REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 15 OF 2020

APPELLATE SIDE

(Coram: Odunga, J)

ADAMS MBITHI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an Appeal from the judgment and sentence of

Honourable M Opanga- SRM dated 9th September,

2019 in Kangundo PM's Court Criminal Case No. SO 1 OF 2018)

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

DAMS MBITHI.....ACCUSED

JUDGEMENT

1. The appellant, **Dams Mbithi**, was charged and convicted of the offence of Defilement contrary to Section 8(1) as read with Section 8(4) of the ***Sexual Offences Act No. 3 of 2006***. The particulars were that on the 3rd day of January 2018 at [Particulars withheld] village he intentionally caused his penis to penetrate the vagina of **MMM** a child aged 17 years.

2. In the alternative the accused was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the ***Sexual Offences Act No.3 of 2006.***

3. The Appellant pleaded not guilty and the matter proceeded to full hearing.

4. The Prosecution's case, in summary was that on 3rd day of January 2018, being the opening day for schools, the complainant, PW1, a form two student at [particulars withheld] Girl's High School was meant to return back to school. Her father informed her that he would send someone to take her to school. PW2, the Complainant's mother, was at home that day when the Appellant, a friend to her son went that morning and informed her that he was taking PW1 to school and the Appellant and the Complainant then left for school. However, according to the complainant, while on the way to school they went to the home of a friend of the appellant and had sexual intercourse. After that they left for school but on the way the complainant realized that she had misplaced her keys and they returned back to the home where they had sexual intercourse but did not get the owner who had locked his door and was nowhere in sight. By the time they arrived at the school, it was late.

5. In the meantime, the complainant's father had called the school several times inquiring whether the complainant had arrived but by 4.00pm she had not yet arrived. The father then gave instructions to the school authorities that upon her arrival, the person who transported her should be arrested and the complainant should be taken for medical examination. The father also called the police from Kwa Mwaura and asked them to go and wait for the duo.

6. Upon the arrival of the duo, they were apprehended by the police and upon being asked where they were, the complainant informed them that the motor cycle developed mechanical problems on the road. They two were taken to Kangundo Police Station where the complainant disclosed that they had had sex. They were then taken for medical examination. Upon examination by PW4, it was found that though her outer genital was normal, her pants had whitish stain and she was in pain. The bottom of her vagina was hyperemic and swollen and her hymen was long torn. There was however no bleeding. He formed an opinion that there was sexual contact and placed her on the relevant treatment.

7. Upon being placed on his defence, the Appellant gave an unsown statement in which he stated that on the material day PW2 called him to take the Complainant to school and while on the way to school with PW1 his motor cycle got spoilt and as a result they delayed on the way as he had to look for a mechanic to repair the motor cycle. When they got to school they found police waiting for them. He denied committing the offence and alleged that the charges were fabricated. It was his evidence that PW2 knew him too well and had often sent him to run errands for her.

8. In her judgement the learned trial magistrate found that the accused was positively identified as the perpetrator given the circumstances and that the Complainant was a minor as shown in her birth certificate. The Court therefore found that the prosecution had proved their case against the accused person on the main charge of defilement contrary to section 8(1) as read with section 8(4) of the ***Sexual Offences Act No. 3 of 2006*** and convicted him accordingly. After considering the mitigation, she sentenced him to serve 10 years imprisonment.

9. In this appeal the Appellant submits that his constitutional rights were violated as he was not informed of his right to legal representations and relied on Articles 25 of the Constitution. It was also submitted that the Prosecution failed to prove its case beyond reasonable doubt as the evidence presented was weak and was contradictory. Further the prosecution failed to call crucial and vital witnesses such as the owner of the house in which the sexual intercourse allegedly took place. It was further submitted that the learned trial magistrate misapprehended the facts and failed to consider the evidence.

10. In response to the Appeal, it was submitted by **Mr Ngetich**, Learned Prosecution Counsel that the Constitution, in Article 50, makes it mandatory for an accused to have this right promptly informed to them before the trial commences. In this case, it was the Appellant's contention that the Learned Trial Magistrate failed to observe that he was a layperson or he was not well conversant with legal matters hence he ought to have been represented by an advocate. In other words, his argument is that his right to legal representation was violated. He argued that he was not informed of the right to legal representation and that the law mandates the court to inform an accused person of this right. He closed this argument by saying that substantial injustice was occasioned on him.

11. In addition, the Learned Counsel cited section 43 of ***Legal Aid Act 2016***, on duties of the court when interacting with an unrepresented person. It was noted that from the court proceedings, the court did not at any point inform the appellant herein of his right to a fair trial and inform him of his rights as an accused person and reliance was placed on **Joseph Kiema Philip vs. Republic** that trial court must place it on record that the rights under Article 50(2)(g) and (h) of the Constitution were communicated to the accused person. Learned Counsel also relied on **Jared Onguti Nyantika vs. Republic [2019] eKLR,** where it was stated that that is a fundamental issue in the trial process that an accused person be informed of his right to an advocate of his own choice, and the failure to facilitate it amounts to an injustice. It was emphasized that the accused person ought to be notified of that right at the earliest opportunity, and failure to inform of the right was a denial of a right to fair hearing.

12. Furthermore, it was submitted that given that the accused was charged with an offence which carries a severe sentence of life imprisonment it was necessary to be accorded his right to legal representation as required by law. In that regard, there is substantial injustice unless represented. According to Learned Counsel, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a court ought to consider in addition to the relevant provisions of the ***Legal Aid Act***, various other factors which include: the serious or nature of the offence in question thus serious offences may attract public interest to the extent that the public may require some form of representation to be accorded to the accused person to conduct his own defense; the severity of the sentence, thus legal representation is to be provided where the offence carries a death sentence and or life imprisonment ;the ability of the accused person to pay for his own legal representation; whether the accused is a minor, the ability of the court to comprehend the court proceedings thus the literacy of the accused and the complexity of the case which is discernible from the issues of fact and law which may not be comprehend by the accused. He relied on **David Njoroge Macharia vs. Republic [2011] eKLR** and **Karisa Chengo & 2 others vs. Republic [2015] eKLR**, and submitted that failure to inform the appellant his right violated his fair trial rights and amounted to injustice and that a trial where fair hearing rights have been violated in this manner cannot stand. Accordingly, the state conceded to this ground of appeal.

13. It was further noted that though the Learned Trial Magistrate relied on the proviso under Section 124 of the ***Evidence Act***, however she did not record that she was convinced that the complainant was telling the truth. It was also conceded that the shamba boy, a vital witness to the prosecution case was never called to testify. It was however submitted that voire dire was not required as the complainant was aged 17 years old. Therefore, this ground of appeal fails.

14. The Respondent therefore submitted that the Court should find that the proceedings were irregular, the conviction unsafe and sentence irregular and proceed to quash the conviction and sentence meted upon the appellant.

Determination

15. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). 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 finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."

16. Similarly, in **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

"1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. 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 conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."

17. It has been held that in a first appeal the appellant is entitled to expect this Court to subject the evidence on record as a whole to an exhaustive re-examination and to this Court's decision on the evidence having given allowance to the fact that this court did not see the demeanour of witnesses. Further even where the appeal turns on a question of fact, the Court has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the trial Court with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it. See **Pandya vs. R [1957] EA. 336** and **Coghlan vs. Cumberland (3) [1898] 1 Ch. 704**.

18. This appeal has been conceded mainly on the basis of the manner in which the trial was conducted. Even though the State conceded the appeal, it is not automatic that this court must in those circumstances allow the appeal since the court has the duty to put the evidence to afresh scrutiny and arrive at its own determination. In **Odhiambo vs. Republic (2008) KLR 565,** the court said:

"the court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence."

19. That was the position adopted in **Lamek Omboga vs. R., Kisumu Court of Appeal Criminal Appeal No. 122 of 1982** where the Court of Appeal expressed itself as hereunder:

"When the appeal opened before us, Mr Okoth for the appellant began submitting that as State Counsel did not support the conviction in the first appeal in the High Court, the State was in effect withdrawing the charge and the appeal should have been allowed. With respect, we do not agree. An appellate court is not in any way bound by the opinion of State Counsel as to the merits of an appeal."

20. Article 50 (2) (g)(h) of the Constitution of Kenya 2010 on fair hearing, states that:

(2) Every accused person has the right to a fair trial, which includes the right--

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly; (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

21. The Constitution makes it mandatory for an accused to be promptly informed of this right before the trial commences.

22. In addition, the ***Legal Aid Act 2016***, section 43 on duties of the court when interacting with an unrepresented person states that:

"A Court before which an unrepresented accused person is presented shall:

a) Promptly inform the accused of his or her right to legal representation;

b) If substantial injustice is likely to result, promptly inform the accused of the right to an advocate assigned to him or her; and

c) Inform the service to provide legal aid to the accused person"

23. In this case the said provisions were not complied with. In **Joseph Kiema Philip –vs- Republic [2019] eKLR** the court with regards to the said requirement stated that:

"The right to legal representation is founded upon well-known principles, doctrines and concepts which include access to justice, right to fair trial, the rule of law and equality before the law. This fundamental right is recognized in a myriad of states due to its importance in ensuring that the process is just, credible and transparent. Thus legal representation is a cardinal principle of fair trial. The criminal justice system in Kenya places the right to fair trial at a much higher pedestal, and in that respect and in the context of this matter; the accused is placed in somewhat advantageous position. Therefore,

legal representation is a fundamental constitutional dictate envisaged under article 50 of the Constitution of Kenya 2010…it is paramount that the record of the trial court should demonstrate that the accused was informed of his right to legal representation…In this instance the appellant had been charged with defilement which attracts a serious sentence once convicted. From the record of the trial court, the appellant was not informed of his right to legal representation which rendered the trial unfair and led to a grave miscarriage of justice."

24. Similarly, in *the case of* **Jared Onguti Nyantika vs. Republic [2019] eKLR**, it was stated that it is a fundamental issue in the trial process that an accused person be informed of his right to an advocate of his own choice, and the failure to facilitate it amounts to an injustice. It was emphasized that the accused person ought to be notified of that right at the earliest opportunity, and failure to inform of the right was a denial of a right to fair hearing. In the present case, the Appellant faced a long sentence in prison if convicted. In ***David Njoroge Macharia vs. Republic*** **[2011] eKLR** and ***Karisa Chengo & 2 others vs. Republic*** **[2015] eKLR**, it was emphasized that;

"one of the factors that makes it critical that the court must inform an accused person of the right to legal representation is the seriousness of the offence or the gravity of the sentence to be imposed upon conviction. The appellant herein faced a charge of defilement of a minor of fourteen, which attracted a penalty of minimum sentence of twenty years imprisonment. The charge was a very serious one, upon being found guilty the appellant faced a minimum of twenty years in jail, and he was indeed sentenced to that exact period. That being the case, the trail should have informed him of his right to legal representation and directed that he be provided with an advocate at state expense."

25. I therefore, have no hesitation in finding, which I hereby do, that the Appellant's rights under the foregoing provisions were violated and contravened.

26. In sexual offences, where the minor is the victim of the offence, the evidence of that minor, if believed by the trial court, can, without corroboration, found a conviction. Section 124 of the ***Evidence Act*** makes this quite clear:

"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth." [Emphasis added]

27. Dealing with a similar issue in the case of **Mohamed vs. R (2008) 1 KLR G&F 1175,** this Court held that:

"It is now well settled that the courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that he child is truthful."

28. The Court of Appeal sitting in Mombasa in **Sahali Omar vs. Republic [2017] eKLR** held that:

"On the first issue, the appellant took issue with lack of corroboration of the complainants' evidence, which he said ran afoul of section 124 of the Evidence Act…The import of that provision is that ideally, the evidence of a child of tender years in criminal proceedings should always be corroborated; notwithstanding the voir dire examination of the child under section 19 of the Oaths and Statutory Declarations Act. In short, that even though the court is satisfied that the child is competent to tell the truth, their testimony should nonetheless be corroborated by independent evidence. However, the section also allows for an exception. Under the proviso thereto, the court is allowed to solely rely on the evidence of a child of tender years if the child is the victim, provided the court first satisfies itself on reasons to be recorded, that the child is being truthful…It is a well established rule of law that the unsworn testimony of a child of tender years must be corroborated. However, where a child of tender years gives sworn testimony or is affirmed, corroboration is unnecessary. (See. Patrick Kathurima v. R (supra) and Johnson Muiruri v. Republic, (1983) KLR 445 and also John Otieno Oloo v. Republic [2009] eKLR)…In addition, the proviso to section 124 of the Evidence Act affords an exception to this general rule in cases of sexual assault where the child in question is not only the sole witness but also the alleged victim. So that as far as PW1 was concerned, even though neither PWs 2, 3, 4 or even 5 (the medical practitioner) could directly support her testimony, the court could nonetheless rely on it provided it recorded its reasons. In this case, the trial court is seen to have addressed itself thus:

"…The complainant did not mention anyone else. The offences were committed during the day. The accused was well known to PW1, PW2, PW3 and PW4."

The appellant has not taken any issue with the reasons recorded by the trial court. This, in addition to the fact that PW1 and PW2 gave evidence under affirmation, the ground on corroboration should fail."

29. Therefore, what is required of the trial court is to be satisfied that the victim is telling the truth. It was therefore held in **Omuroni vs. Republic (2002) 2 EA 508** that:

"Trial courts can decide cases one way or the other on the basis of demeanour of a witness or witnesses particularly where the issue of credibility of such witness is decisive. In such a case the trial judge must point out instances of demeanour which he noted and upon which he relies. The trial court must point out what constituted the demeanour which influenced the trial

judge to make favourable or unfavourable impression about the credibility of a particular witness."

30. This decision was relied upon by **Warsame, J** (as he then was) in **Jon Cardon Wagner vs. Republic & 2 Others [2011] eKLR** when he stated that:

> **"It is required, which is of paramount of importance, that a trial court must indicate or point out instances of demeanour which he noted and which he relies upon as a basis of accepting the evidence of a particular witness. The trial court can only be influenced to make a favourable impression about the credibility of a particular witness after establishing the instances as to why and how he thinks that particular witness is a witness of truth. In this case the trial court did not pay any regard to this elementary principle of law in arriving at the decision as to whether the three complainants were witnesses of truth. In the absence of any basis for establishing whether the three witnesses were witnesses of truth, the trial court was wrong in its decision."**

31. In this case the learned trial magistrate did not make a specific finding under section 124 of the ***Evidence Act***. Accordingly, this court cannot state with certainty what the Court would have decided had it addressed that issue.

32. Having considered the foregoing, I agree with both the Appellant and the Respondent that it would be unsafe to sustain the conviction of the Appellant.

33. In the circumstances, I allow the appeal, set aside the appellant's conviction, quash his sentence and set him at liberty forthwith unless he is otherwise lawfully held.

34. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 2nd day of March, 2021.

G. V. ODUNGA

JUDGE

In the presence of:

Appellant online

Mr Ngetich for the Respondent

CA Geoffrey