



No. 391/14

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CRIMINAL APPEAL NO.73 OF 2013

KYALO MUTUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Kajiado Principal Magistrate's Court

Criminal Case No. 563 of 2012 by Hon. S.O. Temu, SRM on 22/2/13)

JUDGMENT

1. **Kyalo Mutua** (appellant) was charged with committing an act which caused penetration to a child with a mental disability contrary to **Section 7** of the **Sexual Offences Act No. 3 of 2006**. Particulars thereof being that on the **16th** day of **May 2012** at [**Particulars Withheld**] in **Loitokitok District** within **Kajiado County**, intentionally caused his penis to penetrate the vagina of **S M** a child aged **10 years** with mental disabilities.

2. In the alternative he faced a charge of committing an indecent act with a child with mental disability contrary to **Section 7** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence being that **16th** day of **May 2012** at [**Particulars Withheld**] in **Loitokitok District** within **Kajiado County**, intentionally touched the vagina, the breasts and thighs of **S M** with his penis a child aged 10 years with mental disability

3. He was tried, convicted and sentenced to serve **twenty (20) years** imprisonment on the main charge.

4. Being dissatisfied with the conviction and sentence he now appeals on grounds:-

i. The trial was a nullity having been based under a repealed provision of the law namely **Section 7** of the **Sexual Offences Act**,

ii. The trial was a nullity having been conducted by an unqualified Police Prosecutor in contravention of **Section 85** of the **Criminal Procedure Code** as read with **Section 88** of the **Criminal Procedure Code**.

iii. The trial magistrate made an error in law and misdirected himself by convicting on evidence of

a single witness (PW3) without warning himself of the danger of convicting on such evidence.

iv. The trial magistrate erred in law and fact by shifting the burden of proof to the appellant.

v. The learned trial magistrate erred in law and fact by failing to summon the appellant's employee who was a vital witness.

5. Facts of the case are that on the **16th May, 2012**, PW1 **N M** left her daughter **S M**, aged **10 years** and mentally challenged under the care of her mother-in-law. At about 3.00pm, PW3, **I M**, a minor aged **12 years** old saw the appellant a worker at his uncle's butchery coming from the house in which he used to sleep with their herdsman. He carried a polythene paperbag. He sought to know what he carried but he did not respond to the question. He however, told him that he was late for work.

6. Thereafter his sister **S** came from the same house while bleeding. He informed their father. PW4, **Malano Ole Mwenda** went to the butchery in search of the appellant. The appellant was arrested. He was taken to hospital with the child for examination.

7. PW2, **Doctor Isha Mohammed** who examined the complainant found her clothes and inner garments with blood. She was bleeding from her private parts. She was unable to walk. Her pelvis had first degree tear. Her vagina had lacerations with moderate bleeding. The hymen was broken with lacerations. He found evidence of forceful penetration to the vagina. He also examined the appellant who had no injuries on his private parts. His clothes had no signs of stains. His blood was taken for examination for venereal diseases which was found to be negative. The appellant was charged.

8. When put on his defence the appellant denied having committed the offence. He stated that he disagreed with **S** (PW4). He had a meeting with him and his brother on **6/5/2012** in respect of the business of selling meat. The two (2) had given out business money to some women. PW4, vowed to ensure he left the market. On the **16/5/2012** he went to the place of business and asked him to accompany him to the police station where they would agree on how the money would be refunded. He went only to be placed in custody.

9. At the hearing of the appeal, appellant opted to rely upon his written submissions where he buttressed grounds of appeal.

10. In response thereto, the State opposed the appeal. Learned Counsel **Ms Kefa** submitted orally that evidence of penetration of the child who was mentally retarded was proved and the appellant's defence did not challenge the prosecution's case.

11. This being the first appellate court, it is duty bound to subject the evidence on record to afresh review and scrutiny and come to its own conclusions bearing in mind, however, that it did not see or hear witnesses testify. (see **Pandya versus Republic [1957] E.A. 336; Okeno versus Republic [1972] EA.32.**)

12. **Sexual Offence Act, 2005** alluded to by the appellant is non-existence. It is true, a perusal of the proceedings indicated that the trial magistrate convicted the appellant as charged but cited **Section 7** of the **Sexual Offences Act, 2005**.

13. The appellant was charged with an offence contrary to **Section 7** of the **Sexual Offences Act, 2006** which Provides:-

“A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years”.

14. The Section of the law envisages a situation where a person intentionally commits rape or an indecent act with another when her family, a child or a person with disability is watching/seeing. It does not envisage a situation where a person with a disability is defiled like in the instant case. In the premises the

appellant was accused of contravening a wrong section of the law.

15. Looking at the second ground of appeal, the appellant argues that the trial was a nullity because the case was prosecuted by **Sergeant Onger** who was unqualified as a prosecutor.

16. **Section 85(1) (2)** of the **Criminal Procedure Code** provides thus:-

“1) The Attorney-General, by notice in the Gazette, may appoint public prosecutors for Kenya or for any specified area thereof, and either generally or for any specified case or class of cases.

(2) The Attorney-General, by writing under his hand, may appoint any advocate of the High Court or person employed in the public service, to be a public prosecutor for the purposes of any case”.

17. **Section 88(1)** of the **Criminal Procedure Code** provides thus:-

“A magistrate trying a case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorized by the Attorney-General in this behalf shall be entitled to do so without permission”.

18. This case was prosecuted by a Police Sergeant. It is alleged that he was unqualified. This would suggest that he had not been gazetted by the Director of Public Prosecutions (DPP) to conduct the prosecution. There was no response from the learned State Counsel to that ground therefore this court takes it that indeed he was unqualified hence not authorized to undertake duties of prosecution. In the premises the trial was a nullity.

19. The trial was a nullity because the trial court did not interrogate circumstances under which the Police Sergeant was prosecuting the case. The question to be answered will be –whether a retrial should be ordered?

20. In the case of **Fatehali Manji versus Republic [1966] E.A Pg 343** the Judges of Appeal **Sir Clement de Lastang, Ag. P Spry Ag V – P and Law J.A** stated thus:-

“i) in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of the insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is 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 retrial should only be made where the interest of justice require it;

ii) The original trial was neither illegal nor defective and in the circumstances of the case it would be unfair to require the appellant to stand a trial”.

21. This is a case where some other grounds of appeal question whether the case was indeed proved to the required standard.

22. There is evidence of a child, PW3. He was subjected to a preliminary examination per the record. He told the court that those who told the truth would go to heaven and he undertook to tell the truth. The court then remarked that the minor could give sworn evidence. The question and answer process is usually important as it helps the court establish if the child possesses intelligence that makes him understand the nature of the oath that would make him discharge the duty of telling nothing but the truth.

23. This was well put in the case of **Johnson Muiruri versus Republic [1983] KLR 447** where the Court of Appeal stated thus:-

“We once again wish to draw the attention of our courts to the proper procedure to be followed when children are tendered as witnesses. In Peter Kanja Kiume -Criminal Appeal No. 77 of 1982 (unreported) we said “ where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion on a voire dire examination, whether the child understands the nature of oath in which even his sworn evidence may be received. If the court is so satisfied his unsworn evidence may be received. ..

It is important to set out questions and answers when deciding whether a child of tender years understands the nature of the oath so that the appellate court is able to decide whether this important matter was rightly decided, and not be forced to make assumptions”

24. In the instant case, it is evident that the record is silent on the nature of the questions put to the witness. What is on record is purported answers. The basis upon which the court formed an opinion to have the child sworn is not stated. This court being an appellate court can only make assumptions as to how the opinion was formed.

25. The only evidence connecting the appellant to the offence committed was the evidence of PW3. In basing his decision of his evidence the trial court stated as follows:-

“The court was fully satisfied with the candid with which PW3 answered questions-in-chief and on cross-examination. He was frank and exact to the point. The court was thus convinced beyond any reasonable doubt that indeed PW3 knew the accused well and he had positively identified him and he had no difference with the accused in order to frame him. The accused did not at all make any attempt to challenge the credibility of PW3 as he had seen him clearly during the day which time was about 3.00pm as per prosecution witnesses’ evidence”

26. PW3 was not the victim of the offence. He was sworn and subjected to cross-examination. It is trite law that the court could base a conviction on his evidence as a single witness. (**See Section 143 of the Evidence Act**). However, it would have been desirable for the court to warn itself on the danger of basing the conviction solely on his evidence. Without such a warning the conviction ought to be set aside unless there is evidence to establish that there was no failure of justice.

27. Re-looking at the evidence on record, PW1 stated that she left the victim of the offence under the care of her grandmother. the grandmother having not been called as a witness the court does not know how she discharged her duties of watching over the child and whether indeed the child ended up at their worker’s house.

29. PW3 on cross-examination stated that he did not see when the appellant entered the house. He only saw him leaving the house. He also did not see the child enter the house and he did not see him close the door. This was a house that used to be occupied by another worker. The appellant was arrested soon thereafter and subjected to examination by a medical doctor. Per the result of the examination there was absolutely no suggestion that he had engaged in coitus. The nature of injuries sustained by the victim would suggest that there could be even just a stain of blood on the person who had been in contact with her. But this was not the case with the appellant. The question lingering is if indeed he was the child’s assailant?

29. According to the witness the child was not able to talk. The Doctor who examined her found that the child could recognize her parent’s motor and sensory reflexes but could talk incoherently. Therefore the prosecution did not tender evidence as to what time and how the child went into the house and if indeed the appellant left the house, whether he did see the child. PW3 said the child could cry but would not make any sound. In his defence the appellant denied having been at the scene. He alleged he was framed up. In as much as his evidence may have been unconvincing, the duty was upon the prosecution to prove that indeed he was the child’s assailant. Medical evidence adduced in his regard was not favourable to the prosecution’s case.

30. In the premises there was no proof beyond any reasonable doubt that he was the one who committed

the heinous act upon the person of the child victim. In the premises, the alternative charge would not be established.

31. Consequently, the appeal succeeds, the conviction is quashed and sentence set aside. The appellant shall be released forthwith unless otherwise lawfully held.

32. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 16TH day of SEPTEMBER, 2014.

L.N. MUTENDE

JUDGE