



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMA BAY
CRIMINAL APPEAL NO.20 OF 2016

BETWEEN

ZACHARIA KIBOMA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from original conviction and sentence in original Ndhiwa SRM's Court Criminal Case No.143 of 2015 – Hon. M.A. OCHIENG (Mrs), dated 4th February, 2016)

JUDGMENT

1. **ZACHARIA KIBOMA** (the appellant) was convicted on a charge of defilement contrary to **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual Offences Act**, that on 12th April 2015 at [particulars withheld] sub location in [particulars withheld] District, he caused his penis to penetrate the vagina of **RAO**, a child aged 4½ years. The appellant denied the charge and prosecution called a total of 6 witnesses to support its case, whilst the appellant was the only defence witness.
2. **D O O** (PW1) the child's mother told the trial court that while alone inside her house, her child **RAO** arrived crying and unable to walk properly. On being asked what was the problem, the child said her aunt's husband had got hold of her, put her on the bed, and defiled her. She checked the child's genitals and saw mucus – like substance oozing from her orifice. PW1 raised an alarm and her co-wife **H A L (PW3)** who confirmed checking on the crying child noticed a lot of water inside her female genitalia. The child also told her that the person responsible for the deed was her aunt's husband.
3. The child's father **P O N (PW2)** was informed about the incident and after checking on the child and seeing what he described as sperms; he and P1 took the child to hospital for examination.
4. A report was made to the PW4, area Assistant Chief (**OWAGA TABUNA OTUORO**), who testified that the appellant disappeared for 2 months, but the day he resurfaced he was apprehended and handed over to police.
5. **APC WILSON KATHENYA (PW4)** of **PALA AP** Post confirmed that the area Assistant Chief handed over the appellant to him on allegation that he had defiled a child.
6. **CPL JULIUS MUTUKU (PW6)** who investigated the matter confirmed receiving the appellant from the AP Officers based at Pala, one month after the incident had been reported to him. He also received the clothes the child was wearing on the fateful day, namely a panty, biker and a T-shirt. He also explained that the appellant could not be subjected to medical examination as he had disappeared for one

month and he was in fact arrested after 2 months.

7. **JOSEPH ONYANGO OMBEWA (PW7)**, the clinical officer who examined the child and presented the P3 form filled by **DR. KERARIO** and the findings were that the clothes were torn, and there were bruises on the labia majora and hyperaemic bleeding on the vaginal wall. The Doctor remarked that penetration had been achieved.

8. In his unsworn defence, the appellant maintained that he did not defile the child and narrated to the court a ritual he underwent to inherit one **J** whose husband had died.

9. In her judgment, the trial magistrate pointed out that the child did not testify as her mother had informed the court that she could not express herself very well and was just beginning baby class. The trial magistrate then stated:

“I fully concur with this, having found that the complainant was aged 4 years old. A child aged 4 years old who has just started school cannot be in a position of communicating effectively.”

10. The trial magistrate analysed the evidence and held that it adequately proved that the child was defiled by the appellant.

11. The appellant contested the findings on grounds that the medical evidence did not implicate him, and the trial magistrate failed to consider that there was an existing grudge between him and the child's aunt who must have instigated the charges. He also complained that his defence was rejected without any proper basis.

12. In conceding the appeal, MR. OLUOCH on behalf of the State submitted that when it became clear that the complainant was aged 4½ years old at the time of the offence, the trial magistrate ought to have invoked intermediary provisions under **Section 31 (a), 31(2), 31(5) and 31(6)** of the **Sexual Offences Act** and declare the complainant a vulnerable witness, and order for an intermediary to give evidence on her behalf. As matters stood no one testified on behalf of the child, and all there was on record was hearsay evidence. Counsel urges that the court orders a retrial since the anomaly was not caused by the complainant or the prosecution. He pointed out that witnesses were readily available and taking into account the nature of the offence, a retrial would meet the ends of justice.

13. I have considered the evidence on record and provisions of **Section 31** of the **Sexual Offences Act** –

“31(1) (a) A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is –

a) The alleged victim in the proceedings before the court;

b) A child.”

14. **Section 31 (2)** further empowers the court on its own initiative to declare a witness vulnerable if in the opinion of the court she is likely to be vulnerable on account of *inter alia*, age, trauma, the possibility of intimidation, the nature of the subject matter of the evidence.

15. **Section 31 (5)** provides that upon declaration of the witness as being vulnerable, the court has the power to direct that such a witness gives evidence through an intermediary.

16. The trial magistrate had received information from RAO's mother that the child was aged 4½ years and could not express herself well enough. The child's inability to express herself well led to her not testifying at all – this inability was in my view affected by her age, and also the nature of the subject matter of the evidence. I take judicial note that sex in Kenyan communities, (especially in the rural areas

remains a taboo subject which is not casually talked about). This scenario fitted well with what is contemplated under **Section 31** of the **Sexual Offences Act**.

17. I concur with Mr. Oluoch that had the provisions of **Section 31** of the **Sexual Offences Act** been adhered to, the child could have given her evidence through an intermediary.

18. The failure to involve use of an intermediary resulted in the court being treated to what largely amounted to hearsay evidence. Taking into account the evidence presented and the fact that the appellant has served less than a year of the life sentence and witnesses are available, I am of the view that a retrial will not occasion any prejudice.

19. Consequently the appeal is allowed and the conviction herein is quashed. The sentence be and is hereby set aside.

20. The matter shall be sent back to Ndhiwa magistrate's court for retrial before another magistrate other than the one who heard and determined this matter.

21. The appellant shall be presented before Ndhiwa magistrate's court on 20th December 2016 for retrial directions.

Delivered and dated this 15th day of December, 2016 at Homa Bay

H.A. OMONDI

JUDGE