REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL APPEAL NO. E018 OF 2020

MUTINDA NDUNDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence by Hon C. K. Kisiangani (RM) in the Machakos

Chief Magistrate's Court in Criminal Case Number (S O) 1804 of 2014

***delivered on 3.12.2015*)**

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

MUTINDA NDUNDA.....ACCUSED

JUDGEMENT

1. The Appellant herein, **MUTINDA NDUNDA**, was charged before the Chief Magistrates court at Machakos with a main count of the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act. He also faced an alternative charge for the offence of committing indecent act with a child contrary to section 11(1) of the said Act.

2. He was convicted on the main charge and sentenced to serve twenty (20) years' imprisonment.

3. Being dissatisfied with the said judgment, the Appellant filed the present appeal. Vide his memorandum of appeal as amended the grounds are summarized as follows: -

> ***a) The learned magistrate erred in law and fact in convicting the appellant and yet the prosecution case was not proven beyond reasonable doubt.***
>
> *b)* ***The trial magistrate erred in law and fact in disregarding the appellant's defence.***
>
> c) ***The trial magistrate erred in law and in fact in failing to conduct a voir dire examination that was fatal to the prosecution case.***

4. The appellant submitted on each of the grounds raised in the appeal. On the issue of failure to conduct a voir dire, it was submitted while placing reliance on section 125 of the Evidence Act as well as section 19(1) of the Oaths and Statutory Declarations Act that the failure to conduct a voir dire vitiated the trial. On the issue of proof of penetration, it was submitted that the same was not proven to the required standard. The appellant submitted that he was not properly identified as the perpetrator and that his defence of alibi cast doubt on the prosecution case. The court was urged to set the appellant at liberty.

5. In reply, counsel for the prosecution conceded to the appeal. In placing reliance on the case of **Patrick Kathurima v R (2015) eKLR, Samuel Warui Karimi v R (2016) eKLR** and **Boniface Wambua Kiilu v R (2020) eKLR** it was submitted that the failure to conduct a voir dire was fatal to the prosecution case and that the court was urged to find that the prosecution case was not proven beyond reasonable doubt.

6. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo v Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

> "***On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".***

7. In support of the prosecution case, there were 5 witnesses lined up. **Pw1 CMS**, a 14-year-old Form one student and in the absence of a voir dire testified that she knew the appellant. She recounted how on 13.11.2014 at 8.30 am she had gone to tether goats on the farm when someone strangled her from behind who threatened to kill her if she screamed and who undressed her then defiled her. She testified that she ran home and found her mother and told her what happened then later when her father returned home, she told him about the ordeal. She testified that she was taken to Kitiwe Dispensary and given a P3 form at Machakos Police station that she tendered and was marked as MFI2. She told the court that she was able to see the appellant when he was defiling her and that he was arrested after about one hour following the incident. She recalled that when the appellant was brought to the dispensary, he was wearing the same clothes that he was wearing when defiling her. She tendered in court her birth certificate that was marked for identification as MFI3. She also tendered her light blue dress and pant which were marked as MFI 1(a) and (b).

8. **Pw2** was **JM**, the victim's mother. She recounted to court how on 13.11.2014 Pw1 had gone to tie the goats in the farm when at 9.30 a.m. she came home while screaming and reported that when she was tying the goats, someone defiled her. She told the court that Pw1 did not have her underpants and her private parts were dirty. It was her testimony that Pw1 was taken to Kitini Dispensary and that as they were taking the victim to the hospital, the appellant was spotted running and was apprehended by members of public.

9. **Pw3** was **Athanus Wambua Masila**, the ex-senior assistant chief who testified that on 13.11.2014 his attention was drawn to noises outside Kietini Centre. He told the court that he found the appellant being beaten by members of public and that he was informed that the appellant had defiled Pw1 when she had gone to tie goats.

10. **Pw4, Sgt Lorna Kemuma** of Machakos Police station Gender Desk and the investigating officer testified that on 13.11.2014, Pw3 brought the appellant to the police station on allegations of having defiled Pw1. She told the court that she interrogated the complainant who recounted how she had gone to tie goats when a person pounced on her from behind and removed her clothes then defiled her but however he ran away after she screamed. She testified that the appellant was arrested with the help of the public and that Pw1 was taken to Machakos Level 5 Hospital for treatment where the P3 form that she issued was filled. She produced the birth certificate that indicated that Pw1 was born on 20.4.2001 and which appellant did not object to its production.

11. **Pw5, Dr John Mutunga** testified of a medical examination that was conducted on the complainant. The examination observed that Pw1 had bruises on her neck as well as both legs and thighs as well as her external genitalia. He testified that her hymen was broken and bleeding but no spermatozoa was seen. He found that the victim had suffered harm, that she had been defiled and he signed the P3 form on 25.11.2014; he produced the same in evidence. He also had the PRC form of the victim and which stated that the victim had bruises on her neck and thighs; her vagina was stained, hymen broken and the same was produced. It was his testimony that the treatment notes for the victim had information that was captured in the PRC and P3 form; the same was produced in court as Pexh 2c. That was the close of the prosecution case.

12. The trial court found that the appellant had a case to answer and was put on his defence and he opted to give sworn evidence and call no witness. He testified that the charges were false and he denied commission of the offence. He told the court that he was arrested by the public and taken to Machakos Police station while walking on the road going home.

13. Having looked at the rival submissions and the grounds of appeal, I find the issues for determination are: -

a. **Whether or not the prosecution had proved its case beyond reasonable doubt.**

b. **Whether there were procedural infractions that would vitiate the trial.**

c. **Whether there was an error by the trial court in disregarding the appellant's defence.**

d. **What orders may the court make?**

14. On the issue of proof of the prosecution case, a perusal of the list of exhibits presented before the trial court showed a birth certificate in the names of the complainant evidencing the date of birth as 20.4.2001 meaning that at the time of commission of the offence she was aged 13 years. The element of age has been easily proven.

15. With regard to evidence of penetration, the court considered the medical evidence which was based on a P3 form and found that penetration was proven. I see no reason to doubt the same as the P3 and PRC forms have cogent consistent evidence that explain the sequence of events as narrated by Pw1 and the doctor to the court. As for the identity of the appellant; the evidence was more of recognition as the appellant himself admitted that he was arrested on the way home meaning that he was placed at the scene. In addition, there was an eye witness account of the incident that was consisted in the evidence of Pw1 whose evidence I am satisfied is truthful and I see no reason to disbelieve. In the case of **Mshila Manga v R (2016) eKLR** the court observed that under the proviso to section 124 of the Evidence Act for a

conviction to be made the court ought to be satisfied that the witness was truthful and record reasons thereof. I find that the prosecution evidence is cogent and consistently corroborated so as to prove that there was an unlawful contact between the genitals of Pw1 and the appellant.

16. On the other hand, I am not convinced that the appellant was candid in his account of events as he simply stated that he was arrested on his way home without giving an account of his activities for the day. In the case of **Dinkerrai Ramkrishan Pandya v R [1957] EA 336** the East Africa Court of Appeal cited the case of ***Coughlan v Cumberland (3) (1898) 1 Ch. 704*** where ***Lindly MR, Rigby and Collins L.JJ observed*** that "*when the Question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not;* ***and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on credibility of witnesses whom the court has not seen***.

17. The appellant's evidence did nothing to shake the evidence against him and the same raised no defence at all despite him assailing the trial magistrate for failing to consider his defence. The ground raised by him regarding a disregard for his defence lacks merit.

18. When I look at the evidence in totality, I am satisfied that there was penetration, the appellant was properly identified and the age of the victim was proven. I therefore find that the prosecution evidence proved their case beyond reasonable doubt; that the appellant's version of events is not credible and I agree with the finding of the trial court. Suffice to add that the appellant was arrested near the scene while attempting to flee and was positively identified by the victim who had earlier given a description of the clothes that he wore to her parents. The identification of the appellant as the perpetrator was thus not in doubt. He was not mistaken for someone else as he attempted to allude in his defence.

19. On the issue of procedural infractions and their effect, the appellant pointed out and I note that there was no voir dire conducted on Pw1. In the case of **Samuel Muriithi Mwangi v Republic [2006] eKLR,** the Learned justices of Appeal stated that ;

> ***"Section 19 of the Act provides for reception of evidence by children of tender years.***

20. It is trite law that when a court is faced with a child which is stated to be 14 years and below, according to case law (**Kibageny Arap Korir v R [1959] EA 92-93**, the court must first establish whether the child is possessed of sufficient intelligence to justify the reception of that evidence and understands the duty of speaking the truth. In case the child is intelligent enough to give evidence but does not understand the duty of speaking the truth, his or her evidence may be taken without taking the oath but no conviction can follow unless, such evidence is corroborated by some other material evidence in support of it implicating the accused ***(Section 19 of the Oaths and Statutory Declarations Act).***

But if the child understands the duty to speak the truth, then the oath is administered before taking evidence from him or her.

21. Section 19 of the Oaths and Statutory Declarations Act provides:

> ***"19. Evidence of children of tender years***
>
> ***(1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section***.

22. Section 233 of the Criminal Procedure Code has been repealed, however the import of section 19 above is to ensure that the courts take evidence of the child of tender age only upon satisfaction that the child is intelligent enough to testify on the matter before court and understands the duty of speaking the truth. In view of the statutory responsibility to assess the intelligence of the child and establish whether she/ he understands the duty of speaking the truth, the trial court conducts a voir dire before taking the evidence of any child of tender age.

23. Having gone through the law and legal principles above, the record does not reveal that questions were put to Pw1 and answers recorded and it cannot be said that a voir dire was conducted. The basis of the learned Magistrates opinion to swear in Pw1 is not known since she did not record any questions or answers to any question. There is no evidence of dialogue completely.

24. In respect of Pw1, even though there was infraction in taking her evidence as there was no voir dire conducted, I am convinced that there is evidence against the appellant. I would then have to consider whether or not to order a retrial.

25. As was stated in the case of **Ahmed Ali Dharmsi Sumar vs Republic 1964 E.A 481** and restated in **Fatehali Manji vs The Republic 1966 E.A. 343**:-

> ***"In general a re-trial 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 particular facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered***

where it is likely to cause an injustice to the accused person.”

23. The Court of Appeal in the case of **Mwangi v Republic [1983] KLR 522 held** as follows;

“…several factors have therefore to be considered. These include:

1. A retrial will not be ordered if the conviction was set aside because of insufficient evidence.

2. A retrial should not be ordered to enable the prosecution to fill up the gaps in its evidence at the first trial.

3. A retrial should not be ordered where it is likely to cause an injustice to the accused person.

4. A retrial should be ordered where the interest of justice so demand.

Each case should be decided on its own merits.”

24. I am satisfied that the prosecution evidence against the appellant would sustain a conviction. However, because of the infraction on the taking of evidence of Pw1 I find an order for a retrial would have been appropriate. However, the retrial should not be ordered where the appellant will stand prejudiced. A retrial might have the effect of giving the prosecution a chance to tie up loose ends in their case. I note that the appellant has been in custody right from the date of arrest namely 13.11.2014 to date. I find that the said period is sufficient punishment for his transgressions. I suppose that he has since learnt his lessons in trying to mess around with young and vulnerable girls.

25. In the result the appeal succeeds. The conviction is quashed and the sentence set aside. The appellant is set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Dated and delivered at Machakos this 4th day of February, 2021.

D. K. Kemei

Judge