REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 37 OF 2018

JAMES MWANGI MURIITHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence by Hon M. Kasera, (PM) dated 21st December 2017 in criminal case No. 33 of 2016 in the Chief Magistrate's Court at Kajiado)

JUDGMENT

1. The appellant was charged with defilement of a person with mental disability contrary to section 7 of the Sexual Offences Act No. 3 of 2006. Particulars were that on 3rd September, 2016 at Kajiado County he intentionally caused his male organ to penetrate the female organ of JW, a child aged 7 years. He pleaded not guilty to the charge and after a trial in which the prosecution called 5 witnesses and the appellant's defence, the appellant was convicted and sentenced to life imprisonment.

2. He was aggrieved with both conviction and sentence and lodged an appeal and raised the following grounds namely:

> ***1. That the learned trial magistrate erred in law and fact by relying on contradictory evidence.***
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> ***2. That the learned trial magistrate erred in law and fact by failing to appreciate that the prosecution had failed to prove its case beyond reasonable doubt.***
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> ***3. That the learned trial magistrate erred in law and fact for failure to summon essential witnesses for the determination of his case.***
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> ***4. That the learned trial magistrate erred in both law and fact by shifting the burden of proof to him.***
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> ***5. That the learned trial magistrate erred in law and fact by failing to find that the investigating officer did not conduct any investigations and that if he did, the same was shoddy.***
>
> ***6. That the learned trial magistrate erred in law and facts by failing to give his defense adequate consideration.***

3. When the appeal came up for hearing, the appellant relied on his written submissions and so did the prosecution counsel. In his written submissions, the appellant argued that his right to a fair trial was violated in that he was denied an opportunity to cross-examine the complainant on grounds that she had difficult in speaking. According to the appellant, the trial court should have appointed an intermediary to assist the complainant communicate. He relied on ***M.M v Republic*** [2014] eKLR.

4. The appellant further argued that the prosecution did not prove the ingredients of the offence. He submitted that PW1 testified that she did not witness the incident but was only told about it by a third party. He also submitted that even PW3 who alleged to have seen him with the complainant admitted that he did not know whether he had defiled her. He submitted that the complainant could not explain what happened or pin point the person who defiled her. He therefore submitted that the totality of the prosecution evidence did not prove that he was the perpetrator of the crime he was charged with.

5. The appellant submitted that even the allegation that he was arrested with the complainant in his house by members of the public was not proved since no member of public was called to testify. In his view, this was a serious omission on the part of the prosecution. He relied on ***Christopher Nsolio Kimuya v Republic*** [2019] eKLR on the identification of the perpetrator.

6. The appellant further faulted the trial court for allowing production of medical records by someone other than the maker without proven grounds. He relied on ***JA v Republic*** [2016] eKLR to argue that a basis must be laid for not calling the maker of the document. He also

relied on ***Hussein Mohammed Bathi v Republic*** [2018] eKLR for the submission that where the incriminating evidence is from medical treatment notes, the maker therefor is a primary and crucial witness who should be called to testify, failure of which proof is not established.

7. Next, the appellant submitted that the trial court failed to reconcile contradictions and inconsistences in the prosecution's case. According to the appellant, both PW1 and PW4 stated that there was no birth certificate for the complainant. PW4 stated that the complainant was born on 26th February, 2009 and on being recalled, he stated that he had a birth certificate and that she was born on 16th September, 2009, (PEX 5) but no explanation was given on the source of the birth certificate. He relied on the Nigerian case of ***David Ojeabuo v Federal Republic of Nigeria*** [2014] LPELR 22555(CA) on the meaning of contradictions.

8. The appellant argued that the prosecution's case did not meet the overall burden of proof. He relied on ***Wycliffe Shakwila Mungo v Republic*** [2018] eKLR for the argument that the police are required to be professional in the conduct of investigations and ought not to be driven by malice.

9. Submissions by the Office of Director of Public Prosecutions have not been traced although Miss Ireri informed the court when the matter came up for hearing that she was relying on those submissions.

10. I have considered this appeal, submissions by parties and the decisions relied on. I have also perused the trial court's record and the impugned judgment. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, reevaluate and reanalyze the evidence afresh and come to its own conclusion on it. The court should however bear in mind that it did not see the witnesses testify and give due allowance for that (See ***Okeno v Republic*** [1972] EA 32).

11. In ***victor Owich Mbogo v Republic,*** criminal appeal No. 152 of 2015 [2020] eKLR, the Court of Appeal stated that:

> ***"It is the duty of the first appellate court to reevaluate the evidence afresh and reach its own conclusion bearing in mind that unlike the trial court, the appellate court did not have the benefit of hearing or seeing the witnesses testify***."

12. PW1 RWG and mother to the complainant, testified that the complainant was 7 years and would be 8 years old on 26th February 2017. She was in baby class. On 3rd September, 2016 she locked her children in the house and went to the market to buy vegetables. She left the keys with Mama Marion, her neighbour. When she came back at 10 a.m. the children were not in the house. She checked them at the neighbour but only found two of them playing. The complainant was not there. The children told her that the complainant had gone with the "**vegetable vendor**". She knew it must be the appellant because he used to supply her with kales. She went looking for the complainant. She asked Fredrick Thotho, PW3, a friend to the appellant whether he had seen the complainant. He told her that she was with the appellant at their plot. She went to the plot and found people outside the house. The complainant was crying. The appellant had been locked inside the house. They asked her to call the police. The police came and arrested the appellant. She took the complainant to Nairobi's Women Hospital where she was examined and treated. In cross-examination, she told the court that the appellant's neighbour saw him with the complainant in his house and that it was the appellant's friend who called her on phone.

13. PW3 Fredrick Thotho Lukuo, testified that on 3rd September, 2016 at 11 a.m. he was at home in the plot when the appellant came with a child. When he called PW1 to ask for Kales, she inquired if he had seen the complainant. He told her that she was with the appellant in the plot. In cross-examination, the witness stated that he had seen the appellant with the complainant but he did not know whether he had defiled her.

14. PW4 No. 47577 CPL Susan Mutua of Kitengela Police Station, Gender office, testified that on 3rd September, 2016 she was called by people of "NWH". She went there and found a child who was mentally retarded and could not record a statement. She wrote the statement. The appellant had been arrested by members of public with the complainant in his house. The complainant was confirmed to have been defiled after examination. She did not get a Birth Certificate and PW2, the complainant's mother did have a clinic card. She was later recalled and produced the birth certificate as PEX 5 showing that minor was born on 16th September, 2009.

15. PW5 Ruth Lengele, a clinical Officer with Nairobi Women Hospital, testified that on 3rd September, 2016 the complainant was seen by her colleague DR. Ndere who filled the PRC. The complainant was born on 26th February, 2009 and was mentally retarded. She had been defiled by a person known to her after he took her to his house where he defiled her. She had discharge from her private parts and the private parts were also bruised. The hymen was lacerated and freshly broken. She was put on treatment. She testified that she had worked with Dr. Andere for 3 years and she knew his signature. The Doctor had filled the PRC while she filled the P3 form on 4th September, 2016. They were produced as PEX 2 and PEX 3 respectively. The report for mental retardedness was filled by Ann Wasiku and she produced it as PEX 4.

16. When put on his defence, the appellant gave an unsworn testimony. He told the court that on 3rd September, 2016, he woke up at 6 a.m and went to the farm, bought Kales came back and went to clean the house. The police came and arrested him. He denied committing the offence.

17. The trial court considered the above evidence and was satisfied that the prosecution had proved its case against the appellant beyond reasonable doubt. It convicted him for the offence. The court stated:

> ***"The complainant who is mentally retarded could not give much in evidence. She told the court that the accused urinated on her. PW1 who is her mother found her in the plot where the accused lived. She was crying. Members of the public told her to get the police. Accused was locked in the house from outside by members of the public...The doctor confirmed she was injured in her vagina. I find accused defence (sic) is a mere denial which I dismiss. I find prosecution has proved their case against the accused beyond reasonable doubt."***

18. The appellant faulted the trial court for convicting him when the prosecution did not prove its case to the standard required, that the prosecution did not call material witnesses and that the prosecution evidence was contradictory and inconsistent. He also argued that he was denied the right to cross-examine the complainant which violated his right to a fair trial.

19. The appellant was charged with the offence of defiling a person with mental disability contrary to section 7 of the Sexual Offences. The prosecution evidence was that the appellant was arrested by members of the public with the complainant in his house. When she was taken to hospital, it was confirmed that she had been defiled. This was according to PW1 her mother. Her evidence was supported by that of PW3 who stated that he saw the complainant in the plot with the appellant. PW5 the clinical officer who filled the P3 form information extracted from the PRC which had been filled by a Dr. Ndere testified that according to medical examination, the complainant had been defiled

20. In a case of defilement, the prosecution must prove age, penetration and the perpetrator of the crime. In the present appeal, there was evidence that the complainant had been defiled. PW5 the clinical Officer testified that the complainant was taken to hospital on 3rd September, 2016 and was seen by DR. Ndere who filled the PRC form. Her private parts had been bruised and the hymen freshly lacerated/broken. She also had discharge from her private parts. She filled the P3 form on 4th September, 2016. The PRC and P3 forms were produced as exhibits. From this evidence, there was no doubt that the complainant had been defiled.

21. On age, the appellant argued that there were contradictions. PW1 stated that the complainant would turn 8 years on 26th February 2017 which meant she was born on 26th February 2009. PW4 stated that there was no Birth Certificate or clinic card. She was taken for age assessment which put her age at below 12 years. PW4 was later recalled and produced a Birth Certificate as PEX5 showing that she was born on 16th September 2009. With this evidence, what is clear is that the complainant was born in 2009 and given the availability of a birth certificate, the issue of age was settled.

22. Regarding mental disability, PW5, testified that a report on the complainant's mental disability was filled by Ann Wasiku and she produced it as PEX 4. The trial court conducted a ***voire dire*** examination and was of the view that the complainant had difficulties to speak. These confirmed that the complainant had difficulties in her speech.

23. The question that remained to be proved were that of identity of the attacker. The appellant argued that the prosecution did not prove he was the one who defiled the complainant. The prosecution relied on the evidence of PW1 and PW3 on who the perpetrator was. PW1 testified that she left children in the house and went to the market. When she came back the children were not in the house. She went looking for them at the neighbour's house but only found two children. The complainant was missing. The children told her that the complainant had gone with the "**vegetable vendor**. She immediately knew it was the appellant because he used to supply her with kales. PW3 told her that the complainant was with the appellant in the plot. She went and found members of the public outside the plot with the complainant crying. The appellant had been locked inside the house. She called the police and that is how the appellant was arrested.

24. PW3 on the other hand testified that on the material day, the appellant went with the complainant to their plot. When he called PW1 to go for Kales, she inquired whether he had seen the complainant. He told her that she was with the appellant within their plot. He admitted in cross-examination that he did not know whether he had defiled her.

25. From the above evidence, the prosecution could not tell with certainty that it was the appellant who had defiled the complainant. PW3's evidence was that he had seen the complainant within the plot but not that the appellant defiled her. He did not also state that the appellant was inside the house with the complainant or that only the appellant lived in the plot.

26. Moreover, PW1 stated that when she went to the plot, there were many people around and the complainant was crying. The appellant had been locked inside the house. She did not say who locked the house. The people only asked her to call the police. None of the members of the public who was present was called as a witness. It was not made clear to the court who locked the appellant in the house and why. It was not also clear who opened for the children given tha their mother had locked them inside the house when she left and where they went.

27. The law is clear that in a criminal trial, the prosecution bears the burden of proving its case beyond reasonable doubt. In ***Stephen Nguli Mulili v Republic*** [2014] eKLR, the Court of Appeal stated:

> ***"[I]t is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP V WOOLMINGTON, (1935) UKHL 1 where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See FESTUS MUKATI MURWA V R, [2013] eKLR."***

28. In ***Miller v Ministry of Pensions,*** [1947] 2 All E R 372, ***Lord Denning*** stated on the degree of proof beyond reasonable doubt:

> ***"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.***

29. In ***Bakare v State (***1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria, amplified on the phrase proof beyond reasonable doubt, stating:

> ***"Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the***

administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability." (emphasis)

30. From the evidence on record there was no proof that beyond reasonable doubt that the appellant committed the offence. In ***Pius Arap Maina v Republic*** [2013] eKLR, the court held that the prosecution must prove a criminal charge beyond reasonable doubt and any evidential gaps in the prosecution's case raising material doubts, must be in favour of the accused.

31. The prosecution seemed to rely on the assumption that since the complainant was in the compound where the appellant lived, he must have defiled her. This was nothing but suspicion. Even then, the law is clear that suspicion, however strong, cannot be the basis of a conviction. There must be other evidence pointing to the appellant as the perpetrator of the crime.

32. In ***Sawe v Republic*** [2003[eKLR, the Court of Appeal was clear on this when it held that;

> ***"The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove its case against the accused beyond any reasonable doubt. As this Court has made clear in the case of Mary Wanjiku Gichira v Republic (Criminal Appeal NO 17 of 1998), (unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence."***

33. The appellant also argued that his right to a fair trial was violated in that he was denied an opportunity to cross-examine the complainant who did not testify because she had difficulty speaking. According to the appellant, the trial court should have appointed an intermediary to assist the complainant testify.

34. The record is clear that the complainant did not testify. When the case came up for hearing on 5th January 2017, the prosecutor informed the trial court that the child (complainant was mentally disabled. The court went on to take the evidence of PW1, her mother. The court then attempted to conduct a voire dire examination on the complainant as PW2, but could not go far, concluding that the complainant was unable to say much since she had challenges with speech. She therefore did not testify and was not cross examined.

35. Section 31(2) of the Sexual Offences Act allows the court, either on its own motion or on request by the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings, to declare any such witness, other than the accused, a vulnerable witness if in its opinion the witness is likely to be vulnerable on account of grounds including age, intellectual, psychological or physical impairment; trauma or such other reasons or factors as the court may consider relevant.

36. Appointment of an intermediary is therefore at the discretion of the court where circumstances allow. According to section 2 of the Act, an intermediary is a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and, may include a parent, relative, psychologist, counselor, guardian, children's officer or social worker.

37. The role of an intermediary in a criminal trial, is to convey the substance of any question to the vulnerable witness, inform the court at any time that the witness is fatigued or stressed; and request the court for a recess.

38. In ***MM v Republic*** [2014] e KLR, the Court of Appeal stated;

> ***"It is clear from sections 31 (2) and 32 that, first and foremost it is the duty of the prosecution to ascertain the vulnerability of the witness and to apply to the court to make that declaration before appointing an intermediary. In addition, the court, as we have earlier observed, can on its own motion, through voire dire examination, declare a witness vulnerable and proceed to appoint an intermediary. Any witness (other than the one to be declared vulnerable) can likewise apply to the court for the declaration. The application must not be granted merely because the victim is young or too old or appears to be suffering from mental disorder. The court itself must be satisfied that the victim or the witness would be exposed to undue mental stress and suffering before an intermediary can be appointed."***

39. The trial court conducted a voire dire examination and was satisfied that the complainant had difficulty with her speech. It did not allow her to testify. The court did not however consider appointing an intermediary to assist her testify. The prosecution did not also request the court to declare the complainant a vulnerable witness who required assistance to testify. That denied the complainant an opportunity to tell the court what happened and who defiled her if she could identify him. It also denied the appellant an opportunity to cross examine the complainant, thus violated his right to fair trial.

40. In the circumstances, it is clear to this court that the prosecution failed to prove beyond reasonable doubt that it was the appellant who defiled the complainant. The appellant's right to fair trial was also violated when he was denied an opportunity to cross-examine the complainant. The trial court fell into error by convicting the appellant on the basis of evidence that did not meet the threshold of proof beyond reasonable doubt required in a criminal trial.

41. Having considered the totality of this appeal, reanalyzed the evidence on record and reassessed it myself and considered the law and decisions, I am satisfied that this appeal has merit and it should be allowed. Consequently, this appeal is allowed, conviction quashed and the sentence set aside. The appellant hereby set at liberty unless otherwise lawfully held.

Dated Signed and Delivered at Kajiado this 5th Day of February 2021.

E. C MWITA

JUDGE