



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CRIMINAL APPEAL NO. 49 OF 2013

MARTIN MAINA KIMANI.....APPELLANT

VERSUS

REPUBLICRESPONDENT

**(Being an appeal against conviction and sentence in Kangema Principal Magistrate's Court
Criminal Case No. 261 'B' of 2007 (Hon. S.N. Mbungi) on 20th June, 2007)**

JUDGMENT

This appeal arises from the conviction and sentence in a case in which the appellant was charged with the offence of defilement of a girl contrary to **section 8(2)** of the **Sexual Offences Act, No. 3 of 2006** (herein referred to as "the Act"). On the 26th October, 2006, at *[particulars withheld]* village in Murang'a district within central province the appellant is said to have intentionally and unlawfully had carnal knowledge of H.W, a girl of six years old.

In the alternative the appellant was charged with the offence of indecent act with a child contrary to **section 11(1)** of the Act the particulars being that on the 26th day of October, 2007, at *[particulars withheld]* village in Murang'a district within central province, the appellant intentionally and unlawfully did indecent act to H.W by touching her private parts.

At the trial the appellant entered a plea of not guilty both to the main count and the alternative charge and after hearing the prosecution and defence case the learned magistrate found the appellant guilty on the main count and sentenced him to life imprisonment. It is against this decision that the appellant has appealed to this court.

In his amended grounds of appeal which he submitted to court on 17th October, 2013 the appellant has faulted the trial magistrate for convicting him yet no DNA test was ever conducted to establish whether the appellant was involved in the commission of the offences for which he was charged. To that extent the learned magistrate is alleged to have ignored the provisions of **section 36(1)** of the **Sexual Offences Act**.

The appellant also argued that though he was found guilty, some of the essential prosecution witnesses did not testify. At the same time the learned magistrate is faulted for disregarding the appellant's defence and shifting the burden of proof to the appellant. In any event, so the appellant argued, his conviction was against the weight of evidence adduced during his trial. In all these omissions, the learned magistrate is said to have erred both in law and in fact.

The state opposed the appeal and urged this court to uphold the conviction and the sentence. Ms Maranga for the state argued that it was established at the trial that a girl of six years had been defiled. She was

examined and found to have been sexually assaulted. The DNA test, in the counsel's view, was unnecessary since the evidence of the first four prosecution witnesses was consistent with the charges against the appellant. The learned counsel for the state also argued that the sentence meted out against the appellant was lawful as it was the only and mandatory sentence prescribed under **section 8(2) of the Act**. In any event, so the state counsel argued, the appellant did not show any remorse.

In order to appreciate the submissions by both the appellant and counsel for the state, it is important to revisit the evidence at the trial. A fresh analysis and evaluation of this evidence will lead this court to arriving, as it should, at its own conclusions. It is a legal obligation reaffirmed in the case of **Dinkerrai Ramkrishan Pandya versus Republic (1957) E.A. 336**. It was applied by the Court of Appeal in **Okeno versus Republic (1972) EA 32** where at page 36 the court said:

“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

The complainant testified without having been sworn. The learned magistrate noted that “the complainant is too young to be sworn” and proceeded to take her evidence. She told the court that she was six years old and that she attended [*particulars withheld*] nursery school. On the material day, she was playing with Teresia's children when the appellant lured her away to the river. He promised to give her fruits. At the river, the appellant is said to have removed the complainant's pant, lied on her and inserted his finger into her vagina. According to the complainant, the appellant threw her pant into the river. She thereafter went home where she found her mother (PW2) whom she told what the appellant had done. Her mother washed vagina with warm salty water and took her to the hospital. The complainant was issued with a P3 from which she identified in court.

The complainant's mother, **E.N.K (PW2)** told the court that the complainant was her daughter and that she was six years old. On 26th October, 2007, she left in the morning to do her usual casual jobs leaving the complainant behind. When she came back at 3 pm she did not find the complainant home. Apparently, this witness left and only came back home at around 7 pm; it is then that she found the complainant sleeping at home. The complainant told her that the appellant had taken her to Mukangu to eat guavas but instead had defiled her. She checked her vagina and noticed that it was oozing with blood. The complainant's mother reported this incident to the appellant's father and later washed the complainant's vagina with warm water. She took the appellant to hospital the following day. She also reported this case to the police at Kirongo police post.

The clinical officer **Paul Mwangi (PW3)** testified that he examined the complainant on 29th October, 2007. He told the court that upon examination of the complainant, he detected blood oozing from a small tear on her vagina. The injury on her vagina was consistent with penetration. His findings were contained in the P3 form which he produced and was admitted in court as evidence.

The police officer who arrested the appellant was **Peter Mwathi (PW4)** who was then attached to Kahuhia Chief camp. The officer testified that the appellant was brought to the camp on 21st October, 2007 by members of the public. He took the appellant to Kirogo police post.

It is apparent from the proceedings that although the prosecutor asked for more time to call the investigating officer, the officer never testified and the prosecution closed its case without the evidence of the investigations officer.

When he was put on his defence, the appellant gave unsworn statement in which he denied having defiled the complainant. He says that on 26th October, 2007, he met two boys who asked him to go to the

assistant chief's office. While on the way they met the boys' mother and together they went to the chief's office. It is at the chief's office that he was arrested and taken to Kirogo police post.

It is clear from the record that the only direct evidence linking the appellant with the offence with which he was charged is that of the complainant herself; none of the rest of the prosecution witnesses saw the appellant committing this offence and therefore the prosecution case would largely turn on the evidence of the complainant herself.

The record reflects that the complainant appears to have been candid in her testimony; she was vivid in describing the events that ultimately led to the alleged sexual assault. Despite the consistency in her evidence there was one serious omission on the part of the learned magistrate, which in the absence of any other evidence, would render the complainant's evidence of little value.

The complainant was a minor aged six; under **section 19 of the Oaths and Statutory Declarations Act, Chapter 15 Laws of Kenya**, she was a child of tender years and before her evidence was taken the learned magistrate ought to have satisfied himself that the witness either understood or did not understand the nature of an oath or that she was intelligent enough and understood the duty of speaking the truth. The learned magistrate was under a legal obligation to subject the complainant to a *voire dire* examination before concluding that her evidence would be taken unsworn rather than on oath. It was not enough for the learned magistrate to take the unsworn evidence of the complainant on the ground that "*the complainant was too young to be sworn*" without having established and made a finding, which ought to have been noted on the record, that the complainant did not understand the nature of an oath but that she was intelligent enough and that she understood the duty of speaking the truth.

Legally, it is mandatory for any witness in a criminal case to be examined on oath; this is the tenor of **Section 151 of the Criminal Procedure Code** which provides that:-

Every witness in a criminal cause or matter shall be examined upon oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath.

Despite this mandatory requirement, children of tender years, as the complainant at the trial was, are exempt from being examined on oath in certain instances. The exemption and the circumstances under which it may apply are found in **section 19 of the Oaths and Statutory Declarations Act, Chapter 15 Laws of Kenya**. It is provided in that section of the Act that:-

"19. (1) Where in any proceedings before any court or person having by law or consent of the 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 as aforesaid, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such other person as aforesaid, 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."

A "child of tender years" as understood in this section was defined in the case of **Kibangeny Arap Kolil versus Republic (1959) E.A 92** where it was held "*that in the absence of special circumstances a child of tender years could be taken to include a child of any age or apparent age of under fourteen years.*"

Under **section 19 of the Oaths and Statutory Declarations Act** evidence of a child of tender years may be received on oath if in the opinion of the court, the child understands the nature of an oath. Where, in the opinion of the court the child does not understand the nature of an oath but he is intelligent enough and he understands the duty of speaking the truth, his evidence may be received and admitted though not on oath. On either occasion, the court can only reach an opinion on whether the evidence of a child may be received on oath or not upon enquiry comprising questions directed at the child; this enquiry is what is

sometimes referred to as *voire dire* examination. The evidence of a child of tender years, whether sworn or unsworn, can only be received after this examination and the court is satisfied that the evidence may be received in one form or another. Failure to observe this procedure is fatal to a conviction if the evidence in question is so core to the conviction that without it an acquittal would follow. In other words a conviction based on the evidence of a child of tender years, whether sworn or unsworn, without prior examination of the child on whether he understands the nature of an oath or he is intelligent enough and understands the duty of speaking the truth may amount to a miscarriage of justice if there is no other independent evidence linking the prisoner with the offence for which he has been convicted.

In the case of **Sakila versus Republic (1967) E.A** , the court (Platt, J as he then was) referring to the decisions in the cases of **Kibangeny Arap Kolil versus Republic (supra)**, **Nyasani s/o Bichana versus Republic (1958) E.A 190**, **Fransisio Matovu versus Republic (1961) E.A 260** and **Oloo Gai versus Republic (1960) E.A 86** said at page 406 that:-

“It is well established that before evidence of a person of tender years is admitted, a voire dire examination should be carried out in order that the court may satisfy itself that the witness is possessed of sufficient intelligence and that he understands the duty of speaking the truth in order to justify the reception of his evidence. And further that where it is clear that he understands the nature of the oath, his evidence may then be received on oath or affirmation. Where this procedure is not carried out and the evidence of a person of tender years is of a vital nature, it may be that the omission may occasion a miscarriage of justice.”

The court went further to say that considering earlier decisions in the cases cited, where there is no other evidence other than that of a child of tender years who has not been properly examined the conviction cannot be sustained. The court allowed the appeal, quashed the conviction and set aside the sentence on this ground.

In **Nyasani s/o Bichana versus Republic (supra)**, which is one of the decisions that the court in **Sakila versus Republic (supra)** relied on, the court of appeal said at page 191 that:-

“It is the duty of the court under that section (that is section 19 of the Oaths and Statutory Declarations Act) to ascertain, first, whether a child tendered as a witness understands the nature of an oath, and if the finding on this question is in the negative, to satisfy itself that the child “is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth”. This is a condition precedent to the proper reception of unsworn evidence from a child, and it should appear upon the face of the record that there has been a due compliance with the section.”

The court concluded that non-compliance might well result in the quashing of a conviction in a case where the other evidence before the court is insufficient in itself to sustain the conviction.

Having failed the test of a *voire dire* examination, the complainant’s evidence was of little value to the prosecution case and the only other available evidence was that of the complainant’s mother and the clinical officer. The complainant’s mother told the court what she had been told by her daughter; her evidence was not independent of her daughter’s testimony. It was more or less hearsay evidence owing to the fact that, for the reasons stated, the evidence of her daughter should not have been sustained.

One other aspect of the complainant’s mother’s evidence which could not go unnoticed was that although she told the court that she took her daughter to hospital for treatment, no evidence was ever produced to demonstrate that the complainant was ever treated in any hospital. The only medical evidence was the P3 form which was produced by the clinical officer who examined the complainant on 29th October, 2007, three days after the alleged assault. This witness confirmed that there was a small tear with some blood oozing from the complainant’s vagina which in his opinion was consistent with penetration.

Section 8(2) of the Act under which the appellant was charged reads:

8. (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

Defilement itself is defined in section 8(1). That section reads as follows:

8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

The essence of section 8(2) of the Act is that a person who causes penetration with a child of 11 years old or less is guilty of the offence of defilement and is liable to imprisonment for life.

There is no doubt that going by the evidence of the clinical officer there was penetration and therefore the complainant was defiled; what is in doubt is the person who defiled the complainant. In the absence of the complainant's evidence, the evidence of the complainant's mother and that of the clinical officer could not prove beyond reasonable doubt that the appellant had perpetrated the offence for which he was charged and convicted.

It is also apparent from the record that the case against the appellant was never investigated; had it been investigated, the gap created by the omission of the complainant's evidence would perhaps not have been fatal to the prosecution case and probably the appellant's conviction.

There is no doubt that the evidence of the complainant was core to the appellant's conviction and since it could not be sustained because it was taken without having first subjected the complainant to a *voire dire* examination the appellant's conviction could not be said to be safe without, as has been held in the decisions of cases that have been cited hereinbefore, causing a miscarriage of justice. I would allow the appellant's appeal, quash the conviction, set aside the sentence and order that he be set at liberty forthwith unless he is lawfully held.

Signed, dated and delivered in open court this 25th day of February, 2014.

Ngaah Jairus

JUDGE