officer PW3 PC Joseph Kaman did not carry out investigations but merely compiled evidence, as the appellant had been arrested by the public. Counsel submitted that though there was no requirement for corroboration of the evidence of a minor victim witness in sexual offences under Section 124 of the Evidence Act (Cap.80), this was a special case as the complainant had mental disabilities, and was deaf and dumb. As such counsel argued the complainant evidence was governed by the provision of Section 31(10) of the Sexual Offences Act, which provides that an accused cannot be convicted solely on the evidence of an intermediary.

With regard to ground 5, counsel submitted that the mandatory provisions of Section 200 of the Criminal Procedure Code (Cap. 75) were not complied with by the magistrate which was a fatal omission. Counsel relied on the case of RICHARD KISSA MATAYO –VS- REPUBLIC (2012) eKLR wherein the judge stated that there was a presumption that the case will proceed from where it stopped while the succeeding magistrate herein and her own Motion started the matter afresh without informing an accused of his rights under the Section, as required by the law.

On proof beyond reasonable doubt counsel submitted that the value of the evidence of PW1 was lowered greatly by her mental handicap, thus the appellant would not have been convicted on her evidence alone.

Lastly, the counsel argued that the defence of the appellant should not have been casually dismissed.

In response, Learned Principal Prosecuting Counsel, Mr. Okemwa submitted that counsel for the appellant relied mainly on technical grounds and submitted that Section 31(4) (b) of the Sexual Offences Act was to be guided by rules which had not yet been made. Therefore, counsel submitted that the fallback position was still section 124 of the Evidence Act (Cap.80).

Counsel submitted that the intermediary was a relative of the complainant who was allowed by the law to

play such a role and that the court gave reasons for replacing the former intermediary.

Counsel submitted further that under Section 124 of the Evidence Act, a single minor witness in a Sexual Offence could be believed and, if so believed, a conviction could be sustained on that account. Counsel relied on a case of MAKUNGU –VS- REPUBLIC (2002) EA 482 where judges declared the requirement for corroboration in Sexual Offences was unconstitutional. Counsel suggested that Section 31(10) of the Sexual Offences Act which required corroboration of the evidence of an intermediary was unconstitutional.

Counsel submitted also that though the magistrate who took over the case and ordered a recall of the witnesses, the appellant did not raise an issue. According to counsel, the mistake of the magistrate could be cured by Article 159 of the Constitution of Kenya 2010.

On the medical report, counsel submitted that the medical report of the appellant was in another person's name. It was however clear according to counsel, that the appellant was taken to Mathari hospital for mental treatment. Counsel submitted that relying on that report would have consequence, committal to Mathare Hospital and a retrial which would not assist the appellant.

This is a first appeal. As a first appellate court, I am required to re-evaluate all the evidence on record and come to my own conclusions and inferences. I am required to bear in mind that I did not have the opportunity to see witnesses testify and determine their demeanor. See the case of OKENO –VS- REPUBLIC (1972) EA 32.

I have considered the appeal, the submission of counsel and I have perused the record and judgment.

The trial was initially conducted by Honourable B. J Ndeda SPM but was later taken over by Honourable M. Wachira CM who restarted the case.

The succeeding magistrate ordered a new trial because the victim was vulnerable. This has been challenged on appeal. Counsel for the appellant has argued that Section 200 of the Criminal Procedure Code (Cap.75) was not complied with. The relevant part of Section 200 of the Criminal Procedure Code (Cap.75) relating to the take-over of a part heard case by a succeeding magistrate provides as follows;

200(3) “Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor the accused person may demand that any witness be summoned and be heard and the succeeding magistrate shall inform the accused person of that right”.

Indeed, the learned succeeding Magistrate did not inform the appellant that he had a right to recall witnesses. Learned counsel for the appellant has relied on the case of RICHARD KISSA MATAYO –VS- R (Supra) to state that there is a presumption that the case will proceed from where it stopped.

I have perused that case, and all the judge said is that ordering a new trial in an old case would cause unnecessary delays. In my view, reading through the words under Section 200(3), the intention of the Legislature was to protect the accused person by allowing him/her to recall witnesses if that accused considers that the new magistrate or judge might not easily understand the evidence recorded from the previous witnesses by the previous magistrate. That is the mischief that the legislature wanted to address. I have not been told that in the present case the procedure adopted by the succeeding magistrate caused unnecessary delay by requiring fresh trial. In any event, this is a case where the complainant would have to give evidence in an special way which would have to be specifically understood by the magistrate who has taken over the case.

I agree that Section 200 is worded in mandatory terms that the accused has to be informed of his right to recall witnesses. In the present case there was a new trial, so if the appellant wanted any particular

witness who testified to testify again he could still have the opportunity to do so. He did not at any time say that any witness who had testified previously and not called in the new trial be brought by the prosecution as a witness to testify. I find that the decision of the magistrate, to restart the case on the court's motion, though it did not comply fully with the requirements of Section 200(3) of the Criminal Procedure Code, was not fatal as it did not prejudice the appellant in the sense it opened the opportunity for him to recall witnesses was availed. I dismiss that complaint.

With regard to the interpretation by an intermediary, it appears to have been agreed that the complainant was mentally challenged, was dumb and deaf. The mother had already been called as a witness in the previous proceedings and testified. She was the one who was called by the magistrate to interpret the evidence of the complainant and did not testify in the new trial.

Though Section 31 of the Sexual Offences Act does not specifically prohibit the same person being a witness and an interpreter, in my view it would procedurally be wrong for somebody who was a crucial witness to become the interpreter. Such person might be interpreting what he/she thinks is the situation, rather than what the witness is stating. In my view therefore the mother of the complainant who was a crucial witness and had already testified in the previous proceedings was disqualified from being the interpreter intermediary. However, in my view, Section 31(9) of the Sexual Offences Act allows the court to change the intermediary interpreters on its own initiative.

The Prosecuting Counsel has submitted that Section 31(10) of the Sexual Offences Act, which requires corroboration of the evidence of an intermediary in unconstitutional. In my view it is not. Both statute and Case law establishes requirements for corroboration in many instances, including identification in unfavourable circumstances. The decision of MAKUNGU –VS- REPUBLIC (2002) EA 482 relied upon by Mr. Okemwa related to the requirement of corroboration of the evidence of female victims of sexual offences as against male suspects. It was unconstitutional to the extent that the requirement for corroboration was based on gender. The requirement for corroboration of the evidence of an intermediary interpreter is not unconstitutional.

The learned trial magistrate did not use the intermediary to interpret the evidence of the complainant. She herself did so. She purported to be an expert in interpreting the evidence of this mentally challenged, deaf and dumb witness PW1 the complainant without giving any reason for such a decision nor stating how she came to understand that evidence. In my view, such an act caused prejudice to the appellant as in the process, the trial court ended up stating that the appellant did not cross examine the complainant. One wonders how the appellant would have cross examined the complainant in the state that she was and without an intermediary to explain what the complainant meant by her gestures. In those circumstances I find that there was no proper trial. I will thus allow the appeal.

This would be a case for consideration of retrial. However the appellant has been in custody since 2014. The circumstances and condition of the key witness the complainant and the attendant challenges of interpretation of evidence in this matter do not endear themselves to a retrial. I am sure that the reason why only 3 witnesses testified at the trial was because of the attendant technicalities of interpretation, and am not sure whether the prosecution can get any more witnesses. In those circumstances I will not order a retrial.

Consequently I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Garissa on 25th July, 2017.

GEORGE DULU

JUDGE