REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

CRIMINAL APPEAL NO. 17 OF 2014

(From original sentence and conviction of the Principal Magistrate's court at Malindi Criminal Case no. 3 of 2011 before Hon. Y. A. Shikanda – SRM)

MOHAMED SANGA MWAZOMBO ..... APPELLANT

VERSUS

REPUBLIC ….....RESPONDENT

JUDGMENT

The appellant was charged with the offence of defilement of a girl aged 8 years contrary to Section 8 (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that the appellant on the 22nd December, 2010 at [particulars withheld] area in Malindi District within Kilifi County intentionally and unlawfully caused penetration of his male genital organ, namely penis, into genital organ namely vagina of E M, a girl aged 8 years.

The appellant was convicted and sentenced to serve life imprisonment. The grounds of appeal are that the prosecution did not prove its case and did not discharge the burden of proof. The medical evidence exonerated the appellant and the investigations were shoddy. The conviction is not safe as the prosecution evidence is full of contradictions. Mr. Gicharu Advocate for the appellant submitted that the evidence indicated that the complainant was taken to the hospital on the same date of the offence. PW3 testified that medical examination was done six (6) days after the offence while the P3 form indicates that the examination was done after sixteen (16) days. This makes the medical evidence not to be reliable. The trial court relied on that medical evidence to convict the appellant.

Counsel for the appellant contends that Section 200 of the Criminal Procedure Code was not complied with. When Mr. Shiundu took over the suit from Mr. Sagero the law was complied with. However, when Mr. Shikanda took over it was not complied with. Further, three witnesses were recalled after the defence had closed its case. The appellant was not accorded the opportunity to cross-examine those witnesses. This violated the appellant's right provided under Article 50 of the Constitution. The magistrate who finished the case relied on the record yet he had not heard the witnesses.

Miss Mathangani, Counsel for the State, opposed the appeal. Counsel submitted that PW1 positively identified the appellant. The complainant was recalled and was consistent. The medical evidence confirmed that PW1 was defiled. Section 200 was complied with and the defence opted to continue from where the case had reached. Treatment notes were produced after PW3 was recalled. The documents were photocopies as the originals had been burned. The sentence is proper.

The evidence before the trial court shows that PW1 was the complainant. She gave unsworn evidence as the court found that she could not testify under oath. She informed the court that she was eight years old. On the 22nd December, 2010 she had visited her mother at [particulars withheld] and at between 7.00 and 8.00pm the appellant went to her mother's place. She knew the appellant as he is her mother's neighbor. The appellant carried her on a *bajaj* motor cycle and took her to the shops. He was with another boy. It was dark and he took her towards his home. She was taken to his home which had no lights and she was defiled. She felt pain at her private parts as she had not had sex before. She did not bleed. The appellant took her back home and left. Her father was informed and the matter was reported to the police. She was taken to Malindi District Hospital.

PW2, B M, is the mother of PW1. It was her evidence that PW1 was born in 2005. On 22nd December, 2010, at about 7.00pm she was with PW1 and another child called A who is nine years old. She heard the appellant talking with the children and Ali told her that the appellant had gone with PW1. She waited until 8.00pm but PW1 had not returned. She called the appellant on his phone but the appellant refused to pick the phone. She called the third time and the appellant picked the phone. The appellant went back with the child (PW1) and left. PW2 checked PW1's private parts and noted watery substance. PW1 was not bleeding. PW1 was taken to Malindi Hospital and a report was made to the police.

PW3, IBRAHIM ABDULLAHI, was a clinical officer based at the Malindi District Hospital. On 7th January, 2011 he examined PW1 and filled a P3 form. According to him vaginal examination showed that the hymen was not torn. Laboratory examination did not disclose spermatozoa. The history showed that the appellant was a cousin to the complainant. It is his evidence that the hymen can be torn by trauma. PW4, ROBERT KINUTHIA, stationed at Malindi Police station. A report was made on the incident on the 22nd December, 2010, and he asked the appellant on the 10th January, 2011. He investigated the case and it was the appellant to be charged with the offence.

The appellant gave sworn evidence and testified that PW1 is his cousin's daughter. On 22nd December, 2010 he went home after work. He met PW1 and another child. They told him that their mother was in the house. As he left, the children started following him. He went home and took a motor bike and went to the shops. PW1 wanted a ride and he went with her. He did his shopping but while there PW2 called him and asked him to return PW1. He complied and took PW1 back to her home. He left her with her mother. After three hours, her mother called him and asked him where he was at the shops. She asked him to go and see what he had done to her children. He went there and told PW2 that he had done nothing to PW1. He was released and went home. At about 10.00pm PW2 called him again asking him to go to her house. He once again went there and met PW2's husband. The husband started beating him and they left to hospital with PW1. He was arrested after one month and all that time he was at home. He used to live with his elder brother and knows the complainant. The shops are just 100 meters away and he had gone to buy kerosene.

The main issue for determination is whether the prosecution proved its case as required. According to PW1, she knew the appellant as he is a neighbor to her mother. It is her evidence that she was taken to a dark house. According to PW2, the appellant came from a bushy area with PW1 and informed her that he had gone to see water. The matter was reported to the police and the appellant was arrested on the 18th January, 2011. Counsel for the appellant contends that Section 200 was not complied with. I have gone through the record of the trial court and on 5th April, 2012 the matter was placed before Mr. Shiundu – Principal Magistrate, Section 200 of the Criminal Procedure Code was explained to the appellant and his advocate, Mr. Gekanana, informed the court that they were willing to proceed from where the matter had reached. The record shows that Mr. Shiundu never handled the matter up to the hearing stage and it was placed before Mr. Shikanda – Resident Magistrate on the 17th September, 2012. The matter was handled by Mr. Shikanda up to conclusion. It is therefore clear that Section 200 was complied with as Mr. Shiundu did not hear any witness. At that time the case had been fully heard and the appellant had already testified.

The record shows that the appellant testified before Mr. Sagero on the 18th January, 2012. When Mr. Shikanda took over the matter, PW1, PW2 and PW3 were recalled. The defence case was closed by Mr.

Shikanda on the 13th March, 2013. Mr. Gekanana informed the court that he did not wish to submit. The trial court fixed a date for judgment as 3rd April, 2013. On that date, the court in its own motion indicated that it had perused the records and noted that PW1 was not cross-examined. Parties agreed to have PW1 recalled. The court indicated that the recalling was done in accordance with Section 146 of the Evidence Act and Article 159 of the Constitution. On 11th June, 2013 PW1 was recalled and was cross-examined. She told the court that she remembered what she had given in evidence. She did not bleed and she was taken in a small house. She did not feel pain. The prosecutor asked the court to allow the prosecution to recall PW4 to produce treatment notes. The court granted that request. PW4 was recalled and he testified on 25th June, 2013. The case was closed and judgment was fixed for 19th July, 2013.

On 13th August, 2013, the trial magistrate indicated that he had gone through the records and was of the opinion that PW3, the clinical officer, ought to be recalled to clarify. Summons were issued. On 10th April, 2014 PW3 testified. He informed the court that PW1's hymen was partially torn. There was no blood and no spermatozoa were found. The trial court fixed the date for judgment as 9th May, 2014.

Counsel for the appellant contends that the procedure used by the trial magistrate was prejudicial to the appellant. Records show that in all the dates when the three witnesses were recalled namely, PW1, PW3 and PW4, counsel for the appellant was in court. The recalling of the three witnesses was mainly at the instance of the trial court. The prosecution caused the recalling of PW4 to come and produce treatment notes. The State Counsel indicated that the original treatment notes were burned. There is no evidence from PW2 that the original treatment notes had been burnt. The medical documents were introduced to the trial court when PW2 was testifying and they were marked as Prosecution MFI 2 (marked for identification 2). PW2 never talked of the documents having been burnt. It is PW who informed the court when he was recalled that the originals were returned to the mother and it is the mother who told him that the originals had been burned. The trial court recalled the witnesses and utilized Section 146 of the Evidence Act. Section 146 (4) of the Evidence Act states as follows:

Section 212 of the Criminal Procedure Code states as follows:

"If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter."

From the above two sections, it is clear that witnesses can be recalled. Under Section 146 the court may permit a witness to be recalled. The presumption is that it is one of the parties to the dispute who would apply to the court to have the witness recalled. In this case it was the court that ordered for the recall of the witnesses. The trial court had listed the matter for judgment and it appears that after going through the evidence which had been tendered before a different magistrate, the court felt that more evidence was required. This was unprocedural as the court could be held to be assisting the prosecution case. The court is supposed to be an objective arbiter and should not fill the holes left by the prosecution evidence. Records show that the trial magistrate recalled PW1 at the first instance and fixed the matter for judgment after having heard the evidence of PW1 and PW4. For the second time the trial magistrate was still not satisfied and even after having fixed the matter for judgment asked for PW3 to be recalled to clarify. It is not indicated what was to be clarified. The judgment indicates that the magistrate who wrote the judgement did not hear the bulk of the evidence and he was to rely heavily on the record since he did not have a chance to see and hear the witnesses. Only four witnesses testified for the prosecution. Only PW2 was not recalled. The other three witnesses were recalled and the magistrate had the opportunity to see and hear them. It appears to me that the trial court was not so sure of the evidence on record and kept on recalling the witnesses so as to satisfy himself on the evidence. It would have been advisable for the trial magistrate to have ordered the matter to start a fresh. It does not matter whether the defence was given an opportunity to cross-examine the witnesses. The option to recall the witnesses shows that the court was in doubt as to the sufficiency of the evidence.

Under Section 212 of the Criminal Procedure Code the prosecution may be allowed to adduce more evidence in reply to the defence evidence so as to rebut what the accused would have stated in his

defence. Under that Section, the court would consider whether the defence evidence could not have been foreseen by the prosecution by the exercise of reasonable diligence. The idea is that the defence evidence should to some extent be in line with the questions put to the witnesses during cross-examination. Where for instance the accused raises an *alibi* defence which could not have been foreseen by the prosecution through the manner in which the cross-examination of the prosecution witnesses was being done, the trial court can allow the prosecution to call for more witnesses to rebut the defence evidence.

In the current case, the appellant gave sworn defence and the evidence was in line with the prosecution evidence. The trial court did not invoke the provisions of Section 212 of the Criminal Procedure Code but it is clear that the Section was not applicable. The defence evidence did not introduce any new issues. I do agree with the appellant's advocate that the manner in which the witnesses were recalled was prejudicial to the defence. That made the prosecution not to be fair.

The medical evidence indicated that there was no tear of the hymen. According to PW3, vaginal examination was showed that there was partial tearing of the hymen. It is the evidence of PW1 and PW2 that PW1 did not do it. There were no spermatozoa seen. It is not clear whether the partial tearing of the hymen was fresh or not. The treatment notes indicate that there was no tear on tissue. PW1 was seen on the same day she was allegedly defiled. The treatment notes show that she was seen at a clinic at [particulars withheld] and she was referred to Malindi. She was seen at Malindi Hospital on the same day. It is not clear to me how an eight year old child could be defiled and yet she fails to bleed. It is also not clear how the hymen was partially torn. It could be possible that PW1 had had sex before and her hymen was partially torn. No blood was detected from her private parts. No spermatozoa was seen. The medical examination was conducted soon after the incident. This raises doubt as to whether PW1 was defiled.

According to PW2, she saw the appellant coming from the bush with PW1. PW1 herself informed the court that she was taken to a house which was dark. The defence evidence was to the effect that the appellant was called twice to go to PW2's home. The child by the name A seems to have disappeared from the case and it is not clear whether he was involved. I do find that the prosecution case still leaves doubt which should benefit the appellant.

Delivered and dated at Malindi this **17th** day of **March, 2015.**

Said J. Chitembwe

JUDGE