REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL CASE NO. 65 OF 2010

ANDREW MUCHIRI MWAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence by B. M. Nzakyo, Resident Magistrate, in Othaya Resident Magistrate's

Criminal Case No.250 of 2008 delivered on 15th March 2010)

JUDGMENT

ANDREW MUCHIRI MWAI, the appellant herein, was tried on a charge of defilement contrary to *Section 8 (1) (2)* of the Sexual Offences Act no. 3 of 2006. At the end of the trial he was convicted and sentenced to serve thirty (30) years imprisonment. Being aggrieved he preferred this appeal.

On appeal the Appellant put forward the following grounds in his petition:

1. The learned trial magistrate erred in law in holding the charge was defective notwithstanding the said charge in its particulars did not satisfy the requirements of section 8(1) of the sexual offences Act No. 3 of 2006.

2. The learned trial magistrate erred in law and fact by not addressing its mind on the issue of the time the offence was committed and the time it was reported without any explanation.

3. The learned trial magistrate erred in law in relying on the uncorroborated evidence of the complainant.

4. The learned trial magistrate erred in law by relying on medical evidence which was not conclusive.

5. The learned trial magistrate erred in law and fact by not addressing the defence offered by merely stating it was unreliable.

6. A total evaluation of the evidence proves the conviction was against the weight of evidence.

The Appellant further put forward the following supplementary grounds of appeal:

1. The Learned Resident Magistrate erred in law in convicting the Appellant without first making a finding in his judgment that the complainant was telling the truth and/or failed to record any reasons for such a finding in total violation of Section 124 (Second Proviso) of Cap 80 Laws of Kenya. Prejudice and a miscarriage of justice was occasioned to the Appellant.

2. The Learned Resident Magistrate erred in law and in fact in failing to make an enquiry before admitting the evidence of P.W. 2 (a minor of 13 years). A miscarriage of justice as occasioned to the Appellant.

3. The Learned resident Magistrate erred in law in convicting the Appellant on insufficient, contradictory and uncorroborated evidence. Prejudice and a miscarriage of justice was occasioned to the Appellant.

4. The Learned Resident Magistrate erred in law and in fact in holding that the Appellant had not proved his Alibi when in law he had no such burden to proof the same. Prejudice was occasioned to the appellant.

When the appeal came up for hearing, Mr. Makura, learned Senior State Counsel, conceded the appeal and pressed for a retrial.

Before considering the substance of the appeal, let me set out in brief the case that was before the trial court. The prosecution's case was supported by the evidence of five (5) witnesses. T.N (P.W. 1), the Complainant herein, was fetching firewood in the bush on 22nd June 2008 when the Appellant allegedly took her to his house, where he removed her underpants before defiling her. Though the Appellant had been warned to reveal to anybody what he had done to her, she nevertheless disclosed the same to her mother. Z.W (P.W. 2), the complainant's younger sister confirmed in her evidence that P.W. 1 had been sent to collect firewood on the fateful day. Dr. Jean Kinyua (P.W.5), told the trial Magistrate that she examined P.W. 1 and found her hymen broken.

When the Appellant (D.W.1) was placed on his defence, he gave sworn testimony and summoned the evidence of one independent witness. He told the trial court that on 22nd June 2008 at around 9.00 a.m. he together with his mother went to fellowship at A.C.K. Church, Mucharage and left at 1.00 p.m. Six days later he was arrested as a suspect for defiling P.W. 1. He denied having met the Complainant that date. The Appellant's story was corroborated by the evidence of his mother Jane Wangari Mwangi (D. W. 2). D.W. 2 said the Appellant's family had several land disputes with that of the Complainant. After considering the evidence, the learned Resident Magistrate came to the conclusion that the complainant was penetrated hence defiled. The learned Resident Magistrate concluded that the Complainant had identified the Appellant as her assailant. She claimed D. W.1 was someone well known to her and that is why she promptly mentioned his name.

Having given the brief history behind this appeal, let me now consider the substance of the appeal. Mr. Kimani, learned advocate for the appellant, argued four main grounds of appeal. First, it is argued that the charge was fatally defective in that the word 'unlawful' was not used in the charge. Mr. Makura did not address his mind on this issue. I have already stated that the Appellant was convicted for the offence of defilement contrary to *Section 8(1) (2)* of the Sexual Offences Act No. 3 of 2006. It is true the word

"unlawful" was not used in the Charge Sheet. In my view the use of the word 'defilement in itself denotes unlawfulness hence there was no need to use the word 'unlawful'. The second ground argued was to the effect that the Complainant's evidence was not corroborated as required under *Section 124* of the Evidence Act. Again, Mr. Makura, did not address me on this issue. It is apparent from *Section 124* of the Evidence Act that there is need to corroborate the evidence of a victim of sexual offences before conviction. However, that requirement is dispensed with under the proviso to Section 124 so long as the court records the reasons for accepting the evidence and must state that the alleged victim is telling the truth. The record shows that the victim herein was a child aged seven (7) years. Her evidence was the only direct evidence. In view of her age, there was need for corroboration. Still, the trial magistrate could have accepted her evidence under the proviso to *Section 124*. Unfortunately, the trial magistrate did not record the reasons why he did accepted her evidence neither did he cord that the minor was telling the truth. I think this ground of appeal is well founded. Thirdly, the Appellant was of view that the medical evidence tendered was inconclusive and contradictory in itself. For some strange reason, Mr. Makura did not address this court on this aspect. I have perused the medical report which was produced before the trial court. The same indicates that the Complainant's hymen was broken. On cross-examination P.W.1 told the trial court that the hymen had been freshly broken when she examined the patient on 27th June 2009. It must be noted that it is alleged that the alleged offence is stated to have taken place on 2nd June 2009. It cannot therefore be true that the hymen was freshly broken. The other serious dent on the medical evidence is that the appellant was not examined to create the nexus at least to corroborate the evidence of the Complainant. In the same medical report the witness who filled and signed the P3 form clearly stated that there was abnormalities in the victim's genitalia. This assertion alone lends credence to the Appellant's allegation that the medical evidence was inclusive and contradictory. The fourth ground argued on appeal is to the effect that the evidence of P. W. 2 was received without the magistrate conducting a preliminary inquiry (voir dire). It is clear from the evidence on record that Z.W (P.W. 2) was the older sister of the Complainant. It is stated that she was in class 7. The record shows that the trial court received her evidence without conducting *voir dire* examination. It is the submission Mr. Kimani that the learned Resident Magistrate fell into error when he failed to conduct a preliminary inquiry before allowing P.W.2 to give sworn testimony. I do not think this ground has any merit for two reasons: First, there is no evidence that P.W. 2 was a minor. The record indicates that the witness was in class 7. In my view such a witness cannot be said not to understand the meaning of giving evidence under oath. There was no need to conduct a preliminary inquiry. Secondly, there is no indication that the trial magistrate relied on her evidence to convict the Appellant.

At the beginning, I stated that Mr. Makura, learned Senior State Counsel conceded the appeal. Mr. Makura, pointed out that the learned Resident Magistrate proceeded to receive sworn evidence from the Complainant yet there was clear evidence showing that the witness did not understand the meaning of testifying under oath. I have perused the record and it is obvious that P.W. 1 had clearly stated that she did not understand the meaning of testifying under oath. It was therefore wrong for the learned magistrate to find that the witness understood the meaning of testifying under oath. Mr. Makura urged this court to order for a retrial. Mr. Kimani strenuously opposed this proposal on the ground that the case does not meet the conditions necessary to order for a retrial. Perhaps, the question which should be answered is what are the conditions necessary which an appellate court should consider before making an order for retrial? The answer to the aforesaid question can be deduced by the holding of the Court of Appeal in the case of **Fundi Reuben Ngala =Vs= Republic No. 268 of 2005** (unreported) in which the Court held as follows:

"Whether or not a retrial shall be ordered is within the discretion of the court and will be dictated by the circumstances of each case. Ordinarily a retrial would be the appropriate order to make where there are fundamental irregularities which would result in a miscarriage of justice which is curable under Section 382 of the Criminal Procedure Code."

In the case of **Mwangi =Vs= Republic [1983] K.L.R. 522** the Court of Appeal further restated as follows:

"A retrial should not be ordered unless the appellate court is of the opinion that on proper consideration the admissible evidence, a conviction may result."

I have carefully considered the grounds of appeal relied upon by the Appellant. The weaknesses pointed out were substantially committed by the trial court. Those weaknesses include the reception of sworn evidence from a witness who did not understand the meaning of testifying under oath. I am aware that under *Section 174* of the Evidence Act, that the improper admission or rejection of evidence shall of itself be a ground for a new trial so long as it appears that there was sufficient evidence to justify the decision or that if the rejected evidence had been received, it ought not to have varied the decision. It is clear from the evidence on record that the Appellant was convicted on sworn evidence which was improperly received. These facts within the exception set out under *Section 174* of the Evidence Act. The other weakness which has emerged is the apparent contradiction between the oral evidence of the doctor (P.W.5) and the findings in the P3 form. In my view those issues cannot be attributed to the prosecution. In a nutshell, this case meets the conditions necessary to issue an order for retrial. The Appellant was convicted on 15th March 2010 and sentenced to serve 30 years imprisonment. I am satisfied that the Appellant will not suffer any prejudice if the order for retrial is made. My holding is founded on the fact that it will be easy to get witnesses and that the Appellant will not have served the substantial part of the sentence.

In the end, the appeal is allowed. The conviction is quashed and the sentence set aside. The Appellant to be held in custody pending a fresh trial. The Appellant to be retried before another magistrate of competent jurisdiction other than B. M. Nzakyo. The rehearing to be undertaken on priority basis.

Dated and delivered at Nyeri this 8th day of July 2011.

J. K. SERGON

JUDGE