REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 27 OF 2015

MARTIN MUSYOKA MUTIA……APPELLANT

-Versus-

REPUBLIC ……RESPONDENT

(Being an appeal from original conviction and sentence of the Senior Principal Magistrate's Court at Kajiado in Cr. Case No. 1037 of 2012 in a judgement delivered by Hon. S.O. Temu (P.M.) on 19.7.13)

JUDGEMENT

The appellant Martin Musyoka Mutia was charged with three counts under the Sexual Offences Act No. 3 of 2006. The first count was in respect of defilement contrary to Section 8(1) as read with Section 8 (2) of the Sexual Offences Act. The second and third count was committing an indecent act with a child contrary to Section 11(1) of the stated Act.

Briefly the facts as accepted by the learned trial magistrate were that on 19th October, 2012 at [particulars withheld] Estate in Kajiado County intentionally and unlawfully caused his genital the penis to penetrate genital organ/vagina of R G herein referred as **R.G.** a girl aged 6 years. Further on the same day of the 19.10.2012 at [particulars withheld] Estate in Kajiado County intentionally touched the vagina of R.G. a girl aged 6 years and another girl A.W. a girl aged 4 years.

The appellant at the time of plea denied all the three counts. After a full trial the appellant was convicted and sentenced to fifty (50) years imprisonment on the first count and ten (10) years in respect of the third count. The sentences were to run concurrently.

Dissatisfied with both conviction and sentences, appellant has appealed to this court. The appellant's appeal is based on the following grounds;

> ***1. That the admission of medical evidence was detrimental to the administration of justice and violated Article 50(4) of the Constitution.***
>
> ***2. That the case for the prosecution was not proved to the required standard needed in law.***
>
> ***3. That the sentence imposed on Count 1 was unlawful, inappropriate and contrary to Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006.***
>
> ***4. That there was no sufficient evidence to support Count 1.***

This being a first appellate court, its trite law that this court re-analyses, re-examines and scrutinize the evidence adduced at the trial court and come up with it's own conclusions.

The duty laid upon this court was well set out in the case of **OKENO VS. REPUBLIC 1972 EA 32** where the court of appeal stated:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination. (See PANDYA VS. REPUBLIC (1957) EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (See SHANTILAL M. RUWALA VS. REPUBLIC (1957) EA 570).***
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> > ***"……..it is not the function of the 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 it's 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 also PETER Vs. SUNDAY POST (1958) EA 424."***

In determining this appeal this court has to be guided by these well established principles of law.

EVIDENCE AS ADDUCED AT THE TRIAL COURT

The prosecution adduced evidence by calling seven (7) witnesses in support of their case.

PW1 R.G. a minor aged six years testified and stated that on a day she cannot recall was at the home of her friend A for lunch. The accused who was known to them joined after lunch when the mother of PW4 (A.B.) had gone back to her shop. It was her testimony (PW1) that the accused removed his trouser and inserted his penis to her private parts – the vagina. Further in (PW1's) testimony accused took his finger and inserted it into the vagina of her friend A.B. When done accused threatened them with death in the event they report the incident to anybody. In her evidence (PW1) stated that she could not hold the information on what accused had done to them. She decided to tell her brother (PW2) B.G.M.

In the testimony evidence of PW3 he stated that on receiving the report from PW1 on what accused had committed against R.G. and A.B. he brought the issue to attention of their mother PW3. PW3 stated that (RG), (PW) at one time complained to her of having difficulties in passing urine and experiencing itching in her private parts. This caused her concern and prompted her to share with the mother of AB who gave evidence as PW4. PW4 confirmed to PW3 that her daughter AB aged four (4) years was also suffering from the same condition.

In their testimony PW3 and PW4 told the court that they decided to have their children RG and AB seen by the doctor. The initial diagnosis at Abdi's Clinic revealed an infection. They were referred to Kajiado District Hospital for further examination. PW3 further testified that before they could make it to Kajiado District Hospital her son informed her that RG and AB had been defiled by one 'Matho'. The said Matho herein accused was staying in the same home with PW4.

It was their evidence that the complainants RG and AB were examined at Kajiado District Hospital. The matter was reported to Kajiado Police Station and investigated by PW6 P.C. (W) Lucy Okumu.

PW6 stated that on 21.10.12 PW3 and PW4 filed a report at the station in respect of two minors RG and AB who had allegedly been defiled. She commenced investigations and issued p3 forms to be filled by a medical doctor against the two minors. She further testified that PW3 and PW4 detailed her on the suspect who committed the offence. Before she could trace whereabouts of suspect members of the public and parents of the minors arrested him and was brought to Kajiado Police Station.

PW6 further evidence on investigations carried out including securing birth certificates of the minors RG and AB. The two birth certificates were produced in evidence as exhibit 1 (a) and (b) to confirm the ages of the minors.

PW5 Dr. Catherine Chemasi testified that she worked with Dr. Wanga at Kajiado District Hospital who filled respective p3s for two minors RG and AB. She gave evidence on behalf of Dr. Wanga who conducted the examination. According to her testimony the examination and findings on the two minors was put on police form 3 which was admitted in evidence as exhibit 3 and 4. She further gave evidence regarding an examination done on the accused and p3 form exhibit 5 produced and admitted in evidence as exhibit 5. From the findings on examination she stated that the two minor's hymens were torn. The reference drawn being that they were defiled.

In his defence, the appellant denied defiling PW1 and AB. He said the case was a frame up upon him by PW3 due to a business dispute they were handling together. He was arrested while working for another employer and beaten by members of the public. He denied that he knew the two minors though acknowledged they lived with one of the prosecution's witness.

ON APPEAL

The appellant filed written submissions and highlighted the main issues at the hearing.

He submitted that the case against him was not proved beyond reasonable doubt. He argued that the testimony of the complainant did not state the date the offences were committed. He further challenged the medical evidence by PW6 in respect of (PW1) who had been seen three days after the alleged incident of defilement. The findings according to the appellant were not consistent with the offence complained. This was in reference to the notes in Section C of the p3 where the doctor stated:

"No tear or injuries to the labia majora and minora".

In his submissions the findings are in consistent with the opinion regarding erythema of the vaginal vault and torn hymen noted by the doctor.

He attributed the charge to a fabrication by PW3 who they worked together in a shop at Kajiado town. In the course of their employment he submitted that they took goods on credit worthy Ksh.10,000, sold them but PW3 did not remit the money. The employer terminated his services.

Secondly he submitted and argued against the severity of sentence of sixty (60) years imprisonment by the trial court.

Mr. Akula for the Director of Public Prosecutions supported the conviction and sentence. He submitted that the learned trial magistrate properly evaluated the evidence for the prosecution and the defence of the appellant. The totality of the evidence according to the Senior Prosecution Counsel Mr. Akula the case against the appellant was proved beyond reasonable doubt.

He argued that the complainants PW1, PW3 gave an explanation on how the offence was committed. The complainants were confirmed to be minors by production of birth certificates. He further argued that from the evidence of the complainants and confirmation by medical examination reports through production of the p3 penetration against them was proved.

As regards sentence, Mr. Akula submitted and argued that the sentence provided for is that of life imprisonment. He faulted the sentence of fifty (50) years imprisonment imposed by the learned trial magistrate as erroneously. He relied on the provisions of Section 8(2) of the Sexual Offences Act No. 3 of 2006.

The learned trial magistrate in his judgement considered the evidence from both sides and came to the conclusion that the case against the accused was proved beyond reasonable doubt and sentenced him accordingly.

ANALYSIS EVIDENCE AND DETERMINATION

To appreciate the revitalized submissions advanced by the appellant on appeal and opposition by the learned prosecution counsel. I have carefully perused the judgement of the learned trial magistrate as well as the reasons for determination. As a notice the trial court had scanned the evidence and arrived at the conclusion that the prosecution had been able to bring home the charges against the appellant on the basis of credible evidence.

Having stated the aforesaid, I proceed to deal with the grounds of appeal.

On ground one, appellant contended that the trial magistrate erred in admitting medical evidence which was detrimental to the determination of justice and violated Article 50(4) of the Constitution. The admission of medical evidence in any criminal proceedings is provided for Under Section 80 of the Laws of Kenya.

In the instant case, medical evidence was presented by Dr. Catherine Chemasi as PW6 on behalf of Dr. Wanga both of Kajiado District Hospital. PW6 confirmed that she had worked with Dr. Wanga for more than one year hence understands his writing and signature. The examination and findings by Dr. Wanga were reduced into writing in police form 3 for PW1 and PW3 respectively. According to her testimony, PW1 and PW2 had been defiled three days back owning to their ruptured hymen. The p3s were admitted as exhibits 1(a) and (b). This follows that the medical doctor did testify in this case on her area of competence.

The appellant invoked Article 50(4) of the Constitution 2010 to impeach admission of evidence by the prosecution in support of the case against him. Under Article 50(4) of the Constitution it provides that;

> ***" Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded, if the admission of the evidence would render the trial unfair, or would otherwise be detrimental to administration of justice."***

The gist of Article 50 provides for the rights to a fair hearing sub-article 2(c), (j), (k) and (l) reads as follows:

> ***"50(2) every accused person has the right to a fair trial which includes the right***
>
> ***(c) to have adequate time and facilities to prepare a defence.***
>
> ***(j) to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence .***
>
> ***(k) to adduce and challenge evidence.***
>
> ***(l) to refuse to give self incriminating evidence".***

I pause here to consider one of the fundamental issues which emerges from the record which goes to the core of deciding this appeal.

The issue is whether the learned trial magistrate erred in law and fact in conducting a voire dire examination in contravention with Section 19 of the Oaths and Statutory Declarations Act. Whether the learned trial magistrate complied with the provisions of Section 124 of the Evidence Act and finally whether the prosecution proved it's case beyond reasonable doubt against the appellant.

I propose to analyse the record and law applicable in a case where the court is called upon to receive the evidence of children.

> ***"Section 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 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 nothing in accordance with Section 233 of the Criminal Procedure Code Cap 75, shall be deemed to be a deposition within the meaning of that section."

In a trial court, where the witness is a child of tender years, the court must comply with the provisions of Section 19 of Cap 15 of the Laws of Kenya. There are two elements that the trial court must satisfy itself before receiving the evidence of a child witness of tender years.

a. ***Whether the child understands the nature of oath, or***
b. ***If the child in the opinion of the court does not understand the nature of an oath, whether the child is possessed of sufficient intelligence to justify reception of the evidence, and understands the duty of speaking the truth.***

It follows therefore that an inquiry (voire dire) has to be conducted by the trial court to satisfy the elements above. The first inquiry being that of understanding the nature of the oath, if he does, he/she is sworn in the ordinary way and his/her evidence is received on the same basis as that of an adult witness. If having decided that the proposed witness is a child of tender years, the court is not satisfied that the child understands the nature of an oath, it must then satisfy itself that he is possessed of sufficient intelligence to justify reception of his/her evidence and that he/she understands the duty of speaking the truth. If the court is not satisfied as either of the foregoing matters, the child's evidence may not be received at all.

That is the law.

In the instant case, I have carefully re-examined and re-evaluate the record to satisfy myself whether the trial magistrate complied with Section 19 of Cap 15 of the Laws of Kenya. The procedure for conducting of the voire dire examination was properly set out in the case of **FANSINSCO MATOVE Vs. REPUBLIC 1961 EA 260**. In the case of **PETER KULVE Vs. REPUBLIC CRIMINAL APPEAL NO. 77 OF 1982 UR.** The court said:

"Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth…….

It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided, and not be forced to make assumptions"

In the case before me PW1 (AW), PW2 R.G., PW3 (BGM were aged 4, 6 and 11 years respectively as at the time they adduced evidence before the trial court. In the circumstances of this case a voire dire examination was mandatory.

From the record it is worthy reproducing nature of the voire dire conducted on each of the child witness as to appreciate the gravity of the irregularity of procedure.

PW1 (A.W) voire dire taken as follows:

"My names are A W. My father's name is Baba K. I am a pupil at [particulars withheld] Primary School in middle class. I eat Ugali and vegetables last night. "

COURT: When the child is asked of her age. She cannot tell the child is tender to give sworn evidence. She will give unsworn evidence."

PW2 R.G. the voire dire in contention reads as follows:

> ***"My names are R G. I am a pupil at [particulars withheld] Primary School in Standard One. I go to churn. Whoever tells the truth will go to Nairobi. I will tell the truth."***

COURT: Minor is tender. She will give unsworn evidence."

PW3 B.G.M. The voire dire in contention reads as follows:

> ***"My name is B G M. I am a resident of Juakali within Kajiado County. I am 11 years old. I am a pupil at [particulars withheld] Academy in Standard Six. We learn using English and Kiswahili. I go to church at Catholic Church. He who lies will go to hell and he who tells the truth will go to heaven and in will go to heaven. I will tell the truth."***

COURT: Minor to be sworn".

From the requirements of the law the trial magistrate did not follow the correct procedure as set out above. The voire dire examination conducted by the trial magistrate did not establish that the children (PW1), (PW2) possessed sufficient intelligence to justify the reception of their evidence and that they understood the duty of speaking the truth.

As for PW3, whom the trial court ordered that his evidence be received on oath, nothing on record to show the child understood the nature of an oath. The trial magistrate concluded that the child is capable of giving evidence on oath simply because the child stated that:

> ***"He who lies will go to hell and he who tells the truth will go to heaven and I will go to heaven. I will tell the truth."***

This is not the test that Section 19 of Cap 15 envisages for the swearing of a child witness.

I am of the considered view that the voire dire examination for PW1, PW2 and PW3 were defective for failure to meet the criteria Under Section 19 of Cap 15 of the Laws of Kenya.

The voire dire conducted by the learned trial magistrate on PW3 did not establish that the child understand the nature of an oath to be allowed to give sworn evidence.

As regards PW1 and PW3 the trial court did not satisfy itself that two children of tender years were possessed of sufficient intelligence to justify them to adduce unsworn testimony.

Secondly, that they also understood the duty of speaking the truth.

The conclusion therefore by the trial court in both instances that the witnesses were capable of giving sworn and or unsworn evidence respectively was a misdirection of law.

Besides a defective voire dire this court was also faced with a criminal procedure code irregularity in dealing with evidence of PW1 and PW2 by the trial court. PW1 and PW2 gave and adduced unsworn testimony in support of the prosecution case. This was after the learned trial magistrate made a finding in the manner they were to testify.

At the conclusion of their testimony in chief the record does not indicate that an opportunity was accorded to the appellant to cross-examine each of them. The evidence by PW1 and PW2 remained untested and unchallenged by the appellant. This was in contravention of Section 208(3) of the Criminal Procedure Code Cap 75 of the Laws of Kenya.

Section (3) states that:

> ***"If the accused person does not employ and advocate, the court shall, at the close of the examination of each witness for the prosecution ask the accused person whether he wishes to put any questions to that witness and shall record the answer."***

This procedure is buttressed by the provisions of Article 50 of the Constitution 2010 on right to a fair hearing.

> ***"Under Article 50(k) the accused has a right to adduce and challenge evidence as one of the levels of right to a fair trial."***

Accordingly the appellant right to a fair trial which is guaranteed in Article 50 (k) of the Constitution was violated by the alleged irregularity. The failure not to be called upon to cross examine the two witnesses must have taken the appellant by surprise. I am of the conceded view that a serious miscarriage of justice was committed by the trial court when it received the evidence of important key witnesses without according an opportunity for the appellant to test credibility of the same.

The non-compliance by the trial magistrate with the provisions of Section 19 Cap 15 of the Laws of Kenya violated Section 124 of the Evidence Act. The provision of Section 124 states and provides that:

> ***"Where in a criminal case involving a sexual offence, the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if for reasons to be received in the proceedings, the court is satisfied that the child is telling the truth."***

The law under the provision enjoins the trial magistrate to be satisfied that the child is telling the truth and record the reasons for that belief.

I have already made a finding that there was a misdirection on both law and procedure by trial magistrate proceeding on a defective voire dire and subsequent ruling. The learned trial magistrate also failed to give appellant an opportunity to cross examine the two key witnesses PW1 and PW2.

In a sense indeed this kind of evidence does not inspire confidence in sustaining a conviction for the offence of defilement under Section 8(1) as read with Section 8(2) of Sexual Offences Act.

The other ground deals with sentencing.

Sentencing is the discretion of the trial magistrate. This court cannot interfere with sentence imposed by a trial court unless it is apparent that the magistrate acted on a wrong principle or overlooked a material factor. Taking into account the sentence provided for under Section 8(2) of Sexual Offences Act. The trial magistrate acted on a wrong principle and overlooked a material factor.

This is in respect of the provisions of the law which sets a sentence of imprisonment for life. The learned trial magistrate gave no reasons for departing to impose the prescribed sentence.

The appellant was sentenced to 50 years on 1st count of defilement and 2nd count to 10 years imprisonment. The trial magistrate did not make an order whether the sentence was to run concurrently or consecutively. The order on sentence is hereby set aside.

What is the best course of action in the instant case. The appellant was charged with a serious offence of defilement in 2012. The trial concluded on 19.7.2013 when appellant was convicted and sentence to sixty years imprisonment. On consideration this court has noted irregular or defective. In order to balance the rights of the victim and that of the appellant it is only fair that a retrial be ordered. The key principles to be taken into account when making an order for retrial were stated in the case of **MKANAKE Vs. REPUBLIC 1973 EA 67**. The East African of Court of Appeal said as follows:

> ***"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 insufficient of evidence or for purposes of enabling the prosecution to fill up gaps in its evidence at the first trial. Even where the 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 peculiar facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it likely to cause any injustice to the accused person."***

In the present case I quash the conviction and sentence against the appellant. I reiterate the principles in **MKANAKE** case and for the interest of justice order for a retrial. Accordingly the case be remitted to a competent magistrate for re-hearing as there had been a breach of fundamental and constitutional requirement on a right to a fair hearing.

I therefore direct:

1. The file be remitted to SPM to allocate the case for hearing on a priority basis.

2. The appellant be remanded in custody at G.K. Prison Kajiado.

3. Further mention on 5.2.2016 before SPM for further orders.

It is so ordered.

Dated, delivered, signed on 22/1/2016.

R. NYAKUNDI

JUDGE

Representation

1. Appellant

2. Mr. Akula Senior Principal Magistrate

3. Mateli – Court Assistant