IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 5 'B' OF 2008

JOSEPHAT KEITANY ..... APPELLANT

VERSUS

REPUBLIC …..... RESPONDENT

(Being an appeal from the original conviction and sentence contained in the Judgment of the Hon. N. Shiundu (Senior Resident Magistrate) in Iten Senior Resident Magistrate's Criminal Case No. 1076 of 2007 delivered on 4th March, 2008)

JUDGMENT

The Appellant, Josephat Keitany was in the main count charged with defilement of a girl contrary to Section 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 18th day of November, 2007 in Keiyo District of the Rift Valley Province intentionally and unlawfully committed an act which caused penetration by use of his genital organ namely penis into the genital organ namely vagina of a child named SCC a girl aged 13 years.

Alternatively, he was charged with indecent act with a girl contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006 Laws of Kenya. It was alleged that On the 18th day of November, 2007 in Keiyo District of the Rift Valley Province, committed an indecent act with a girl aged 13 years namely S C C by unlawfully touching her private parts namely the vagina.

The Appellant was convicted in the main count and sentenced to serve twenty five (25) years imprisonment. His appeal is both against conviction and sentence. He has raised the following main issues:-

(a) That the charge sheet was defective.

(b) The trial Magistrate failed to record the language of the court.

(c) That he was convicted on uncorroborated evidence.

(d) That PW7, the Clinical Officer did not prove penetration.

(e) That key witnesses were not summoned to testify.

(f) That the case was not proved beyond all reasonable doubts.

This is the first appellate court whose duty is to evaluate the evidence on record and draw its own conclusion but always bear in mind that it has neither seen nor heard the witnesses.

As to whether the charge sheet was defective the Appellant submitted that he ought to have been charged under Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act. In this respect, I must re-look at the draftsmanship of the charge sheet. The statement of the main charge reads:-

"Defilement of a girl contrary to Section 8 (3) of the Sexual offences Act."

It is important to emphasize that the penalty in a charge of defilement is determined by the age of the victim hence the requirement to draft the charge under the correct section of the law. In the instant case, the victim was aged thirteen (13) years. This age bracket falls under Section 8 (3) of the Sexual Offences Act, the only section under which the main charge was drawn.

Section 8 (1) only defines the offence of defilement. But does the omission to cite Section 8 (1) render the charge sheet defective?

From the inception when the Appellant took the plea, he knew that the charge facing him was that of defilement. Moreso, the law does also envisage situations when an error or omission or irregularity in a charge sheet would be encountered. And unless the same occasions injustice to an accused, it does not render the charge sheet defective – see Section 382 of the Criminal Procedure Code which reads as follows:-

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

In the spirit of the above provision, it follows that the omission to cite the section of the law that defines the offence does not render the charge sheet defective.

The Appellant argued that the trial court failed to record the language of the court. In the submissions, he stated that it is in the evidence of the witnesses that the language of the court was not recorded. He specifically cited that of the complainant during the voire dire examination.

The complainant testified on 17th December, 2007. It is clear on this date the court did not record the language of the court and/or the language the witness was examined in, and testified. The failure to record the language of the court certainly negates a fair trial. An accused must be given an opportunity to follow proceedings in the language he/she understands. And if the language in which the proceedings were conducted is not recorded, it cannot be assumed that the accused understood those proceedings. Incidentally, this scenario is replicated in proceedings in which all the witnesses testified throughout the trial. And as I have noted, this omission occasioned total injustice to the Appellant. For this reason, the best recourse to resort to, for justice to be seen to be done, is to order a retrial. But not before I evaluate the principles (guidelines) to be considered in ordering a retrial.

In the case of **EKIMAT -VS- REPUBLIC (2005) 1 KLR, 1982**, the Court of Appeal sitting in Eldoret 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 retrial 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."

And in **OPICHO -VS- REPUBLIC (2009) KLR, 369**, the Court of Appeal sitting in Nakuru held;

"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."

It is therefore important to evaluate the evidence on record as a guide on whether the case was proved beyond all doubts or whether there is the need to order a retrial.

PW1, S CC, the complainant, then aged 13 years testified that on 18th November, 2007, she was walking home from Chetiba to Chang'ach after a brief escort by his brother, one K. She met with the accused who she knew. He greeted her and asked her where her home was. But she continued to walk. She looked back and saw that the accused was following her. He called her and asked her to stop. She started running. The accused who was armed with a panga followed her. He caught up with her and asked her for the direction of a certain house. He then walked ahead of her. After a while, he walked backwards to where she was. It is at this point that he held her hand and threatened to cut her if she ran away.

It was PW1's further evidence that the Appellant pulled her to the bush where he defiled her.

PW1 reported the incident to his father. His father in turn reported to the Chief. She was treated at Kaptarakwa. On the following day they reported the incident at Tambach Police Station. PW1 was thereafter issued with a P3 form. The Appellant was also arrested and charged.

PW2, R K L the father of PW1 testified that on 18th November, 2007 at about 5.00 a.m., PW1 arrived home having travelled from another farm he owned. PW1 reported to him that she had been defiled by someone she could identify. She was walking with a lot of difficulty and pain. He took her for treatment at Kaptarakwa. On the following day, they reported the incident at Tambach Police Station. A village elder and the area Chief were also informed of the incident.

PW2 identified the P3 form that was issued to PW1.

PW2 further testified that the area Chief called a baraza (public meeting) in which PW1 identified the accused. He stated that he also visited the scene in the company of the Chief which he found disturbed. It was about 50 metres from the road.

PW3, L C the mother of PW1 testified that she knew the Appellant after his arrest. She recalled that PW1 left her house on 18th November, 2007 at about 2.00 p.m. to Tambach where her father lived. She later received a report that she had been defiled.

PW4, Philip Kiprono Kiplagat the Assistant Chief, Rogocho Sub-location testified that on 18th November, 2007 at about 5.30 p.m., he received the information about the incident. He organized for suspects to be taken to his office for identification. PW1 had described the suspect as a person of dark complexion and medium height. She identified the Appellant among the suspects.

PW5, KC, a brother to PW1 testified that on 18th November, 2007, she escorted PW1 who was going where their father lived. He testified that he only escorted her for a short distance. Thereafter, he received information that she had been defiled.

PW6, APC Morris Tirean of Cheptebo Chief's Camp testified that he arrested the Appellant on instructions from the sub-chief of Rogocho sub-location. He escorted him to Tambach Police

Station.

PW7, Luka Koskei, a Clinical Officer from Kaptarakwa District Hospital examined PW1 on 24th November, 2007 and filled her P3 form. He stated that she had tenderness and oedema on the tibia minora. There was foul smell and foul discharge. He estimated the age of the injury to be eight (8) hours. He concluded that she had had sexual intercourse. He produced the P3 form as an exhibit.

PW8, Police Constable Abraham Tabot of Tambach Police Station testified that on 24th November, 2007, PW1 was taken to his office in the company of the Appellant and her mother. He recorded her statement, issued her with a P3 form and charged the Appellant.

According to PW8, the Appellant way laid PW1 by the road before defiling her. He was armed with a panga with which he threatened her if she screamed. He said he visited the scene which was in a forest 7 metres from the road.

The Appellant gave an unsworn statement of defence. He stated that on the 18th November, 2007 he was at home. After taking lunch, he went to a traditional party where he remained until 7.30 p.m. when he went home to sleep. He thereafter remained at home. Three days later, he received a letter from the Chief who summoned him to go to his office. On arrival, he found an administration police officer who arrested him on allegations that he had committed an offence of defilement. He was taken to Tambach Police Station.

The first point of consideration upon analysing the above evidence is whether PW1 properly identified the Appellant.

Although the offence was allegedly committed in broad day light, it is worthwhile noting that the assailant was not previously known to PW1. In her own words, PW1 stated as follows:-

"I knew the accused in this matter. I saw him on the date of the incident. He is before court. Accused identified by the witness."

On cross-examination by the Appellant, she stated as follows:-

"I marked your face after the incident. The Chief showed me a group of four people and I identified you. You were putting on a black short when the incident occurred."

Ultimately, it is only after the Chief paraded some suspects in his office that PW1 was able to pick out her assailant. This parade was done by PW4, the Assistant Chief of Rogocho Sub-location. Although PW4 did not state in his evidence on which date he paraded the suspects, it is clear from the testimonies of PW6 and 8 that it was on 24th November, 2007, seven days after the incident.

According to PW4, he had been told that the suspect was a man of dark complexion and medium in size. He then suspected two persons, namely David Koech and Kavid Kiptagon.

At the point that PW4 paraded the suspects, nothing indicated that the Appellant was a man of dark complexion as the suspect had been described. The trial court did not also note the physical appearance of the Appellant and whether it matched with that given by the complainant.

It then follows that it is not clear how PW4 ended up parading the Appellant in his office. Besides, even after he thought that the description of the assailant fitted that of David Koech and David Kiptagon, he did not state whether the two gentlemen were among those paraded in his office.

It is also not conclusive that PW4 ever paraded any men in his office as he testified. This fact is buttressed by PW6's evidence who did not mention that he found other men other than the Appellant in PW4's office when he went to arrest the Appellant. Again, the Appellant (though he

gave unsworn defence) stated that he was arrested after being summoned by the Assistant Chief to his office. He did not state he was paraded with other men or found other men in the Chief's office.

In the surrounding circumstances, doubts arise of how PW4 settled on the Appellant as the culprit. It then behoved on the police to find it prudent to conduct an identification parade. The same would have erased doubts that indeed PW1 properly identified the Appellant as the person who defiled her. In the absence of a proper identification, it is difficult to conclude that indeed it is the Appellant who defiled PW1.

There is also marked contradiction with respect to the date that the offence was reported to the police. According to PW1 and 2, they reported the incident on the day after 18th November, 2007, which was 19th November, 2007. In sharp contrast to this testimony, PW8 (I opine the investigating officer), stated that the report was made on 24th November, 2007, the day on which the Appellant was also arrested. It raises eyebrows why PW1 and 2 wanted to impress that they acted promptly in reporting the incident. It also raises eyebrows as to why it took them close to one week to report such a heinous offence. In lieu therefore, court remains with doubts as to the correct date the Appellant was arrested. No attempt was made by the prosecution to correct that anomaly.

The evidence of PW7 was that PW1 had had a sexual intercourse but in view of the foregoing, the intercourse cannot be linked to the Appellant. Therefore, even if this court were to prefer a retrial, a conviction would not be automatic. A retrial should only be ordered where a conviction is likely and the interests of justice will be served. The scenario presented by the evidence in this case demonstrates that it is not a suitable case for a retrial and that ordering a retrial may occasion grave injustice to the Appellant.

In the circumstances, the appeal must succeed. I quash the conviction and set aside the jail term sentence. I order that the Appellant be forthwith set free unless he is otherwise lawfully held.

DATED and **DELIVERED** at **ELDORET** this 18th day of September, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Appellant present in person

Mr. Mulati for the Respondent