



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 39 OF 2010

ABRAHAM KIPKOECH NGETICH APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal arising from the Judgment of Hon. G. A. Mmasi (Senior Resident Magistrate) in Eldoret Chief Magistrate's Court Criminal Case No. 6487 of 2009 delivered on 10th March, 2010)

JUDGMENT

The Appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006.

Particulars of the charge are that on the 23rd of October, 2009 at Uasin Gishu District within the Rift Valley Province intentionally and unlawfully caused his male organ (penis) to penetrate the female organ (vagina) of JC a child aged six (6) years.

In the alternative he was charged with indecent act contrary to Section 11 (1) of Sexual Offences Act No. 3 of 2006.

Particulars of the alternative charge are that on the 23rd October, 2009 at Uasin Gishu District within Rift Valley Province indecently touched the private part of JC a girl aged six (6) years.

Judgment was delivered on 10th March, 2010 by Hon. G. A. Mmasi, Senior Resident Magistrate. She found the Appellant guilty of the main charge, convicted and sentenced him to life imprisonment.

The Appellant filed amended grounds of appeal on 25th April, 2013. He has raised five grounds of appeal, namely:-

- 1. That the trial Magistrate erred both in law and facts by failing to consider that the evidence of the medical officer lacked merit as there was no incriminating factors linking me to the said offence.**
- 2. That the trial Magistrate erred in both law and facts by convicting me basing on contradictory and inconsistent evidence of the prosecution side.**
- 3. That the trial Magistrate erred in law and facts by convicting me without putting into account that the mode of my arrest was questionable and essential witnesses were not availed**

to testify.

4. That the trial Magistrate violated the court procedure in neglecting voire dire examination of PW1 before subjecting her to testify.

5. That the trial Magistrate erred both in law and facts by convicting me on defective charges.

The appeal was canvassed before me on 25th April, 2013. The Appellant relied on written submissions also filed on 25th April, 2013. The prosecuting Counsel, Mr. Mulati, responded to the Appellant's submissions orally.

This being a first appellate court, its duty is to examine the evidence afresh and determine whether the Appellant's grounds of appeal hold any water. See OKENO -VS- REPUBLIC (1972) EA, 32.

“An Appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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 conclusion; it must make its own findings and draw its own conclusions.”

With respect to ground 1 of appeal, the Appellant has submitted that the findings of the medical officer who examined the complainant did not link him to the commission of the offence. In particular he singled out that no spermatozoa was found on the complainant and he too was not examined. He submitted that the medical officer who testified as PW5 stated that detailed forensic and DNA examinations were not performed on both himself and the complainant to ascertain his involvement in the offence. That the whitish discharge recorded on the P3 form was not sampled out and taken for chemical analysis to ascertain what it was. That further P3 form did not show that the complainant had a broken hymen.

The state counsel on his part said that the evidence of PW5 confirmed that PW1 had been defiled.

The P3 form produced in court as P.Exhibit 1 formed the basis of the medical expert evidence in prove that indeed defilement took place. It was produced by PW5, a clinical officer at Burnt Forest Sub-District Hospital, who was also its maker. He saw the patient (PW1) on 23rd October, 2009. On examination of PW1 he stated as follows:-

“There were epithelial cells but no pus. I concluded that the child was defiled as the hymen was broken and there was presence of epithelial cells”

On cross-examination by the accused he confirmed the presence of epithelial cells and a broken hymen. He stated there was no spermatozoa and H.I.V. test was negative. He also stated that he never examined the Appellant.

Whereas it is factual, that the Appellant was not examined, or DNA tests done, PW5 testified as an expert witness. He confirmed that the presence of the epithelial cells and broken hymen were conclusive evidence that the complainant had been defiled. I therefore, refuse to buy the Appellant's assertion that there was need for DNA tests or further examination of the whitish discharge found in the complainant's vagina.

Be that as it may though, the testimonies of PW1, 2, 3 and 4 leave no doubts that it is the Appellant who defiled the complainant.

According to PW1, she had gone to the posho mill to grind maize and while on the way there the Appellant held her and took her to the shamba where he defiled her. She said she felt pain and

cried and told her mother what had happened when she went home who in turn took her to hospital.

PW2, the complainant's mother confirmed that she had sent PW1 to the posho mill 200 metres away from their home. She said that she was told by one RK that her child had been defiled. That she saw blood on PW1's vagina although no blood was seen on the pants. She said that she was told by S and C that they saw the Appellant taking her daughter to the maize plantation. She said she reported the matter at the police station while accompanied by the two ladies who witnessed the incident.

PW 2 also produced PW1's birth medical card which showed that PW1 was born on 10th January, 2003.

The said SB testified as PW3. She testified that she saw the Appellant taking PW1 to the maize plantation and together with another lady, one C followed the Appellant and PW1 into the maize plantation. She said that when they entered into the maize plantation, the Appellant ran away on seeing them but found PW1 squatting. She named the suspect "K" who was her neighbour who lived 200 metres away from her home.

PW3 further testified that she saw blood on PW1's private parts. That she and C reported the matter to PW1's mother. She said that she identified the Appellant at the Chief's office where she found him having been arrested.

CC testified as PW4. She wholly corroborated the testimony of PW3. In addition, her testimony was that she saw the Appellant standing with PW1 from a distance of 50 metres. That the child (PW1) had placed a paper bag on the ground. That the Appellant then took the child (PW1), whose parents she knew to the maize plantation. That she trailed them closed. That luckily, PW3 arrived and both followed the duo to the maize plantation. She said she examined PW1's private parts and confirmed she had been defiled.

She said she knew the Appellant as her neighbour for over ten (10) years.

The foregoing is a clear indication that the testimonies of PW2, 3, and 4 corroborated that of PW1. None of the witnesses contradicted herself. PW3 clearly saw the Appellant in the company of the complainant prior to the incident. Together with PW4 they followed him to the scene but he escaped. They both very well knew the Appellant who was their neighbour and had no reason of framing him.

Therefore, even without any further medical evidence that was tendered in court, it is evident that direct evidence of PW3 and 4 implicates him.

Such evidence was never rebutted on cross-examination or by the Appellant's defence.

I do accordingly hold that ground No. 1 of appeal is baseless and I dismiss it in its entirety.

With respect to ground of appeal No. 2, the appellant submits that the evidence of the medical officer lacked merit and the same did not incriminate him. In fact, he blames the trial court for not taking into account that such medical report was not conclusive that he committed the offence.

Far from this assertion. I have already given my view as to why the P3 form produced by PW5 was on its own, conclusive evidence that defilement had been committed. What the P3 form does not disclose is who committed the offence.

In making a determination of the latter, court is guided by evidence of other witnesses or considers the weight and truthfulness of the evidence of the complainant.

In this case, I have already noted that PW1's evidence was candidly corroborated by that of PW2,

3 and 4. Besides PW3 and 4 were eye witnesses whose testimonies leave no doubt in my mind it is the Appellant who committed the offence.

In this regard, ground 2 must fail as well.

With regard to ground of appeal No. 3 in which the Appellant has submitted that there were irregularities with the manner in which he was arrested, such assertion is rebutted by the testimonies of PW6 and 7 both of whom were the arresting and investigating officers respectively.

PW6, APC, BKM testified that the Appellant had been arrested by members of the public. His task rested with re-arresting the Appellant from the members of public.

PW7 on the other hand conducted investigations that led to the Appellant being arraigned in court. No complaint was raised before him by the Appellant with respect to the mode of his arrest. The Appellant too did not raise any such complaint with the trial court. In my view, such a complaint would have probably touched on manhandling of the Appellant by the members of the public. It is trite law that members of public can arrest offenders and hand them over to authorities. His assertion therefore that he was not arrested in a proper manner, too is baseless and I dismiss it.

With regard to ground of appeal No. 4, the Appellant has submitted that the trial magistrate violated the procedure of taking voire dire examination of PW1 before subjecting her to testify.

But the state counsel submitted that this was done and the court concluded that she (PW1) did not understand the meaning of taking an oath and therefore subjected her to give an unsworn statement of evidence.

Under S.19 of the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya, the voire dire examination is conducted to determine whether the minor understood the meaning, nature and purpose of an oath and if he did not, whether he was possessed of sufficient intelligence to justify the reception of his evidence though not on oath.

Further in the case of **OPICHO -VS- REPUBLIC (2009) KLR, 369** it was held, with respect to voire dire examination;

“The child was a vital witness in the trial and the failure by the court to comply with the procedure in the reception of his evidence vitiated that evidence”

The record shows that PW1 testified on 18th December, 2009. The court noted her name and the prosecution proceeded to lead her in evidence in chief. At the close of her testimony, the trial magistrate noted as follows:-

“Order: Witness not to be cross-examined as she does not know the essence of taking the oath”

It must be noted that the duty of conducting the voire dire examination squarely lies with the court. The court must not assume that the questions put forth to the minor by the prosecution will form part of the voire dire examination. It is the duty of the trial court to take it upon itself to record that it is taking such voire dire examination of the minor.

Upon such examination, the trial court must note what its opinion is. If it is of the opinion that the minor understands the meaning of giving testimony on oath, it must rule so and direct that the child gives a sworn statement of evidence. If it is of the view that the child does not understand the meaning of taking an oath, again, it must record such opinion and direct that the child gives an unsworn statement of evidence.

In the instant case the trial magistrate failed to follow this cardinal procedure which ultimately vitiated the evidence of PW1. He made an assumption that he could deduce whether the child understood the meaning of an oath from her evidence as led by the prosecutor. He thus abdicated his duty of conducting the voire dire examination, which duty is the sole responsibility of the trial court.

It is my view therefore, that, due to the transgression of the procedure in taking the evidence of the minor, a retrial should follow.

In **OPICHO -VS- REPUBLIC (Supra)**, the court held that:-

“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 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 interests of justice require it.”

Other decisions cited were **MUIRURI -VS- REPUBLIC (2003), KLR, 552, MWANGI -VS- REPUBLIC (1983) KLR 522 and FATEHALI MAJI -VS- REPUBLIC (1966) EA, 343** that **“although some factors may be considered, such as illegalities or defects in the original trial, the length of time elapsed since the arrest and arraignment of the Appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether on a proper consideration of the admissible or potentially admissible evidence, a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for a retrial should only be made where the interests of justice require it.”**

In the instant case, neither was the prosecution nor the Appellant to blame for the omission of taking the voire dire examination. It was the pure flagrant mistake of the trial court. All the evidence tendered before the trial court combined provide a water tight case against the Appellant. The allegations against him are very grave and cannot be wished away. But it is also the duty of this court to ensure that he gets a fair trial, and even if he will be convicted or acquitted, it must be seen that such a finding was arrived at through a fair and just trial.

May I add that the failure to conduct the voire dire examination is fatal to a conviction of an accused.

In **MUIRURI -VS- REPUBLIC (1983) KLR, 445**, it was held thus:-

“(2) It is important to set out the questions and answers when deciding whether the child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.

(3) When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.

(6) The Judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of oath. The failure to do so is fatal to the conviction.”

Finally, the Appellant has submitted that this appeal should succeed because the charge sheet was defective. According to him, since the age of the complainant was ascertained at six (6) years, the main charge ought to have been brought under Section 8 (1) as read with Section 8 (2) AND NOT Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006.

Under the Sexual Offences Act, penalty for defilement is determined by the age of the complainant.

PW1's birth medical card shows that she was born on 10th January, 2003. She was defiled on 23rd October, 2009. She was then aged 6 years and approximately 10 months. Accordingly, the offence ought to have been defined under Section 8 (1) as read with sub-section (2). The latter prescribes the penalty for defilement of children under eleven (11) years, under which bracket the age of PW1 fell.

However, although the drafter of the charge sheet stated that the Appellant was charged under S. 8 (1) as read with Section 8 (3) of the Act, this omission did vitiate a fair trial or prejudice the Appellant in any way. See Section 90 (2) of the Criminal Procedure Code which provides that “**the validity of proceedings taken in pursuance of a complaint or charge shall not be effected either by a defect in the complaint or charge or by the fact that a summons or warrant was issued without a complaint or charge.**”

I do find, from the foregoing that indeed the Appellant committed the offence of defilement against the complainant, PW1. However, great miscarriage of justice was occasioned against him during the trial on account of the failure by the learned trial magistrate to conduct the voire dire examination on PW1. Lack of such examination definitely vitiated the evidence of PW1. It also probably denied the Appellant an opportunity to test the elasticity of PW1's evidence, had the court found that PW1 understood the meaning of taking an oath and therefore accorded the Appellant an opportunity to cross-examine PW1.

In the result, I allow the appeal, set aside the conviction and the sentence imposed on him. He shall be retried before a competent court other than the Magistrate who conducted the trial.

The Appellant has been in custody for more than two (2) years since his conviction. It is for this reason I order that expeditiously retrial be conducted. I do accordingly direct that he be produced before the Chief Magistrate, Eldoret within seven (7) days of this Judgment, for appropriate action.

DATED and DELIVERED at ELDORET this 27th day of June, 2013.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Appellant in person

Mr. Munene for the State/Respondent