



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL APPEAL NO.231 OF 2012
L N N.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the Hon. B. M. Nzakyo Senior Resident Magistrate)

in Githunguri Senior Resident Magistrate's Criminal Case No.623 of 2012

delivered on 28/08/2012)

JUDGMENT

The appellant L N N was charged with the offence of defilement contrary to Section 8(1) (2) of the **Sexual Offences Act No.3 of 2006**. Particulars of the offence were that on the 26th May, 2012 in *[particulars withheld]* village of Githunguri District within Kiambu County intentionally caused his penis to penetrate the vagina of V W N a child aged 5 years.

In the alternative he was charged with indecent act with a female child contrary to Section 11 (1) of the Sexual Offences Act No.3 of 2006 in that he intentionally caused his penis to come into contact with the genital organ (vagina) of V W N.

The appellant was convicted in the main count and was sentenced to serve imprisonment for life. He was dissatisfied with both the conviction and sentence and he preferred this appeal. In an amended supplementary ground of appeal which he relied on, he raised the following grounds of appeal:-

1. **The trial magistrate erred in relying on medical evidence that was not satisfactory.**
2. **The qualification and job rank of P.W.5 who filled and signed the P3 form was not disclosed casting doubts as to whether he examined the complainant.**
3. **The learned magistrate erred in dismissing his defence.**
4. **That voire dire examination of the complainant who was of tender age was not conducted as required by law.**
5. **That the prosecution did not discharge its burden in proving its case beyond all reasonable**

doubts.

The appeal was canvassed before me on 5th May, 2015. The appellant relied on his written submissions which were presented to the court on the date of the hearing of the appeal. He submitted that the medical evidence was unsatisfactory. In this regard, he stated that the offence was reported to the police on the 29th of May, 2012 (refer to evidence of P.W.4) which was three days after the incident. He wondered why such a serious offence would take three days to be reported which raised suspicion and malice on the part of the complainant in reporting the same to the police. He also submitted that notwithstanding that the report was made on the 29th May, 2012 the medical examination report (P.3 form) showed that the complainant was examined by P.W5 on the 28th May, 2012 which was a day before the report was made. That in itself demonstrated that the charge was framed against him. In an attempt to correct the anomaly the police substituted the medical examination report with another which indicated that the examination was done on 30th May, 2012. This again showed that the evidence against the appellant was being cooked up so as to found a conviction against him.

The appellant also invited the court to look at the P3 form that was produced which indicated that the doctor noted that there was “no enough evidence of penetration” which was an indication that there was no proof that the complainant was defiled. He referred the court to the decision in **Woomington –Vs– The DPP (1935)AC, 462** in which it was held that if there is any reasonable doubt created by the evidence brought forward by the prosecution the prisoner is entitled to a benefit of doubt.

The appellant further submitted that the learned trial magistrate unfairly rejected his defence and particularly took issue with the magistrate who he said stated that his wife gave evidence that amounted to a pack of lies.

The appeal was opposed. Learned State Counsel Miss. Nyaicho submitted that the age of the complainant was proved by P.W.3 who was the mother of the complainant. She produced a birth notification card of the complainant which clearly indicated that she was born on the 14th February, 2008 and was therefore aged 5 years at the time of the incident.

She submitted that the medical report was satisfactory. The P.3 form was produced by PW5 which showed that the complainant’s hymen was perforated which was proof of penetration.

On identification, Miss Nyaicho submitted that the same was by way of recognition. P.W.1 identified the appellant by name and she knew him as a father of her friend W. This fact was corroborated by PW2 who at the time of the incident was playing with P.W.1 and was able to clearly identify the appellant.

On sentence, Miss Nyaicho submitted that the same was proper and ought not to be disturbed.

In view of the foregoing, I shall now frame the issues for determination. I will list them in the order that I think they should be considered.

- a. **Whether Voire dire examination of the complainant was conducted as per the law required.**
- b. **Whether the prosecution proved all the elements of the offence of defilement.**
- c. **Whether the age of the complainant was proved.**
- d. **Whether the appellant’s defence was properly considered.**
- e. **Whether the prosecution discharged its burden of proof.**

In total the prosecution called five witnesses. **PW1** was the complainant. She testified that on the 26th May, 2012 she was at the home of mama Lukas. While there, Lukas laid on her and put a “nail” on her and promised in return to give her juice, colar sweets, jojo and eggs. He did not however fulfill the

promise. She testified that when he put the nail on her they were on the bed inside the house. She then reported the incident to her mother that Lukas had removed her clothes. He then removed his “msumali”(nail) and put it in her. After the incident, the appellant threatened to put her into a tank box and drown her. Her brother washed her. She left the pant she was wearing at Lukas’s home. She identified the appellant in court as the person who put his nail between her legs.

PW2, L W then aged 6 years testified that on the 26th May, 2012 she was at the home of Baba W whom she identified in court as the appellant, in the company of PW1,V. It is then that the appellant told her to go back to her home while he remained behind with the complainant. She obliged and she left behind PW1 and W, a daughter of the appellant with whom she had been playing. It was her further testimony that she did not know what happened after she left.

PW3, L K N the mother of PW1 testified that on the 27th May, 2012 at about 5 pm she was at home bathing her daughter (PW1) who was then aged 5 years. She stated that she was born on 14th February, 2008 and she produced a birth notification card in proof thereof. In her testimony, she stated that as she bathed her daughter she refused to be cleaned her private parts and complained that she was feeling pain. When she asked her what had happened she narrated that she had gone to visit her friend W and L W and as they were playing, the father to W (appellant) chased L W away so that she remained with W. That is when the appellant took her into his house, removed her clothes and then pieced her with a nail in her private parts. He promised to give her colar sweets, juice and fruits. He also threatened to put her into a bucket and roll her into the river if she revealed what had happened to anyone. P.W.3 observed some discharge from her vagina. She reported the matter to the police from where she was referred to Ngewa Health Centre and later to Kiambu District hospital where her daughter was treated. She was later issued with a P.3 form which was filled by a doctor. Later the appellant was arrested and charged.

PW4,Police Constable Patrick Njoroge testified that on the 29th May, 2012 at about 4.00 p.m. while on duty, P.W.1 was escorted by her mother who reported that on 26th May, 2012 at about 1.00 pm P.W.1 had gone to visit the daughter of the appellant when the appellant took her into his house and defiled her. He booked the report, referred P.W.1 for treatment and issued her mother with a P.3 form. Thereafter he arrested the appellant. He also identified a birth notification card brought to him by the complainant’s mother which indicated that the complainant was 5 years old at the time of the incident.

PW 5, Patrick Wambugu of Ngewa Health Centre testified that on 28th May, 2012 the complainant then aged 5 years was taken to the facility by her mother for examination. The history given was that she had been defiled by a person known to her. He stated that the nature of the offence was defilement. On examination of her genitalia the hymen was perforated but there was no discharge of blood observed. The libiamajora and minora were normal. Vaginal swab revealed no spermatozoa. There were few epithelial cells. The child was counseled. He then produced a P.3 form as exhibit.

In a very brief unsworn statement of defence, the appellant gave a defence in the form of mitigation. He stated that he was a married man with a wife and children who relied on him for support and prayed for leniency.

DW2, A A and wife to the appellant stated that on the 26th May, 2012 she left home for her casual job leaving her husband at home. She later heard that her husband had been arrested for the offence of defilement. Her further testimony was that her husband was not at home on the day it was said he had defiled the girl.

I now proceed to consider the issues for determination.

Voire dire examination

The law contemplates that a voire dire examination should be conducted by the trial court on a child of tender years with the purpose of satisfying itself that the child understood the nature of the oath and that he or she is possessed of sufficient intelligence to justify the reception of evidence that he or she will

give. That is to say whether the child understands the essence of giving evidence under oath and speaking the truth. This requirement is mandatory in children of tender years. The same is derived from Section 19(1) of the Oaths and Statutory Declarations Act, Cap 15, Laws of Kenya, which provides as follows:-

“Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with Section 233 of the Criminal Procedure Code, shall be deemed to be a deposition within the meaning of that section.”

This then drives me to determine who a child of tender years is. Suffice to say it is undoubted that the complainant was at the time of the incident aged 5 years. An attempt to define this age bracket was made in the case of Kabangeny Arap Kolil –Vs- Republic (1959) E.A. at page 93 as follows:-

“There is no definition in the Oaths and Statutory Declaration of the expression ‘ child of tender years’ for the purpose of Section 19. But we take it to mean, in absence of special circumstances, any child of any age, or apparent ages or under fourteen (14) years.”

Again, in the dictum of Lord Goddard, CJ in Republic –Vs- Campbell (1956) 2 ALL E.R 272 the court said;

“Whether a child is of tender years is a matter of good sense of the court.... Whether there is no statutory definition, of the phrase approved.”

The age of the complainant having been ascertained to be 5 years, behoved the trial magistrate to automatically conduct the *voire dire* examination. The examination is mandatory whether the child will give a sworn or unsworn statement of evidence. Instead, the court straight away called her to take an unsworn statement of evidence without first ascertaining that she understood the effect of her testimony in court. Interestingly, even after she gave an unsworn statement, the court went ahead and allowed a cross-examination. This, in my view was erroneous because the cross-examination would have been necessary if a sworn statement had been given or if the court had ascertained itself that the minor was capable of withstanding the cross-examination. It follows then that there was a material defect in the trial which can only be corrected by ordering a retrial. I then grapple with the question whether this is a suitable case for a retrial.

In the case of Ekimat –Vs- Republic (2005) 1 KLR, 1982, Court of Appeal held that;

“A retrial should not be ordered unless the court is of the opinion that on a consideration of the admission or potentially admissible evidence a conviction might result, each case must depend on its particular facts and circumstances but an order for the trial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person.”

Again, in the case of Opicho –Vs- Republic (2009) KLR, 369, the Court of Appeal sitting in Nakuru held that:-

“In general a retrial would be ordered only when the original trial was illegal or defective. It would not be ordered where the conviction was set aside because of insufficiency of evidence or for purpose of enabling the prosecution to fill gaps in its evidence at the first trial. Even where a conviction was vitiated by a mistake of the trial court for which the prosecution was not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interests of justice require it.”

While in Mwangi –Vs- Republic 1983 KLR 522 the Court of Appeal stated as follows;

“That a retrial should not be considered unless the appellate court is of the opinion that, on a proper consideration of the admissible evidence, or potentially admissible evidence a conviction might result; Braganza –Vs- Republic (1957) E.A. 152 (CA) 469 PyarwaBussam – Vs- Republic (1960) E.A. 854

Several factors have therefore to be considered. These include:-

- 1. When the original trial was illegal or defective a retrial will be ordered.**
- 2. A retrial will not be ordered if the conviction was set aside because of insufficient evidence.**
- 3. A retrial should not be ordered to enable the prosecution to fill up the gaps in its evidence at the first trial.**
- 4. A retrial should not be ordered where it is likely to cause an injustice to the accused person.**
- 5. A retrial should be ordered where the interest of justice so demand.**
- 6. Each case should be decided on its own merits.**
- 7. Whether there is evidence to support the conviction.”**

The evidence on record clearly attests that there was a sexual contact between the appellant and the complainant. The complainant was known to the appellant not only physically but also by name prior to the incident. The medical examination report (P3 form) produced showed that although the libia majora and minora were intact and no bruises were seen, the hymen had been perforated. The medical officer who filled it also concluded that the offence of defilement had been committed.

On the whole, all the evidence crystallized demonstrates that there is overwhelming evidence that sexual assault was meted against the complainant. I have, anyway, taken note of the minor discrepancies observed by the appellant, but are, in my view, not so grave as to vitiate a strong case for the prosecution. In that case, if a retrial were ordered, the court would not be enabling the prosecution to fill gaps in its evidence.

I also take into account that the offence of sexual assault against a minor is very serious and justice can only be met if a proper trial is conducted. Hence no prejudice would be occasioned to the appellant if a retrial is ordered. In contrast justice would be administered in that a proper and objective finding would be arrived at on the merit of the case. The interest of justice in any event demands that it is inclined towards both the appellant and the complainant. On the part of the complainant, justice is eagerly awaited. For the appellant, a proper trial is not negotiable. Furthermore, the appellant has only been in prison for about two and a half years which is not an inordinately long a period as to prejudice him if a retrial is ordered.

In the result, this appeal partially succeeds with the following orders:-

- a. The conviction is quashed and sentence set aside.
- b. A retrial be and is hereby ordered.
- c. The appellant shall be escorted to Githunguri Police Station on 15th May, 2015 for purposes of preparation of fresh charges after which he shall appear before the Chief Magistrate’s Court in Githunguri to take plea not later than 18th May, 2015.
- d. The original trial file shall be forthwith submitted to Githunguri Law Courts for purposes of

release of exhibits to the investigating officer who shall lead the next phase of the trial.

e. The retrial must be heard on a priority basis.

DATED and **DELIVERED** at **NAIROBI** this 14th May, 2015.

GRACE W. NGENYE – MACHARIA

JUDGE

In the presence of:-

1. Appellant present in person.
2. Ms. Ndombi for respondent.