



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 27 OF 2015

ELMADAM WASONGA AGABU..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from the conviction and sentence of the Senior Principal Magistrate's Court at Bondo (Hon.J. N. Sani Ag. SRM) dated the 13th February 2015 in Bondo SPMCCRC No. 260 of 2012]

JUDGMENT

The appellant was convicted on a charge of attempted defilement Contrary to Section 9(1)(2) of the Sexual Offences Act and sentenced to serve fifteen years imprisonment. The particulars of the charge were that on 25th March 2012 in Gem District within Siaya County, intentionally attempted to cause his penis to penetrate, the vagina of M A O, a child aged 17 years.

The Prosecution's case was that on the material day at around 7.30pm M A O (PW1) had been sent to the fields to look for their missing donkey when she met the appellant who she knew for a long time. He told her he wanted her vagina before getting hold of her and pulling her from the road. He had removed her pant and pulled up her dress and even tried to insert his penis into her vagina when she shouted for help. Her cousin K O (PW2) aged 10 years old was the first to arrive at the scene followed by her aunt J O (PW3) who upon seeing what the appellant was doing raised a loud alarm which attracted fellow villagers and their area Assistant Chief who came and apprehended the appellant. He took him to Yala Police Station where a report was made, statements of the witnesses recorded and the victim issued with a P3 form. The appellant was then charged. A Child Health Card was produced as proof of the victim's age.

The appellant made an unsworn statement in which he stated that on the material day and time he was walking along the road when he met the complainant. As was characteristic of her she got hold of his hand tightly and when her kin and the Assistant Chief arrived and asked her why she was holding him her reply was that he had greeted her and refused to give her money. He denied that he attempted to defile the complainant and contended that this was all a fabrication by his brother the chief.

Nevertheless the trial court upon evaluating the evidence by both sides found him guilty. Being aggrieved by the conviction and sentence he has appealed. He relies on an Amended Petition of Appeal dated 27th July 2015 filed by his Advocates, Aboge & Company. The Petition raises the following grounds:-

***“1. The learned Acting Senior Resident Magistrate erred in law by receiving unsworn statements from several witnesses.*”**

2. *The learned Acting Senior Resident Magistrate erred in law in finding that the Complainant was a child when there was no or any sufficient evidence to justify that finding.*
3. *The learned Acting Senior Resident Magistrate erred in law in admitting photocopies of a Health Card as proof of age of the complainant when there was no justification for doing so and failing to note that the said health card had material alterations.*
4. *The learned Acting Senior Resident Magistrate erred in relying on the contradictory testimony of PW3 and allowing her testimony without her being sworn as required by law.*
5. *The learned Acting Senior Resident Magistrate erred in law in failing to make an adverse inference against the prosecution for failing to call material Independent witnesses and relying only on the evidence of members of the complainant's family.*
6. *The learned Acting Senior Resident Magistrate erred in rejecting the evidence of the appellant out of hand and accepting the prosecution evidence in its entirety.*
7. *The learned Acting Senior Resident Magistrate erred in law in disregarding material contradictions in the prosecution evidence.*
8. *The learned Acting Senior Resident Magistrate misdirected himself in finding that his hands were tied in terms of sentencing when the law gave him some latitude in this regard resulting in appellant receiving a sentence that was too harsh in the circumstances of the case.*
9. *The learned Acting Senior Resident Magistrate erred in finding that the prosecution had proved its case beyond reasonable doubt.”*

At the hearing Mr. Aboge Advocate submitted that PW1's unsworn statement violated Section 151 of the Criminal Procedure Code and cited the decision of Makhandia J in **Francis Erupe V. Republic [2007] eKLR** where it was held that such an omission rendered the trial a nullity. On the age of the complainant he submitted that the Health Card tendered had alterations and the complainant's oral evidence regarding her age differed with that in the health card, which in the circumstances raised doubt as to the actual age of the complainant. He submitted that the trial Magistrate ought to have ordered an age assessment.

He further submitted that crucial witnesses like the chief were not called and the trial magistrate ought to have made an adverse inference. On this he relied on **Gilbert Miriti Kanampiu V. Republic [2013] eKLR**. He contended further that the sentence of fifteen years was excessive as the offence carries a minimum sentence of 10 years. Lastly he urged the Court to take note of the contradictions in the evidence and allow the appeal.

The appeal was opposed. Miss Wakio submitted that it had no merit; that the trial magistrate had conducted a *voire dire* which informed the nature of evidence received from PW1. As for the age she submitted that age assessment was not the only means of proving age. She contended that the complainant was sixteen years at the time of the offence and seventeen years at the time of the trial; that there was no issue of borderline and she was a child. She relied on **Stephen Nguli Mulili V. Republic**. Regarding the evidence it was her submission that rather than cross-examine PW2 the appellant sought forgiveness. As for the omission to call certain witnesses she stated that the prosecution had a right and discretion to call those they deem fit save where defence could show the prosecution had interfered with witnesses. She further submitted that the appellant could have called the chief himself and was categorical that there were no material contradictions in the prosecution's case and that the evidence of the prosecution witnesses was not rebutted.

On the sentence Prosecution Counsel submitted that the trial magistrate had exercised discretion in sentencing the appellant to fifteen years imprisonment. She urged this Court not to interfere with the sentence and to dismiss the appeal in its entirety.

In his reply Mr. Aboge reiterated his earlier submissions and urged this Court to allow the appeal.

This being the first appellate Court I have reconsidered and evaluated the evidence bearing in mind that I did not have the benefit of seeing the witnesses testify. I have also considered the grounds in the petition of appeal and the rival submissions put forth at the hearing. Whereas the evidence on record points to what seems to be a watertight case against the appellant the trial was a nullity. This is because the evidence of PW1 who is the victim was not given on oath. When put on the stand she clearly stated that she was seventeen years old. She was therefore not a child of tender years. The Children's Act defines a child of tender years as one below the age of ten years and it was not therefore even necessary for the trial magistrate to conduct a *voire dire*. To the contrary PW1 ought to have been sworn before her evidence was received. In **Mwangi V. Republic [2006]2 KLR 94** the Court of Appeal had the following to say of a case where witnesses were not sworn:-

“Held:

- 1. It was abundantly clear from section 151 of the Criminal Procedure Code that all witnesses in a criminal trial or cause must be examined on oath.**
- 2. The general common law rule was that the testimony of a witness to be examined *viva voce* in a criminal trial was not admissible unless he had previously been sworn to speak the truth. This general common law rule had received statutory backing in section 151 of the Criminal Procedure Code and the other relevant legislation touching on the matter was the Oaths and Statutory Declarations Act, Chapter 15 Laws of Kenya.**
- 3. The question of the witness taking an oath or an affirmation before being allowed to give evidence in a criminal trial or cause was not a matter for the discretion of the trial court. Excepting evidence received under section 19 of the Oath and Statutory Declarations Act the evidence of witnesses in such cases could only be received on oath or affirmation. No other method was available to witnesses or even interpreters.**
- 4. The usual practice of all the courts in Kenya was, of course, to show in the record that a witness had taken an oath before testifying. In the record that was before us, there was no way in which the Court can determine that the witnesses were or were not sworn before they gave evidence.**
- 5. An accused person convicted on evidence which was not sworn was in violation of section 151 of the Criminal Procedure Code and the Oaths and Statutory Declarations Act. That could not be a matter curable under section 382 of the Criminal Procedure Code. To be convicted and sentenced to death on evidence which was not sworn must of necessity be prejudicial to an accused person.**
- 6. The trial of the appellant was a nullity because the Court was unable to exclude the probability of his having been convicted on unsworn evidence.**
- 7. It did not matter that the issue was being raised for the first time in this appeal. If the trial was a nullity then it did not matter at what stage that issue was raised.”**

(see also the decision of Makhandia J, as he then was in **Francis Erupe V. Republic [2007] eKLR** where the omission to swear one witness was held to have invalidated the entire trial). As I have stated the PW1 was not a child of tender years and her evidence was therefore not subject to Section 19 of the Oaths and Statutory Declarations Act.

The appellant's trial being a nullity the appeal succeeds. However as a conviction might as well have resulted from the evidence and the appellant having served a not so substantial period of the sentence imposed as would render the retrial prejudicial I find that this is a proper case for retrial. Accordingly I allow the appeal, quash the conviction and set aside the sentence, and order that he be retried afresh by a magistrate other than J. N. Sani. Accordingly he shall be produced before the Principal Magistrate's Court in Siaya on 25th April 2016 for retrial. In the meantime he shall remain in prison custody.

Signed, dated and delivered at Kisumu this 21st day of April, 2016

E. N. MAINA

JUDGE

In the presence of:-

Wakio for the state

Aboge for the appellant

CC: Felix Magutu