REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL NO.9 OF 2013

(From original conviction in criminal case no.503 of 2010 of the SPM's Court at Lamu)

PAULO FIKIRI KAZUNGU ..... APPELLANT

VRS

REPUBLIC …..... RESPONDENT

JUDGMENT

The appellant was charged with the offence of defilement of a girl under the age of 11 years contrary to section 8 (1) as read with section8 (2) of the Sexual Offences Act No.3 of 2006. The particulars of the offence were that the appellant on the 3/11/2010 at about 0900 hrs at [particulars withheld] in Lamu county within Lamu District did an act which caused his penis to penetrate the anus of M M a girl of 4 years old.

The appellant was convicted and sentenced to serve 21 years imprisonment. The grounds of appeal are:

1. That there was no fair trial as the appellant was not furnished with witness statements.

2. That the age of the complainant was not proved beyond reasonable doubt.

3. That the burden of proof was wrongly shifted.

4. That the trial magistrate erred in law by failing to conduct voire dire examination to PW3.

5. That the trial erred in law by failing to accept the defence evidence.

The appellant filed written submissions and reiterate that the matter proceeded for hearing without having been given witness statements. This contravened article 50 (2) of the constitution relating to fair trial. The appellant further submits that the complainant was alleged to have been 4 years and 8 months old but this was just the mother's word. There was no age assessment. The clinical officer who testified did not mention the age of the complainant. According to the appellant, it was not possible for the complainant who had been defiled from the anus to have walked all the way to her home taking into account her age. Further, the mother of the child ought to have been noticed.

The appellant further submit that the P3 form does not support the charge of defilement. The P3 form does not indicate the weapon which caused the injuries and whether the complainant was treated. The injuries are not classified as to whether it was harm or maim. There was no proof of penetration. The case was not proved beyond reasonable doubt. The trial magistrate simply allowed the complainant to testify without conducting a voire dire.

Ms Mathangani, state counsel opposed the appeal. Counsel submitted that the evidence was sufficient to sustain the charge. The medical evidence corroborated the evidence of the complainant. The trial court noted that PW3 was a child and opted to allow her to testify without being sworn. The defence evidence was an after thought. The victim was 4 years and the sentence ought to be enhanced.

Before the trial court, four witnesses testified for the prosecution. PW1Harriet Wanjiru is the mother of the complainant (PW3). She testified that on 3/11/2010, at about 9.00 a.m the appellant went to her home to buy black beans. She told him that they were not ready and they could come in the evening. PW1 then sent PW3 to go and buy sugar. The appellant left and followed PW3. PW3 was aged 4 years 8 months. She came back after one hour but did not tell her anything. The following day, PW3 told her that she was feeling pain at the anus. She was told by PW3 that it was the appellant who had defiled her. She checked PW3 and confirmed that it was true. She reported to the village elder (PW2) who started investigations.

PW2 J S M is the area village elder. He got a call that there was a case of defilement and was given the appellant's name. He knew the appellant and went to arrest him. PW3 MM was the complainant. She testified that she was sent to buy sugar and the appellant whom she knew stopped her. She declined but the appellant carried her to the bush. He removed his clothes and hers and placed his penis in her anus and defiled her. She felt pain and started crying. She went home and the pain continued. She informed her mother.

The record shows that PW4 Moses Juma testified twice. On 6/12/2011, he testified as PW4. The witness was not cross-examined and the matter was adjourned. It appears that there was change of magistrates who were handling the matter and a warrant of arrest was issued for PW4. The witness testified again on 18/10/2012 as PW5. The witness informed the court he was a clinical officer based at Mpeketoni. He examined PW3 who was aged about 4 years old and filled the P3 form. It is his evidence that PW3's vagina was intact. She had bruises over the anal opening and a cut wound over the anus. He concluded that there was anal penetration.

The appellant was put on his defence. He gave sworn evidence and testified that he is a farmer and did not know the complainant. He saw the complainant at Mpeketoni Police Station. He was cultivating his farm at [particulars withheld] Area when someone went there and tied him sisal ropes. He was taken to the police station and shown a small child whom he did not know. He denied that he had defiled the child. It is his evidence that it is PW2 who arrested him. He lives alone in the area and PW1 is not his neighbour. His wife and children live in Malindi.

The main issue for determination is whether the appellant defiled PW3. According to PW1, the appellant went to her house on the material day in the morning. There was no eye witness to the incident. PW1 categorically testified that she knew the appellant. The appellant stopped her and took her to the bush. According to the medical report, PW3 had an anal penetration. In his defence the appellant denied committing the offence although the appellant alleges that he was knew in the area, PW2 the village elder testified that he knew the appellant very well. The medical evidence does prove there was defilement. Section 124 of the Evidence Act allowed the court to convict an accused in a sexual offence case if the court is satisfied that the victim is telling the truth. There is no evidence that there was grudge between the appellant and PW1's family. PW3 gave the appellant's name and the evidence shows that the appellant followed PW3 when she was going to buy sugar. I am satisfied that PW3 was telling the truth.

The appellant requested to be supplied with witness statements on 28/7/2011. When the matter proceeded for hearing on 25/8/2011, the appellant did not complain that he had not received any witness statements. Three witnesses testified. He cross examined PW1 and PW3 while PW3 was stood down. Given the fact that the appellant participated in the hearing and cross-examined witnesses, I do find that there was no violation of his Constitutional right to fair trial. The trial was fairly conducted.

The other ground of appeal is that no voire dire was conducted. PW3 gave unsworn

evidence. The main purpose for conducting voire dire is to find out whether the witness understand the meaning of testifying under oath. There are several authorities on this matter. In the case of Kibangeny

Arap Kolil [1959) EA 92, the court held that failure to conduct voire dire examination can be a good ground for appeal. Similarly in the Case of Gabriel s/o Maholi v R [1960] EA 159 the court stated as follows:

"Again our former Court of Appeal said that even in the absence of express statutory provision it is always the duty of the court to ascertain the competence of a child to give evidence; it is not sufficient to ascertain that the child has enough intelligence to justify the reception of the evidence, but also that the child understands the difference between the truth and falsehood."

From the record herein, it is established that PW3 was a minor. The clinical officer indicated that the child was about 4 years and 8 months. The P3 form indicates that she was 4 years. The trial magistrate saw the complainant and concluded that she was a minor and was to give un sworn evidence. I do find that the lack of voire dire examination on PW3 did not prejudice the appellant. At her age, PW3 could not have been expected to testify under oath. In any case, the appellant had an opportunity to cross-examine her. There is no difference as the court is the one to weigh the evidence under oath and the evidence given without the witness having been sworn. Since PW3 was a minor, I do find that her testimony was properly taken.

The appellant emphasized on the issue of age. Although age is important in defilement cases as it determines the sentence to be meted out in the event of conviction, I do find that even if age is not proved, that can not lead to automatic acquittal. What happens then to the victim of the defilement. The charge can be replaced with that of rape and depending on the evidence against the accused, the court should not automatically release the accused. Does it mean if there is evidence that a child has been defiled but her age is unknown then the defiler should be acquitted? I do not find so. In this case the child was below 11 years old. The appellant in his defence indicated that he was taken to the police station and shown a small child. I do find that PW3's age was below 11 years and was within the provisions of section 8 (2) of the Sexual Offences Act.

I do note that the investigating officer did not testify. However, PW4 produced the P3 form and the treatment notes. The P3 form gives the date the matter was reported at the Mpeketoni Police Station and bears the stamp of the OCS. It is clear to me that the case was reported at the station and this led to the charging of the appellant.

Given the evidence on record, I do find that the prosecution did prove its case beyond reasonable doubt. The appellant was sentence to serve 21 years imprisonment. Under section 8 (2) the sentence ought to have been life imprisonment. I will not vary the sentence imposed by the trial court: I do find that the appeal lacks merit and is hereby disallowed.

Dated, signed and delivered at Malindi this 24th day of June, 2015.

SAID J. CHITEMBWE

JUDGE