REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

HIGH COURT CRIMINAL APPEAL NO. 84 OF 2014

MOSES MWANZIA MWETA ……...……. APPELLANT

V E R S U S

REPUBLIC …… RESPONDENT

(From the Original Criminal suit No. 49 of 2013 at Mwingi).

J U D G M E N T

The appellant was charged in the subordinate court with defilement contrary to section 8(1)(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 31st March 2013 in Migwani District of Kitui County intentionally did an act which caused penetration of his male genital organ namely penis into the female genital organ namely vagina of RKM a child aged 12 years. In the alternative, he was charged with committing an indecent act with a child Contrary to Section 11(1) of the Sexual Offences Act. The particulars of the offence were that on the same day and place he intentionally did an act which caused contact of his male genital organ namely penis into the female genital organ namely vagina of RKM a child aged 12 years. He denied both counts. After a full trial he was convicted on the main count and sentenced to serve 20 years imprison.

Aggrieved by the decision of the trial court, the appellant has now come to this court on appeal. He filed his appeal through his counsel C.K.Nzili and Company on the following grounds:

1. That the learned trial magistrate erred in law and in facts in taking the complainant's evidence without conducting voire dire proceedings.
2. The learned trial magistrate erred in law and in facts in failing to record the language used and also put down the entire evidence as given by the appellant.
3. The learned trial magistrate erred in law and in fact in failing to grant the appellant an opportunity to be represented by counsel and cross examine witnesses.
4. The learned trial magistrate erred in law and in fact in admitting in admissible evidence.
5. The learned trial magistrate erred in law and in fact in shifting the burden of proof to the appellant.
6. The learned trial magistrate erred in law and in fact in failing to consider the defence testimony as well as the submissions filed.
7. The learned trial magistrate erred in law and in fact in convicting the appellant against the weight of the evidence tendered.

At the hearing of the appeal the appellant trough counsel Mr. Nzili highlighted the submissions filed. Counsel relied on the grounds of appeal filed as well as written submissions. Counsel submitted that he also relied on five case authorities.

With regard to ground one, counsel submitted that the way the magistrate conducted the proceedings to

determine whether the complainant understood the nature of an oath and the importance of saying the truth was not as required under the Evidence Act. Therefore in counsel's view the proceedings were unfair on the appellant.

With regard to age, counsel submitted that the health card of the child relied upon indicated that the child was above 12 years while the P3 form indicates that the child was about 10 years of age. On the other hand the charge sheet states that the child was 12 years. Counsel submitted that the mother of the complainant, the father and the doctor gave contradictory evidence regarding the age. Since the age of the complainant was a determinant factor in sentencing in sexual offences, counsel submitted that the variance of age prejudiced the appellant. Counsel took issue with the fact that the court did not address this issue.

With regard to shifting of burden of proof, counsel submitted that the appellant gave sworn testimony and raised an alibi. He also raised the issue of a grudge. A such the prosecution was required to tender rebuttal evidence which was not done. The learned magistrate also ruled wrongly that the defence did not support the alibi defence. Counsel therefore felt that the appellant was prejudiced.

With regard to language, the counsel emphasized that the proceedings did not indicate the language used. Counsel submitted that the official language of the subordinate court under the Criminal Procedure Code was either English or Kiswahili and that this court cannot assume the language used in court as the same was not indicated. Counsel emphasized that both the law and article 50 of the Constitution are clear that the language used in court has to be a language which an accused person understands. Therefore in counsels view the failure of the trial court to indicate the language used was a fatal mistake which vitiated the entire criminal proceedings.

Counsel also complained that the presiding officer did not handle the case properly. Counsel submitted that the magistrate did not comply with Section 200 of the Criminal Procedure Code and relied on Section 200(4) which confers powers on this court to order a new trial where there is prejudice. In counsels view there was material prejudice on the appellant in the case.

On weight of the evidence, counsel submitted that the charge talked of penetration while the doctor stated that the child looked neglected and that there were no physical injuries. Counsel arged this court to evaluate the evidence of the lower court and especially the entries in section B and C of the P3 form. Counsel submitted that what the doctor stated in court was at variance with what was in the P3 form.

Counsel also submitted that PW3, the father of the complainant, stated that the girl was mentally retarded since birth. That fact, in counsel's view caused the appellant a prejudice. Counsel also faulted the court for not stating which offence the appellant was convicted with.

Counsel further stated that the case proceeded in the trial court partly in the absence of the appellants advocate which was a serious miscarriage of justice. Counsel sought to distinguish the cases relied upon by the prosecuting counsel.

Learned prosecuting counsel Mr. Wanyonyi, opposed the appeal. Counsel submitted that voire dire proceedings were conducted properly, and that the court asked the child about her name, school and church and the importance of telling the truth. Counsel submitted that the law did not provide any particular format of conducting that examination. Counsel was of the view that the retardation of the complainant was not an issue as there would still be lucid moments.

With regard to language, counsel submitted that the proceedings were conducted in English. Counsel emphasized that at some point the court recorded verbatim what the appellant stated in Kiswahili. In addition the appellant was represented from the time that he took plea, therefore there could be no issue regarding the language. The appellant also did not complain to the trial court about the conduct of the proceedings.

Counsel added that the defence counsel chose to be present during part of the proceedings and to be

absent at other times but was present during the defence case. According to counsel, Section 200(4) of Criminal Procedure Code allowed the court to set aside the decision only if evidence was not recorded which prejudiced the appellant. Since we have not been told the evidence that was not recorded by the trial court, the contention by counsel for the appellant was not justifiable.

With regard to birth documents, counsel submitted that the documents produced in court confirmed that the girl was 12 years old in 2013. In her evidence she said that she was aged 12. The father of the complainant also stated that she was 12 years. Counsel relied on a case of ***Faustin Mganga –vs- Republic (2012) e KLR*** in which the court stated that the mother of a complainant was the best person to know the age. Since the doctor confirmed that the hymen was torn and the complainant testified to previous sexual intercourse with the appellant, counsel submitted, that evidence was sufficient.

With regard to the alibi defence, the learned prosecuting counsel submitted that it was not convincing, as DW2 stated that she was not with the appellant on the material day.

With regard to the conviction counsel, admitted that the trial court did not specifically indicate the charge on which the appellant was convicted. However counsel maintained that the appellant was convicted on the main charge. Counsel stated that the omission was minor and that the appellant did not suffer any prejudice. Counsel submitted that both the conviction and sentence were proper. Counsel distinguished the case authorities cited by counsel for the appellant.

In response to the prosecuting counsel's submissions, counsel for the appellant submitted that the law was clear that voire dire examination had to indicate the mode of evidence whether sworn or unsworn. On language, counsel stated that Section 197 and 198 of the Criminal Procedure Code had clear requirement that the language had to be indicated in the coram. Counsel also stated that Section 208(3) of the Criminal Procedure Code contained mandatory provisions which had to be complied with. According to counsel the omission by the magistrate meant that the trial was not fair and that there was a miscarriage of justice. Counsel urged the court to invoke the provisions of Section 254 of Criminal Procedure Code.

During the trial, the prosecution called 5 witnesses. PW1 was the complainant who testified on oath. It was her evidence that on 31st March 2013 the appellant asked her to go with him to his farm. He then grabbed, undressed her and had sexual intercourse with her. She stated that the appellant had sexual intercourse with her a number of times before. It was her evidence that she later informed the house help KK (PW2) about the incident and the matter was then reported to her parents. In cross examination, she stated that the appellant had sexual intercourse with her a total of 5 times and used to give her money. She stated that the appellant had a disagreement with her father and was not in good terms with her mother. She stated that she was 12 years old. She also stated that the last time the appellant had sexual intercourse with her, he took her to his house.

PW2 was KK. It was her evidence that on the 2nd of April 2013 the appellant came to their house and stated that he had been paying to have sexual intercourse with the complainant. She stated that she made a report to the parents of the complainant about this disclosure. In cross examination she stated that on 31st March 2013 the complainant did not report anything to her. She stated that she did not take the complainant to hospital.

PW3 was PM the father of the complainant. It was his evidence that on 2nd April 2013 at about 5.00 Pm his wife received a phone call informing her that the appellant had gone to their home and talked in Kiswahili about having sexual intercourse with the complainant and paying for the same. It was his evidence that the complainant later confirmed that she had been defiled severally by the appellant. He stated that he reported the incident to the chief. He also stated that the complainant was aged 12 years. In cross examination he stated that the complainant was mentally retarded and had repeated classes severally. He also stated that he took 2 days to take the complainant to the hospital and denied framing up the appellant due to an existing dispute. He stated that the appellant was a nephew.

PW4 was Dr. Gerald Mutysia the Incharge of Migwani District Hospital. He produced the P3 form of the complainant. He stated that the hymen was torn but that there were no fresh injuries. According to the

P3 form the complainant was aged 10 years. He found the child to be well groomed but appeared to have been a neglected child.

PW5 was Corpral Purity Katui the Investigating Officer. It was her evidence that on 3rd April 2013 at 2.40 Pm a defilement report was made to the police by the complainant accompanied by her father. The report was that the appellant had defiled the complainant several times. She thus charged the appellant with the offence. In cross examination she stated that the appellant stated in Kiswahili that he paid for having sexual intercourse with the complainant.

When put on his defence, the appellant gave sworn testimony he called one witness. He denied committing the offence and stated that the father of the complainant was his uncle but did not know the complainant. He stated that on the day in question he was attending a fundraising in a church. He stated also that he was married to one Dorcas and that the mother of the complainant instigated the charges because of a vendetta. In cross examination he stated that he became a born again Christian since Std 6.

DW2 was Beatrice Maithya. It was her evidence that she attended church fellowship with the appellant. She stated that on the 3rd of April 2013 she was at home when the appellant was arrested. According to her the appellant was a preacher man.

In cross examination she stated that she was not sure if the complainant was a Std 2 pupil. She stated that the parents of the complainant stayed far away sometimes not going home for more than a year and that the complainant and other children lived with workers.

This is a first appeal. As a first appellate court, I am duty bound to examine all the evidence on record and come to my own conclusions and inferences. I have to be mindful of the fact that I did not see witnesses testify to determine their demeanor see the case of ***Okeno -vs- Republic (1972) ea 32.***

I have re-evaluated the evidence on record. I have also perused the judgment. The appellant has appealed to this court on several grounds.

The first complaint is that the magistrate erred in the way he conducted the examination to establish whether the complainant knew the importance of an oath as well as the duty to tell the truth. I have seen the way the learned magistrate conducted that process. The court just asked the complainant a few questions after swearing her and then proceeded to allow her to testify. The magistrate put the complainant on oath before putting those questions. The magistrate did not say whether the complainant would give evidence on oath or not after the few questions were put to her.

In my view, the requirement is that the minor witness is asked questions before being sworn in. If one is sworn before being asked questions, then there can be no reason not to swear that person after she or he answers those questions. That is why the magistrate made an error or mistake in not deciding whether the minor would be sworn or not sworn after asking her questions. The Court of Appeal has also stated that, as much as possible the questions put to the minor witness and the answers recorded therefrom should be put on the record.

That was not done. Only answers to the questions were put to her. That was a mistake.

I however find that the appellant did not suffer any prejudice due to the default. He was represented by counsel who asked the complainant many question in cross examination to test the truth of her story. I dismiss that complaint.

The second complaint of the appellant is that the language used in court and by witnesses was not recorded. I have perfused the proceedings. Indeed the language used by the court and by witnesses was not recorded. Part of the proceedings were conducted in the presence of counsel for the appellant. Part were conducted in the absence of the said counsel. When counsel for the appellant attended the proceedings, he did not complain about the language used in court and by witnesses. Therefore in my view the complaint about language is being raised too late in the day. The said complaint should certainly

been raised at the trial by counsel. I dismiss that ground.

The third complaint is that the court did not allow the appellant to be represented by counsel. I have perused the record. On the 1st day of hearing which was 21st May 2013 Mr. Mbaluka appeared for the appellant. He cross examined the complainant at length. On the 2nd day of hearing which was 25th June 2013 when PW2 and PW3 testified, no advocate was present. The appellant cross examined PW2 and PW3 at length. He is not recorded as having complained about the absence of his advocate or asked for an adjournment to get his advocate.

Again on 1st October 2013 when PW4 and PW5 testified, no Advocate appeared for the appelant. The accused did not cross examine PW4 but cross examined PW5. When the defence hearing started on 27th November 2013, the appellant was still not represented by counsel and tendered his defence on oath and was cross examined. On 22nd January 2014 however, Mr. Nzili appeared in court when the second defence witness was to testify. He is recorded as having stated that he did not diarize the matter and that the appellant was in Nairobi and asked for an adjournment which was granted by the court and hearing fixed for 7th of March 2014. On the 7th of March 2014, Mr. Nzili was present for the defence and stated that he did not have his witness and asked for an adjournment. Same was not opposed and the hearing was adjournment fixed for April 2014. On 15th April 2014, Mr. Nzili was represented by Mr. Kinyua. Again no complaint was made about the trial proceedings without counsel.

On 25th May 2014 Mr. Nzili appeared for the defence when a new magistrate M.W Murage took the evidence of DW2. In my view therefore, it cannot be said that the learned magistrate disallowed representation of the appellant by counsel. The court could not force defence counsel to come to court. From the record, it is clear that defence counsel elected to attend court sometimes and not to attend court at other times. When counsel attended court for the testimony of the last witness of the defence, he neither asked for a recall of witnesses nor did he raise an issue about the case being conducted in his absence. Instead he asked for several adjournments which were granted by the court to accommodate him. As such in my view, there is no justification for the contention that the court did not facilitate representation of the appellant by counsel. I dismiss that complaint.

With regard to compliance with Section 200 of Criminal Procedure Code, that is not a ground of appeal. However it was raised in the submissions of counsels on both sides. It is of note that on 15th April 2014 M.W.Murage, took over the case from V.A Otieno SRM. Mr. Kinyua was holding brief for Mr. Nzili. At that time a warrant of arrest had been issued against the appellant. Mr. Kinyua informed the court in the presence of the appellant that the proceedings should continue from where the matter had reached. The court thus ordered the matter to proceed from where it had reached. On 26th May 2014 Mr. Nzili appeared in court and did not complain about proceeding from where the matter had reached.

In deed, the law requires that the explanations of the options under section 200 of the Criminal Procedure Code be given to an accused person. However in the present case no such ground of appeal was filed. Counsel should also have raised such matters in the trial court, where they are representing clients. In my view counsel cannot ask that the matter to proceed from where it had reached, and then the same counsel come to the appellate court to complain about non compliance to Section 200 Criminal Procedure Code. I dismiss that complain which was raised only during submissions.

The appellant has complained about the admission of inadmissible evidence. In submissions however, I have not been addressed regarding the inadmissible evidence that was referred to. My perusal of the proceeding did not reveal any inadmissible evidence that was accepted by the magistrate or which influenced the decision in the trial court. I dismiss that ground in appeal.

The appellant has complained that the trial court shifted the burden of proof to the appellant. Indeed, the appellant gave the defence of an alibi. The appellant did not give any prior indication of that line of defence when cross examining prosecuting witnesses. He was entitled to do so. The magistrate had now a duty to weigh the credibility of the testimonies before him or her. In my view the trial magistrate considered both the prosecution and defence version before coming to her conclusion. There was no shift of the burden of proof.

The appellant has also complained that the magistrate did not consider the defence testimony and the submissions filed. My view is that the magistrate did so and came to the conclusion which he she did.

The last complaint of the appellant was that the trial court convicted the appellant against the weight of the evidence tendered. With regard to this ground of appeal, I note that the mother of the complainant was not called to court to testify. She was the one who reported the incident to her husband PW3. She was the one who was informed by PW2 about the incident. The appellant talked of a grudge existing with the mother of the complainant. Thus in my view she was a crucial witness. The question is why wasn't she called to testify? And why was there no explanation given to the court as to why she did not come to testify?

The issues of variance of age would have been clarified by her. The issue of the report first made to her by PW2 would also have been clarified by her. It is of note that the incident was not reported on the day of occurrence of the intercourse. More importantly, she would have explained or clarified the issue of an existing grudge. In the absence of the mother of the complainant, and in view of the admission by the father of the complainant that the complainant was mentally retarded, I am of the view that the absence of the mother as a witness without explanation leaves a glaring gap in the prosecution case, the benefit of it would have to go to the appellant. In coming to this conclusion I rely on a case of ***Bukenya –vs- Uganda (1972)EA 549*** in which the Court of Appeal of East Africa held that where crucial witnesses are not called and the case of the prosecution is not that strong, the court is entitled under the rules of evidence to make an adverse inference on the prosecution case.

In the circumstances of this case and with evidence on record I make that adverse inference. It is quite possible that there was a family dispute. Indeed the complainant must have had sexual intercourse but it might not have been with the appellant. In addition, this court does not know what exactly PW2 reported to the mother of the complainant. On this basis alone, I am of the view that the appeal will have to succeed.

Consequently I allow the appeal, quash the conviction, and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawful held.

Dated and delivered at Garissa this 29th July 2015.

GEORGE DULU

JUDGE