



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL APPEAL NO. 75 OF 2015 AND 76 2015 (CONSOLIDATED)**

**(From original conviction and sentence in Criminal Case No. 104 of 2013 of the Chief Magistrate's Court at Garissa M. Wachira CM).**

**1. H A K.....1<sup>ST</sup> APPELLANT**

**2. R A.....2<sup>ND</sup> APPELLANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The two appeals herein were consolidated and heard together, as the two appellants herein were convicted and sentenced in the same trial.

In Criminal Appeal No. 75 of 2015 the appellant is H A K was the 1<sup>st</sup> accused in the trial court and will be referred to as the 1<sup>st</sup> appellant. In Criminal Appeal No. 76 of 2015 the appellant is R A was the 2<sup>nd</sup> accused I will call her the 2<sup>nd</sup> Appellant.

In the trial court the 1st appellant H A K was charged with defilement contrary to section 8 (1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 10<sup>th</sup> January 2013 at [Particulars withheld] area in Fafi District within North Eastern Province intentionally caused his penis penetrate the vagina of SKE a child aged 6 years.

The 2<sup>nd</sup> appellant R A K on the other hand was charged with grievous harm contrary to Section 234 of the Penal Code. The particulars of the offence were that on 10<sup>th</sup> January 2013 at [Particulars withheld] in Fafi District within North Eastern Province did grievous harm to SKE.

Both pleaded not guilty to the charges. They were however found guilty of the respective offences after a full trial, and convicted by the trial court. The 1<sup>st</sup> appellant was sentenced to serve life imprisonment while the 2<sup>nd</sup> appellant was sentenced to serve 5 years imprisonment.

Dissatisfied with the decision of the trial court, the appellants have come to this court on appeal through Paul Mungla and Company Advocates. They initially petitions of appeals which were later amended by counsel. The grounds of appeal are similar and are as follows:-

1. That the learned trial magistrate erred in law and fact when she unreasonably believed, convicted and sentenced the appellants on a single, untested, unreliable and uncorroborated evidence of the

complainant a minor contrary to the weight of evidence in the record.

2. The learned magistrate erred in law and fact in conducting proceedings without the assistance of an interpreter in a matter that demonstrably needed constant interpretation contrary to Section 198 of the Criminal Procedure Code and the appellants Constitutional rights to fair hearing under Article 50(1m)and (3) of the Constitution of Kenya

3. The learned magistrate erred gravely in law and in fact in shifting the burden of proof of the appellants guilt from the prosecution and effectively violated the appellants constitutional rights to be presumed innocent until proved guilty.

4. The learned magistrate erred in fact and in law by failing to appreciate sufficiently or at all the totality of the evidence on record with regard to the appellant's alleged culpability for the offences charged.

5. The learned trial magistrate erred in law and fact by conducting a perfunctory and flippant voire dire examination of the complainant minor in total disregard of the importance of the exercise of the judicial proceedings at hand and subsequent reliance thereon.

6. The entire trial process was conducted in a manner prejudicial to the appellants' constitutional rights to fair hearing under Article 50 of the Constitution.

7. The learned trial magistrate erred in law and in fact in failing to consider the probation officers report on record and arrived at a harsh and excessive sentence.

During the hearing of the appeals, Mr. Mungla learned counsel for the appellants made oral submissions in respect of Criminal Appeal No. 75 of 2015 and adopted the same submissions in respect of appeal No. 76 of 2015.

Counsel submitted that the principal or key witness in the criminal trial was the minor complainant said to be aged 6 years. Counsel submitted that under the existing Laws in Kenya, before the evidence of such a minor could be received by a trial court there was need for conducting an examination by the court. Counsel submitted that the dictionary has a definition of what constitutes an examination and relied on the same.

With regard to a criminal trial, the examination of the minor was made to determine whether the child understood the importance of telling the truth, and that the principles applicable in conducting such an examination were considered in the case of *Muiruri -vs- Republic [1983] KLR 447* by the Court of Appeal, whose reasoning was adopted in Garissa High Court Criminal Appeal No. 34 of 2013 – *Kivevelo Mbolo Vs. Republic*. In essence, counsel submitted that both the questions and answers in such an examination had to be recorded by the court, which was not done by the trial court in the present case. The court thus determined the issue on the basis of assumptions, which was wrong. In counsel's view the trial court did not understand the purpose of such examination and did not conduct it well. As such a grave error was committed by the trial court making the witnesses evidence unworthy.

Counsel also submitted that the child said she did not understand an oath but the court did not explain to her what an oath was.

After tendering evidence, the said witness refused to be cross examined and was stood down to be recalled but was not recalled. In counsel's view such a situation denied the appellants a right to cross examine the witness and consequently the right to fair trial. As such, counsel maintained, the proceedings were incomplete as no one knows the answers which the complainant would have given to the questions from the appellants. Counsel relied on Article 50(2) of the Constitution of Kenya 2010.

Counsel submitted further that a situation where a witness refused to be cross examined was considered in the Court of Appeal in the case of *Mark Oiruri Mose -vs- Republic Criminal Appeal No. 29 of 2012 at*

**Kisuvuvu**, and urged this court to follow the reasoning in that case, as failure to allow cross examination of a witness was a fatal omission of a procedure. Counsel stated that even where a minor witness was not sworn, an accused person must be allowed to cross examine such a witness.

Counsel thirdly, submitted that the magistrate violated the presumption of innocence of the appellants in the sense that statements or evidence was not provided to them appellants prior to the trial. Secondly, the right to interpretation under Section 198 of the Criminal Procedure Code and the Constitution was not availed to the appellants. In counsel's view the mention of Kiswahili/Kisomali in the record was not adequate to show the language used in court, as the name of the interpreter was not given. Counsel emphasized that PW5 testified in English without any indication that there was interpretation. Though the appellants cross examined that witness, the interpretation was in doubt. Counsel referred to a case of **Joseph Ayienayi -vs Republic – Kisumu High Court Criminal Appeal No. 25 of 2010**, where in the court stated that a trial court cannot take for granted failure to clearly indicate that there was interpretation.

Counsel submitted further that the totality the evidence on record was insufficient to sustain the convictions. The medical evidence was not conclusive to connect the 1<sup>st</sup> appellant to the offence. There was also a suggestion in the evidence that a boy neighbour was the person who raped the complainant, and the doctor found that the complainant was infected with venereal disease but the 1<sup>st</sup> appellant was not medically examined to connect him with the offence.

Counsel also said that the magistrate, in the judgment, made findings that were not supported by the evidence on record such as that the child was picked up by the Uncle in hospital because the father defiled her, while the record was that the child was taken to hospital because somebody told the uncle that she was unwell. Counsel also attacked the findings of the trial court that the 1<sup>st</sup> appellant lied in court that he made a report to the police after he learnt of the complaint.

Counsel also submitted that the learned trial magistrate shifted the burden of proof to the appellants, even though the appellants had a right to even keep quiet.

Lastly, counsel submitted that the trial court failed to consider the probation report which it had called for before sentencing.

Counsel stated that the submissions were applicable to both appeals.

Learned Prosecuting counsel Mr. Okemwa opposed the appeals. Counsel emphasized that the prosecution called 5 witnesses to prove the offences. According to counsel there was proof that the victim was a child. There was also proof of penetration. There was also proof regarding the person who penetrated the complainant. Counsel stated that the Post Care Rape form and the P3 form on the complainant were clear that the appellants were the perpetrator of the defilement offences.

Counsel submitted that there was no mis direction on the part of the trial court.

With regard to the procedure of examining the complainant minor child before tendering evidence, counsel submitted that nothing had been raised to challenge the actual evidence tendered by the complainant. In addition, there was on record independent evidence from PW2, PW3, PW4 and PW5 which was credible and supported the complainant's story. Counsel emphasized that the importance of voire dire examination of the minor witness was to make the court come to a conclusion. In counsel's view, the trial court did so in stating that the minor had sufficient intelligence and understood the importance of saying the truth.

With regard to lack of opportunity for cross examination of the complainant by the appellants, counsel emphasized that the child witness broke down and, according to counsel, this was understandable because of her tender age and the experience she underwent in the hands of the people that she trusted. In counsel's view even if there was a weakness in not allowing cross examination of the complainant, that was not fatal to the case because there was enough independent evidence to support her allegations.

With regard to language used in court, counsel stated that the names of the interpreter or court clerks during the proceedings were clearly recorded as Ahmed, Halima and Hassan. The language used was clearly Kiswahili and Kisomali and the appellants followed all the proceedings from day one when they were brought to court. They did not complain, and as such there was no miscarriage of justice.

With regard to shifting the burden of proof by the trial court, counsel argued that once an accused person tendered evidence, such evidence had to be considered by the trial court and either believed or disbelieved. The fact that the magistrate disbelieved the appellants defences, did not amount to shifting the burden of proof.

With regard to the probation officer's report, counsel argued that the same did not form part of the evidence but only assisted the court in sentencing.

Counsel concluded by stating that all the cases cited expect ***Criminal Appeal No. 295 of 2012 Mark Oiruri Moses -vs- Republic***, which was a decision of the Court of Appeal, were merely of persuasive authority and dealt with different circumstances.

In response, Mr. Munjla submitted that the authorities cited were applicable in the present case. According to counsel, in all those cases, the appeals were allowed.

Counsel submitted further that corroboration in law meant separate and independent evidence supporting the allegations, and that the evidence of PW2, PW3, PW4 and PW5 did not corroborate the allegations that the 1<sup>st</sup> appellant violated the child. PW5 the Doctor merely corroborated the allegations that the child was violated. In addition no urinary test was conducted to connect the 1<sup>st</sup> appellant with the offence and as such the doubt should be given to him.

The summary of the evidence is as follows. The prosecution evidence is that the complainant a girl aged 6 years, lived at [Particulars withheld] Refugee Camp with her mother the 2<sup>nd</sup> appellant and her stepfather the 1<sup>st</sup> appellant. The father of the complainant had died and the 1<sup>st</sup> appellant had married the mother of the complainant. The 1<sup>st</sup> appellant and the 2<sup>nd</sup> appellant had other children.

On the 10<sup>th</sup> of January 2013, the 1<sup>st</sup> appellant sexually assaulted the complainant by engaging in sexual intercourse with her. When the complainant informed her mother the 2<sup>nd</sup> appellant that she had been raped, but when the 2<sup>nd</sup> appellant enquired from her as to whom the culprit was, she did not give the name. The 2<sup>nd</sup> appellant became annoyed and decided to punish the complainant. She took a metal used for pitching tents, put it in the fire and burnt the complainants severally in her privates parts and all over the body.

The next day which was 11<sup>th</sup> January 2013, somebody told PW2 M A an Uncle of the complainant, that the girl was sick or unwell. PW2 then proceeded to the home where he enquired from the 2<sup>nd</sup> appellant what had happened to the girl and why she had not been taken to hospital. He then took the girl to hospital and also to the police station. After investigations, the two appellants were charged with the offences.

In their respective defences, both appellants gave sworn testimony. They denied committing the respective offences. Each was cross examined. They admitted that they had custody of the child and stated also that they made a report to the police that the child had been taken away by some people.

On the evidence on record, the learned magistrate found that the prosecution had proved their case against each of the two appellants beyond any reasonable doubt. The magistrate thus convicted and sentenced them. Therefrom arose the present appeals.

As a first appellate court, I am duly required to evaluate the evidence on record afresh and come to my own conclusions and inferences, bearing in mind that I did not see witnesses testify to determine their

demeanor – *See OKENO Vs. REPUBLIC [1972] EA 32.*

I have perused the record of the trial court. I have perused the judgment of the trial court. I have also considered the submissions of the appellants counsel as well as the submissions of the prosecuting counsel.

The appellants have appealed on the ground that the voire dire examination of the complainant PW1 was not properly done by the trial court to determine her intelligence and whether she knew the importance of telling the truth before being allowed to testify. The appellants counsel has emphasized that in such a voire dire examination both the questions and answers the minor child needed to be recorded by the trial court before the said court concluding that the child had sufficient intelligence to testify. Counsel relied on the dictionary definition of the word examination and case law.

Indeed it is preferable that the questions and answers of the intended minor child witness in voire dire examination be recorded by the trial court. In the case of *MUIRURI VS. REPUBLIC [1983] KLR 447 at page 448* the Court of Appeal cited what it had said earlier in the case of *Peter Kariga Kiune Vs. Republic Criminal Appeal No. 77 of (1982)* unreported – “**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**”.

Courts have severally emphasized this procedure. However in my view each case has to be determined on its particular circumstances. If the totality of the evidence of the complainant minor witness shows that the witness did not actually understand the importance of saying the truth, then her evidence stands for nothing. If on the other hand it is quite clear that he or she understood the importance of saying the truth then the fact that questions and answers were not recorded alone cannot be fatal to all the proceedings.

In the present case the questions and answers were not recorded. However, the evidence of the complainant was quite clear and in my view, at the age of 6 was coherent and understandable. I dismiss that complaint.

The appellants have complained that the complainant refused to be cross examined and was stood down and not recalled for the cross examination. They say that as such, they were denied their Constitutional rights to cross examination and also the right to fair trial.

Though counsel for the appellant says that the right to cross examination is absolute, in my view it is not. When evidence is tendered by a witness, but is not on oath or affirmation, then such witness cannot be cross examined. This position also applies to an accused person. When he or she tenders evidence but not on oath, cross examination will not apply.

In my view therefore the fact that the witness was not recalled for cross examination cannot be said to be fatal to the proceedings herein. Indeed, the appellants did not cross examine the witness, but in trial even though the complainant PW1 herein was said to have tendered her evidence on oath, her refusal to be cross examined merely meant that her evidence should be treated as unsworn evidence. There is no record that the magistrate treated the evidence as being on oath.

I observe that this child of tender years PW1, was not protected in any way by the trial court which conducted the proceedings. She was put face to face with her alleged tormentors who were her stepfather and mother. Even for adults, it is very difficult to face and answer questions from a parent directly. It would be worse for a child. I would find it natural rather than something to blame, for this child of six years to refuse to answer questions in cross – examination from her stepfather and her mother. In my view the child should have been protected by being shielded from the faces of the stepfather and mother. She should have also been assisted by a psychologist in the process of tendering her evidence. I dismiss the complaint of the appellants’ regarding the evidence of the complainant PW1.

The appellants have also complained that the learned magistrate shifted the burden of proof on the

appellants in the judgment. I have perused the whole judgment. I did not see any specific place where the learned magistrate shifted the burden of proof on the appellants. The burden is always squarely on the prosecution to prove a criminal case against an accused person beyond reasonable doubt. *See LEONARD ANISETH VS. REPUBLIC [1963] EA 206*. An accused person does not have a burden to prove his innocence. Under our Constitution, an accused person can also keep quiet as a matter of right.

However, once an accused person tenders his defence, that evidence has to be weighed as against the evidence of the prosecution as required under Section 169 of the Criminal Procedure Code (Cap. 75). A trial court has to give reasons for agreeing or disagreeing with the defence of an accused person. The fact that a trial court disagrees with the defence of an accused person on its own, does not amount to shifting the burden of proof to an accused person. Shifting the burden of proof is expecting the defence to fill in the gaps of the prosecution evidence. However analyzing the evidence on both sides does not amount to shifting the burden of proof. Making an error of inference also per se does not amount to shifting the burden of proof if there is other sufficient evidence that supports the finding of the trial court. From the contents of the judgment I find no support for the contention that the magistrate shifted the burden of proof to the appellants. I dismiss that ground.

The appellants have raised an issue about language used in court. Having perused the record of the trial court, I find that PW1, PW2 M A all testified in Kisomali language. Both appellants also testified in Kisomali language. PW4 PC Festus Mwendwa (who should be PW3), testified in Kiswahili but the interpretation in court was clearly stated to be Kiswahili to Kisomali. Only PW5 Dr. John Kiogora was recorded as having testified in English language.

The record on that date does not show whether there was translation into Kisomali language. However there was no complaint from any of the appellants, and each of them cross examined the Doctor at length. In my view therefore they must have understood the proceedings. It cannot be assumed that a Somali person cannot understand English or vice versa. The opportunity was there for them to say that they did not understand English. The court interpreter was Halima a name that indicates the clerk was a Somali. In my view in the circumstances of the present matter, it cannot be said that the appellants did not understand the proceedings. I dismiss that complaint.

Having considered all the evidence on record, in my view the prosecution proved their case against both appellants beyond any reasonable doubt. The fact that the 1<sup>st</sup> appellant was not taken for examination to test him for venereal infection did not exonerate him. It would have strengthened the prosecution case but, in my view, it was not mandatory in the circumstances of this case. I do not see how the complainant PW1 and her Uncle PW2 would have framed the 1<sup>st</sup> appellant with this serious offence. I also do not see how the two witnesses would frame the 2<sup>nd</sup> appellant with the offence she was charged with.

As for the probation officers report, in my view it was considered by the trial court that is why the 2<sup>nd</sup> appellant was handed down a sentence of only 5 years imprisonment for an offence which carries a maximum sentence of life imprisonment.

To conclude, I find no merits in the two appeals. I dismiss the appeals and uphold both the convictions and sentences of the trial court.

**Dated and delivered in Garissa this 16th day of August 2016.**

**GEORGE DULU**

**JUDGE**