



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO 71OF 2015

C D M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 830of 2015 in the Senior Principal Magistrate's Court at Voi delivered by Hon E.M. Kadima(RM) on 30th October 2015)

JUDGMENT

INTRODUCTION

1. The Appellant herein, C D M, was tried and convicted by Hon E. M. Kadima Resident Magistrate for the offence of defilement of a girl contrary to Section 8 (2) of the Sexual Offences Act No 3 of 2006. He was sentenced to serve life imprisonment.

2. The particulars of the offence were as follows :-

“On the 21st day of October 2014 at [particulars withheld] in Voi area within Taita Taveta County, intentionally and unlawfully caused your male genital organ (penis) to penetrate the female genital organ (vagina) of H K a child aged 11 years.”

3. The Alternative Charge was for the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No 3 of 2006. The particulars were as follows:-

“On the 21st day of October 2014 at [particulars withheld] in Voi area within Taita Taveta County, committed an indecent act with H K a child aged 11 years by touching her female genital organ (vagina) with your male genital organ (penis).”

4. Being dissatisfied with the said judgment, on 25th November 2015, the Appellant filed a Notice of Motion application seeking leave to be allowed to file an appeal out of time. The same was allowed. The Memorandum Grounds of Appeal were as follows:-

1. THAT the Honourable Magistrate erred in law and fact by basing on the circumstantial evidence (sic).

2. THAT the evidence of PW 1 and PW 2 were not sufficient for him to have got the harsh sentence.

3. THAT the Honourable Magistrate erred by basing on the evidence of medical report which were not corroborated (sic).

4. THAT the Magistrate took no doubt according to the prosecution side (sic).

5. THAT the Magistrate erred in fact by not considering his defence as the fact (sic).

5. The Appellant filed his Written Submissions and Reply to the State's Written Submissions on 11th and 28th July 2016 respectively. However, his said submissions appeared to have deviated completely from the Memorandum Grounds of Appeal that he filed initially as he appeared to have posed the issues as questions for determination by the court. The State acquiesced to these fresh Grounds of Appeal as it did not raise any objection or address its mind to the same.

6. Bearing in mind the provisions of Article 159(2)(d) of the Constitution of Kenya, 2010 which mandates courts to administer justice without undue regard to technicalities, this court proceeded to marry his questions with his original grounds of appeal.

7. When the matter came up for the hearing of the appeal on 27th July 2016, both the Appellant and the State requested the court to render its decision based on the said Written Submissions, which were not highlighted. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

8. Being the first appellate court, this court is under a duty to re-examine the evidence that was adduced in the lower court as was held by the Court of Appeal in the case of **Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR** where it was stated that:-

“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.

9. It did appear from the respective parties' Written Submissions that the following issues were really what had been placed before the court for its determination:-

Whether a proper *voire dire* enquiry was conducted before taking the evidence of the Complainant;

Whether there was sufficient evidence to convict the Appellant on a charge of defilement; and

Whether the Prosecution's case was credible, strong and unchallenged by the Appellant's defence.

10. The court therefore dealt with the issues under separate heads shown hereinbelow.

1. PROOF OF THE PROSECUTION CASE

A. VOIRE DIRE ENQUIRY

11. The Appellant submitted that the *voire dire* enquiry conducted in respect of the Complainant, H K (hereinafter referred to as “PW 1”) did not meet the threshold set by the courts. He placed reliance on the case of **Kivevelo Mboloi vs Republic [2013] eKLR** and argued that failure by the trial court in setting out the questions it framed and was fatal and could not be cured.

12. The State placed reliance on the case of **DWM vs Republic [2016] eKLR** where the Court of Appeal held that there was no particular format of conducting a *voire dire* enquiry and the court can either record the questions and answers or only record the answers verbatim after asking questions. It was therefore its

submission that a proper *voire dire* enquiry was conducted in the case herein and could not be vitiated for failure of the Learned Trial Magistrate to record the questions that were put to PW 1.

13. As was rightly pointed out by the State, there is no legal requirement of the administering of a *voire dire* enquiry in a particular manner unless of course the same causes actual prejudice to an appellant. Such an enquiry will be deemed to be properly done if from the way the proceedings have been recorded in a narrative form, it is abundantly clear that a child witness testifies that he understands the importance of saying the truth and his knowledge of what an oath is before the oath is administered. Where a minor has no knowledge of what an oath is, the trial magistrate must clearly set the same out.

14. In both instances, the trial magistrate must also clearly record that the child is possessed of sufficient intelligence to adduce the evidence before giving his opinion of how the evidence shall be adduced, that is, whether the same shall be sworn or unsworn. Additionally, the trial magistrate must record the minor's answer of the consequences of not telling the truth to enable the appellate court determine whether or not the *voire dire* enquiry was properly conducted.

15. Where a trial court opts to record answers only, then it is incumbent upon it to record the questions asked as well. If the above steps are followed, then the *voire dire* enquiry will be deemed to have been in compliance of the provisions of Section 19 of the Oaths and Statutory Declarations Act failing which the trial can only be deemed to have been defective and a nullity.

16. A perusal of the proceedings shows that the Learned Trial Magistrate conducted what appeared to be a *voire dire* enquiry and recorded as follows:-

“Prosecutor- My witness is a minor.

H K

[particulars withheld]

11 years

M.

I live with my mother V M. My sister is H K . She is 14 years old and my father (sic) C D M. I go to [particulars withheld] Voi, I understand the meaning of saying the truth. If I lie (sic) I will be cursed. I don't understand the meaning of taking an oath.

Court

After carefully listening to the child witness am(sic)convinced she is possessed of sufficient intelligence to understand the meaning of taking an oath. She may be sworn...”

17. From the way evidence was taken and recorded, it is not clear at all who conducted the *voire dire* enquiry. Was it conducted by the Prosecutor, the Learned Trial Magistrate or by both of them? This is because the *voire dire* enquiry ought to be conducted by a trial magistrate to satisfy himself or herself that a child witness is sufficiently intelligent to testify in court and for his direction as to whether the evidence to be adduced will be under oath or unsworn.

18. Additionally, it was not clear what the questions in the first part were, as only statements appeared to have been recorded. Most importantly, it was not clear whether what was recorded were really the answers of PW 1 or they were merely statements or observations by the Prosecutor and the Learned Trial Magistrate, given on their own motion.

19. The question of whether or not such a child understands the meaning of an oath is not a casual question and must be taken with the seriousness that it deserves. Further, administering an oath to a child who has no idea what it is, adds no value to the weight of his or her evidence.

20. Bearing this in mind, the Learned Trial Magistrate erred when he directed that PW 1 take an oath when she had already indicated that she did not understand the meaning of taking an oath. Indeed, a trial court cannot decide for a child if he or she understands the meaning of taking an oath merely by observing the child's demeanour or from the listening to his or her answers. The bottom line is that a trial court must not and should not compel a child who has said he or she does not understand the meaning of taking an oath to take an oath because such child has the option of giving unsworn evidence.

21. Having said so, the Appellant did not suffer any prejudice or demonstrate that he suffered any prejudice when PW 1 adduced evidence on oath because he cross-examined her. If there was anyone who could be said to have suffered prejudice for taking an oath when she had said she had no idea what it was, it could only have been PW 1.

22. In this respect, this court did not find any merit in the Appellant's assertions that no proper *voire dire* examination was conducted.

B. EVIDENCE BY THE PROSECUTION WITNESSES

23. The Appellant submitted that the evidence by the Prosecution witnesses was contradictory. He questioned why the "man they found coming out of the sisal plantation" or the G4 S guard Edmond were not called to testify. He also wondered how PW 2 could say that he was seating on PW 1 and at the same time say that he was lying on PW 1. He further sought to know why PW 2 did not call the police or the public for help but instead ran past the shopping centre all the way to **[particulars withheld]** to call a guard.

24. He also questioned if the actual date the alleged offence was on 4th October 2014 or 21st October 2014 and submitted that PW 1's mother, V M M (hereinafter referred to as "PW 4") had stated that when PW 1 was examined at the hospital, the doctors did not know what to write as they had found nothing wrong with the child. He contended that there was no evidence in the Medical Report that suggested that the breaking of PW 1's hymen was due to his penetration because there were no bruises in PW 1's vagina or discharge noted on her inner wear.

25. He further took issue with the evidence of No 81699 Sergeant Linet Ombogo (hereinafter referred to as "PW 5") who had stated that he told PW 1 to sit and face him which he said deviated from the evidence of PW 1 and PW 2. It was his argument that the "lesso" or the piece of cloth that he laid out for PW 1 was not produced as an exhibit in the trial court. It was his submission that he was framed and the conviction and sentence ought not to be allowed to stand.

26. On its part, the State set out the evidence that was given by the Prosecution to demonstrate that the evidence was cogent and consistent so as to sustain the conviction and sentence against the Appellant herein. The court therefore analysed the evidence by the said witnesses to establish on which side the truth of this matter lay.

27. PW 1 testified that on a day she did not specify, the Appellant, who was her step-father, told PW 4 to tell her not to go to school. She said that the Appellant asked her to follow him to a sisal plantation after she had served him tea. She stated that when they got there, he placed a "lesso" on the ground, asked her to remove her clothes and lie down. He then inserted his penis into her vagina which caused her a lot of pain.

28. It was her testimony that an "adult" passed by and asked the Appellant what he was doing with a child. She said that he stepped on a "panga" the Appellant had wanted to use against the said "adult." She also said that the Appellant dropped his Identity Card. Thereafter, the Appellant told her to dress and accompanied by the said adult, they went to **[particulars withheld]** where the Appellant was subdued by

a guard and taken to the Headmaster of the school, a Mr M. She then went to Voi Police Station where she recorded her statement.

29. She added that she was taken to Moi District Hospital where a sample of her urine and blood was taken for examination. It was her testimony that the Appellant had on a previous occasion inserted his finger in her vagina and that when she told PW 4, she just told her “sorry” and that yet on another day, the Appellant had taken her to the sisal plantation and made small incisions using a blade on her neck, hand and legs.

30. During her cross-examination, PW 1 said that the Appellant told her to keep quiet and placed cellotape on her mouth. He also told her that he had done the same thing to Holliness and so it was not something new to him.

31. A M L (hereinafter referred to as “PW 2”) said that on 21st October 2014, he was passing by a sisal plantation when he saw an adult and a child engaged in a sexual act. He said he went for the “panga” and Identity Card that the man had dropped.

32. He said that the man was embarrassed and told him that the girl was a student at **[particulars withheld]** and he was makingsome incisions on the girl and doing some rituals that would suppress the sexual urge in his girls. He said the man escaped as he was calling the police but that he ran to E, a guard near the gate of **[particulars withheld]** where he got assistance to arrest the Appellant. In his Cross-examination, he said that he was not worried about the man running away as he had his Identity Card and Job card.

33. Dr Maha Salim (hereinafter referred to as “PW 3”) presented the P3 Form on behalf of Dr Lucas who was said to be in Mombasa. His evidence was that PW 1’s hymen was broken.

34. On her part, PW 4 stated that on 21st October 2014, she left PW 1 with the Appellant herein, her father, as she was not feeling well. She went to a kiosk of one E M which was adjacent to her house. At about noon, PW 1 came there and told her that R M was crying. She asked her to bring him to where she was. After about half an hour, she called PW 1 to bring her clothes to change the baby but she did not respond. She then went to check on her but found that the door to her house was locked.

35. It was her further testimony that as she left the house, she met the Headmaster of **[particulars withheld]** with PW 1. They then went to the school and to the hospital where she found her husband and another man. Thereafter, they went to Voi Police Station and Moi District Hospital where PW 1’s panties were examined. The attending doctor asked her if PW 1 had been bathed and she replied in the negative. Her further evidence was that in the evening, PW 1 was re-examined by female doctors who were wondering what to write because they saw nothing wrong with her.

36. In her Cross-examination, it was recorded that PW 4 stated that she lived with R M C and that the Appellant was his father. She explained that PW 1’s father was P K. She said that she had never received any complaint from either PW 1 or Holliness about the Appellant herein and that she used to bathe PW 1 and was not aware of anything that was done to her.

37. She testified that PW 1 followed the father to collect seeds and when she started feeling dizzy, she went and sat beside a tree only for a person to emerge. She said that she did not speak to the Appellant as he had been locked in the cell although he denied ever committing the act. She could, however, not say who had slept with her daughter.

38. It was her further testimony that after the incident, she examined PW 1 with a torch and established that she was still a virgin. In her Re-examination, she was categorical that PW 1 was a virgin. She attributed the pain PW 1 felt to the examination.

39. PW 5 testified that on 21st October 2014, she was on duty when the Appellant was brought to the police station by the Headmaster of **[particulars withheld]** and a man called “Antony”. Her evidence

was mainly what she had been told by PW 1 and PW 2. The gist of her evidence was that PW 1 told her that she was not feeling well and never went to school when PW 4 went away but she followed the Appellant to pick seeds. She said that “Antony” witnessed the Appellant having sexual intercourse with PW 1 and that he called for help and took him to PW 1’s school.

40. From the way the evidence in this matter was presented before the trial Court, this court questioned whether the Learned Trial Magistrate had opted to have PW 1 give sworn evidence to bring her within the ambit of the Proviso of Section 124 of the Evidence Act Cap 80 (Laws of Kenya) because in this way, her evidence need not have been corroborated as a victim of a sexual offence.

41. The said Proviso provides as follows:-

“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth”

42. The court found it necessary to set out the evidence by the Prosecution witnesses in detail as it found the investigations and prosecution in this matter left a lot to be desired. It was its view that the Appellant ought not to have been found liable of the offence he was alleged to have committed as PW 1’s evidence which would ordinarily have been expected to have been unsworn, having indicated that she did not understand what an oath was.

43. Her evidence was too sketchy to say the least. Her contention that the Appellant tied her mouth with cellotape sounded too unconvincing as cellotape is not a material that would have disabled her from screaming if she wanted to. In addition, she did not tell the Trial Court which date the incident occurred. She merely stated on “that date.” The Prosecution did not seek to know what date that was.

44. As the Learned Trial Magistrate had found her to have been of sufficient intelligence to have adduced sworn evidence, she would definitely have told the Trial Court the exact date when the alleged offence occurred. The court did not, however, find the Appellant’s submissions that there was a confusion of dates to have been relevant as a perusal of the handwritten notes by the Learned Trial Magistrate showed that PW 2 had testified that the incident happened on 21stOctober 2014.

45. Having said so, part of PW 4’s evidence, though not at the scene at the material time, differed with PW 1 who testified that PW 4 told her that the Appellant had told her to tell her to stay at home on “that day” and that the Appellant asked him to follow him to the sisal plantation. PW 1 had also stated that the Appellant had at one time inserted his fingers in her vagina which caused her to bleed but PW 4 just told her sorry.

46. PW 4 testified that PW 1 stayed at home because she was not feeling well. She told the Trial Court that the Appellant worked with the Forest Department at Sofia and that PW 1 who had been left at home followed the Appellant to [particulars withheld]. She said that PW 1 told her that she felt dizzy after collecting seeds and that no sooner had she sat beside a tree than a man emerged. She denied ever having received any complaint from PW 1 or her sister about any abuse by the Appellant.

47. The evidence of PW 2 was not any better as it had too many gaps. His collecting the Appellant’s Job Card and National Identity Card from the scene was not contested by the Appellant as he admitted in his cross-examination that PW 2 found him seated down and picked the panga long with his Identity Card. The circumstances under which PW 2 took the said documents remained hazy.

48. PW 2 did not also explain how Appellant was arrested. He did not explain how he together with E, managed to arrest a man who was armed with a “panga” and who had actually attempted to use it against him. Notably, the said E and headmaster were not called as witnesses, yet they were critical to explain the sequence of events.

49. Instead, PW 2 said the following:-

“...I was calling the police (sic) the man tried to run. I rand (sic) to E a guard near the gate at [particulars withheld]. I took the child to headmaster [particulars withheld]. I went to police station with the headmaster (sic) C and child to Voi police station...”

50. It would have assisted this court if PW 2 gave a detailed account leading to the Appellant’s arrest as he is the one who was said to have accosted him defiling PW 1. The distance from the sisal plantation and the school was also not given. The human traffic was also not indicated to demonstrate that indeed, the manner of arrest that was suggested by PW 2 was feasible. This court was therefore not convinced by PW 2’s evidence as relating to the arrest of the Appellant herein as the same sounded too farfetched.

51. Turning to the medical evidence, PW 3 confirmed that PW 1 was not a virgin as her hymen had been broken as at the time she was medically examined by Dr Lucas on 7th November 2014. He testified that the external genital was normal and there was no bruising. He, however, said that there was minimal whitish foul smelling discharge.

52. It is not clear why the Appellant who was at the hospital on the material date was not examined. This would have conclusively determined if the infection PW 1 was said to have had had actually come from the Appellant herein. In the absence of such medical examination, this court was not satisfied to find with certainty as to whether the penetration or the foul discharge Dr Lucas had alluded to was actually caused by the Appellant herein. Doubts were indeed raised in the mind of this court particularly because PW 4 did in fact testify that the doctors asked her if PW 1 had been bathed before being taken to hospital.

53. The court’s doubts were further raised as PW 1 was referred to Moi Hospital for the P3 Form on 7th November 2014 which was almost eighteen (18) days after the alleged incident. No explanation was given to show why she was not taken to hospital immediately particularly because her evidence and that of PW 4 was that she was taken to hospital on the date of the alleged incident.

54. Having carefully analysed the evidence that was adduced by the Prosecution witnesses, this court came to the conclusion that the offence of defilement against the Appellant herein was not proved beyond reasonable doubt. In this regard, this court found Grounds of Appeal Nos (1), (2), (3) and (4) of the initial Grounds of Appeal to have been merited.

II. DEFENCE CASE

55. It was the view of this court that in view of the glaring inconsistencies, the Learned Trial Magistrate may very well have arrived at a different conclusion had he carefully analysed the evidence that had been adduced.

56. PW 4 had said that PW 1 was unwell and that she is the one who followed the Appellant to the sisal plantation. The Appellant’s version of events that was adduced under oath regarding PW 1’s health on the material date was on all fours with that of PW 4.

57. Both PW 1’s and PW 2’s versions sounded unconvincing. The emergence of a “man” appeared to have been intended to place the Appellant in a compromising situation with PW 1. The fact that the said E and the Headmaster of **[particulars withheld]** did not attend court to corroborate his story only lend credence to this court to believe the Appellant.

58. In fact, the Appellant’s version of the sequence leading to his arrested sounded more credible that he is the one who walked to **[particulars withheld]** together with PW 2 after he accused him of having been in a compromising position with PW 1. PW 1 was not the Appellant’s daughter and was still in contact with her biological father. This court may be wrong but having looked at the circumstances of this case, there was more than met the eye. The court will say no more about it.

59. For the foregoing reasons, the court came to the firm conclusion that the weight of the Appellant’s

sworn evidence far outweighed that of the Prosecution. The Prosecution did not prove its case beyond reasonable doubt. In this respect, this court found Ground of Appeal No 5 to have been merited.

DISPOSITION

19. The upshot of this court’s decision was that the Appellant’s Petition of Appeal that was lodged on 25th November 2015 succeeded on all Grounds of Appeal. For the foregoing reasons, in view of the fact that the evidence that was adduced before the trial created doubt in mind of this court, that benefit of doubt led it to quash, set aside the conviction and sentence that was meted upon the Appellant by the trial court as it would be clearly unsafe to confirm the same.

20. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

21. It is so ordered.

DATED and **DELIVERED** at **VOI** this **27th** day of **September** 2016

J. KAMAU

JUDGE

In the presence of:-

Charles Deghuwa Mwangundi.....for Appellant

Miss Anyumba.....for State

Ruth Kituva– Court Clerk