REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO.23 OF 2017

(Appeal Originating from Nyahururu CM's Court Cr.No.113 of 2013 by: Hon. P.O. Muholi – R.M.)

GEORGE KARANJA JOSPHINE……APPELLANT

- V E R S U S -

REPUBLIC……..……..RESPONDENT

J U D G M E N T

George Karanja Josephine, the appellant herein, was convicted by **Hon. Muholi R.M**. for the offence of **defilement contrary to section 8(1)(2) of the Sexual Offences Act**. The particulars of the charge are that on 15/1/2013 in Subukia District, Nakuru County, intentionally and unlawfully caused his penis to penetrate the vagina of **M W W** a child aged 3 years.

The appellant was sentenced to serve life imprisonment.

In the alternative, the appellant was charged with the offence of **committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act**. No finding was made in the alternative charge. No finding was made in the alternative charge.

He has challenged the conviction and sentence through the following summarized grounds:

1. **That the charge is defective;**

2. **That the prosecution evidence was riddled with contradictions;**

3. **That the court erred by refusing to grant the application to recall PW2;**

4. **That his defence was not considered, in that he had lived with the child's mother and they had disagreed;**

5. **That the medical evidence did not connect him with the offence;**

6. **That the sentence is too harsh.**

The appellant also filed submissions in support of the grounds. He prays that the conviction be quashed, the sentence be set aside and he be set at liberty.

The appeal was opposed by learned counsel **Mr. Mong'are** who contended the only issue is whether the appellant should have undergone medical examination, which he said was not necessary.

This being the first appellate court, its primary role is to revisit the evidence that was tendered before the trial court, analyze it and draw its own conclusions but bearing in mind the fact that the court neither saw nor heard the witnesses and make an allowance for that. In ***Okeno v Republic (1972) EA 32 at pg 36,*** *the EA* Court of Appeal said:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v Republic (1957) EA 336) 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. (Ruwalla v Republic (1957) EA 570). 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 witnesses, see Peter v Sunday Post (1958) EA 424.

The case before the trial court was as follows: **PW1, M M W** was a child aged about 3½ years and after a ***voire dire*** examination, the court found that she was too young to comprehend anything. She did not testify.

PW2, M G, the complainant's sister was aged 10 years. After a ***voire dire*** examination, the court was satisfied that she could give sworn evidence. She testified that on 15/1/2013, she left school at 4.00 p.m. and went to look after cattle; that the appellant arrived there, greeted her and he went to the bush; she then heard a child crying outside her aunt's house; that the aunt was deceased; that it is only the appellant who had gone to the said house and there was no one else. She did not see anyone else except the complainant; PW2 found the sister had no clothes; PW2 said she saw the appellant leave the aunt's house; she called her mother who took the child to hospital. PW2 knew **Karanja– the appellant** because he used to sell medicine.

PW3, R W W, the complainant's mother recalled that on 15/1/2013; that she was going home when she met the complainant with M G at her sister-in-law's house and that the complainant started crying; that she was bleeding from between her legs and was naked; she took the complainant to hospital and the Doctor found that she had been defiled. PW2 denied knowing who had defiled PW1 but she reported to Subukia Police Station; that on going home she asked M (PW2) if she saw anything and PW2 said that she saw Karanja who sells medicine come from the sister-in-law's house; she went to the said house and found clothes – a short, cap and her daughter's hat which the police took; that she recognized the cap as belonging to the accused.

PW4, Emmanuel Morop, a clinical officer at Subukia Health Centre examined the complainant and filled the P3 form; he found the clothing to be blood stained; PW1 had lacerations due to deep penetration in her genitalia, labia majora was bruised and hymen was bruised and a whitish discharge from the genitalia. He formed the opinion that the complainant had been defiled.

PW6 Cpl Jane Chepyegon of Subukia Police Station received a report of defilement on 15/1/2013; PW6 noted that the girl was bleeding from her genitalia; she tried to interrogate the complainant but she could not talk; she referred PW1 to hospital where the complainant was admitted but was discharged next day. She visited the scene on 17/1/2013, the house of PW1's deceased aunt and recovered a blue jeans short, a cream cap, a child's pant; that the appellant was arrested on 21/1/2013 by PolePole Administration Police Camp.

When called upon to defend himself, the appellant opted to give an unsworn statement in which he denied defiling the girl and claimed to have been arrested for reasons he didn't know.

The appellant has complained that the date in the judgment is different from the date that the incident occurred; that PW1 & 2 said the incident occurred on 15/1/2013. The particulars of the charge clearly read that the offence was committed on 15/1/2013. The evidence tendered by PW2 & 3 is clear, that the incident was on 15/1/2013 and that is what is captured by the magistrate in the judgment. The only difference appears on the charge sheet where it is indicated that the date of arrest is 23/1/2012 yet the date of arrest is 22/1/2013. Obviously, that is a typing error and it does not form part of the particulars of the charge. Even if there was any mistake it is a petty one and curable under Section 382 of the Criminal Procedure Code which provides as follows:

> **"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:**
>
> **Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.**"

In this case the error does not go to the root of the case at all.

The appellant has also complained that the failure by the court to allow him to recall PW2 was prejudicial to him. On 7/6/2013 after the last prosecution witness testified, the appellant sought the court's leave to recall PW2 for reasons that when she testified, he was unwell. The prosecutor objected and said:

> **"I decline to recall PW2, the reason advanced. I refer the court to cross-examination which he did. The questions were answered".**

The court ruled as follows:

> "**I have considered the application by the accused person, PW2 is a minor aged 3 years who was before court, the accused never raised the issue that he was sick on that day. The complainant is a minor who should be protected from any form of trauma in the community. I decline to grant the application based on the reasons:**
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> **1. That PW2 is a minor aged 3 years who should not be taken through events of that particular day.**
>
> **2. *That the reason advanced is not sufficient as the accused person cross-examined. The matter to be set down for ruling."***

I wish to observe that the magistrate mixed up two witness in his ruling. The complainant who was 3 years old was PW1 and she did not testify because when the court conducted a ***voire dire*** examination on her, it found that she was not able to comprehend anything. PW2 was the key witness was sworn, testified and was cross examined by the appellant. She was 10 years old. So, the court's ruling is totally

misplaced it claims to be protecting a child who was aged only 3 years. So did failure to recall PW2 prejudice the appellant's case?

I believe the relevant provision on recalling of witnesses is Section 150 of the Criminal Procedure Code. It provides as follows:

> **"*A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:***
>
> **Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness"**

Although, as warded, Section 150 seems to suggest that only the court has the right to recall witnesses, it is my view that the court has inherent power to do justice to all parties appearing before it and if justice will be better served by recalling a witness, then it would be proper that the court exercises its discretion whether the application to recall is made by the prosecution or the defence. By the manner in which the section is framed, reasons must be given for an application to recall witnesses. In the instant case, it is worth noting that the appellant was appearing in person. PW2 was the first witness to testify. The appellant asked her only 2 or three questions. It is not abnormal for an accused person acting in person to be confused or be overwhelmed and not know the proper questions to ask. The appellant gave the reason that he was sick on that day. Even if the appellant was not sick but had the need to recall PW2, there was no reason to deny him that latitude. In my view, there was no good reason why the appellant was denied the chance to question PW2 further since she was the key witness and the appellant was facing a very serious charge that attracts life imprisonment upon conviction. As earlier observed, the trial magistrate mixed up the witnesses and declined the application because of the age of the witness. The application called for exercise of judicial direction that has to be exercised judiciously. There had not been a delay in hearing this matter because the appellant was arrested in January and the case was concluded in June, about 5 months later. There is no evidence that the appellant had tried to delay the conclusion of the case. The trial court should have considered all these issues I have alluded to in the exercise of its direction. The duty of the court it to ensure that justice is done to all those who appear before it and in my view the court erred in declining to allow the recalling of PW2.

In light of the above findings, I do not think that I need to consider the other grounds of appeal, but rather, whether I should order a retrial. The principles that the court considers before ordering a retrial are settled and they are inter alia; there has been an illegality or defect in the trial; where the defective trial is a result of the prosecution error; where the defects are caused by the trial court; a retrial will not be ordered if it will be prejudicial to the accused who may have served the whole or a substantial part of the sentence; or where a retrial will be impossible because of lack of witnesses or where it will generally be unfair to order a retrial.

In the case of ***Fetahali Manji v Republic (1966) EA 343***; the Court offered guidance on retrial in the following terms:

> **"In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person."**

Another case where further guide lines were set is in ***Muiruri v Republic (2003) KLR 562***, the court said:

> **"Although some factors may be considered such an illegalities or defects in the original trial, the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not, whether on a proper consideration of the admissible or potentially admissible evidence, a conviction might result from a retrial; at the end of the day, such a case must depend on its own particular facts and circumstances and an order for a retrial should only be made where the interests of justice require it."**

I have already alluded to the reasons why I found that the court erred in declining to allow the appellant to recall PW2. The appellant was sentenced to serve life imprisonment. So far he has only served 4 years. He has not served a substantial part of the sentence. The prosecution did not consider this alternative in their reply to the appeal. The witnesses being family members, a police officer and a medical officer, I believe they can be easily traced. There is no evidence that the appellant will suffer prejudice if a retrial is ordered.

In the end, I quash the conviction, set aside the sentence and order that this case be remitted back to the Chief Magistrate's Court, Nyahururu for a fresh plea and trial before a court of competent jurisdiction. Mention before Chief Magistrate's court on 27/9/2017 for directions. It is so ordered.

Dated, Signed and **Delivered** at ***NYAHURURU*** this 22nd day of *September* 2017.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Mutembei - Prosecution Counsel

Tirian - Court Assistant

Appellant - present