REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCRA NO. 29 OF 2019

DAVID GITONGA PIALO...APPELLANT

VERSUS

REPUBLI...RESPONDENT

(Appeal from the conviction and sentence by Hon P.M. Kiama (PM),

Marimati S. O. No. 118 of 2012 delivered on 02/04/2013)

JUDGMENT

Introduction

1. The Appellant was charged with and convicted of the offence of defilement contrary to **Section 8(1) as read with Section 8(2**) of the **Sexual Offences Act No. 3 of 2006** and sentenced to life imprisonment.

2. Dissatisfied by the said conviction and sentence, the Appellant filed his petition and grounds of appeal on 04/05/2017 and later filed his amended grounds of appeal on 28/10/2020 claiming that the Learned Trial Magistrate erred in law and fact by:

a. Failing to note that the investigation performed was shoddy.

b. Failing to note that the fundamental rights of the Appellant were infringed.

c. Sentencing the Appellant to life imprisonment without considering the trial was irregular.

d. Rejecting the Appellant's defense without giving cogent reasons.

3. The brief facts of the case are that the complainant, RM, was a child aged 2 ½ years at the time this offence was committed on 09/02/2012. On that material day the complainant's mother, SKM (PW1) left him with the Appellant and proceeded to the river to take her goats to drink water. The Appellant was employed by the complainant's mother as a herdsman and farm-hand.

4. As the complainant's mother returned from the river, at about 4.00 p.m., the complainant's mother called the Appellant and told him to go and continue grazing the goats. on reaching home, she found the complainant sleeping on his stomach near the kitchen door. The child started crying when he heard the mother's (PW1's) voice. The child then started crying and saying that the Appellant had pricked him on the back using an object. The child informed the mother that she was pricked in the anus. PW1 checked the child and found that the anus was bloody and there was some watery fluid coming out of the anus. PW1 then called her neighbour Tarasila Kagondu (PW2) and informed her what the child had said. They went to where the Appellant was. PW2 checked the child. They decided to confront the Appellant. On being asked, the Appellant said he had struck the child on the buttocks. The complainant's mother sent for Daniel Musee who went and held the Appellant. They decided to take him to the assistant chief whereupon the Appellant asked to be forgiven claiming he was drunk.

5. The Appellant was taken to the AP's Camp at Kathangacini. The child was given first aid at the clinic. The matter was then reported at Gatunga Police Station. The child was examined at Marimanti District Hospital. The doctor found that there was bleeding at the anal opening and bleeding around the anus. A discharge was also noted around the anus. The doctor confirmed that the child had been defiled. A P3 form was filed and produced in court as exhibit 1. The Appellant was then charged with this offence.

6. Issues for Determination

Having considered the Appellant's Amended Grounds of Appeal and the written submission of the parties herein, it is my view that the main issues for determination are:

a. Whether the prosecution proved its case beyond reasonable doubt;

b. Whether the Appellant's right to legal representation was infringed; and

c. Whether the sentence given was irregular.

Analysis

Whether the prosecution proved its case beyond any reasonable doubt

Prosecution's case

7. The particulars of Count 1 were that on 09/02/2012 at Kathangacini village in Tharaka North District within the Eastern province, the Appellant intentionally defiled a child "RM" then aged 2 ½ years by causing his penis to penetrate the anus of the boy.

8. The prosecution called 6 witnesses in the case. The child's mother, SKM, testified as PW1 on 20/09/2012. On application by the prosecutor, the court conducted a preliminary examination of the child "RM" in chambers on 01/02/2013 and determined that "RM" was incapable of testifying on his own due to his tender age.

9. As provided under section 31(3)(b) of the Act, the trial court declared "RM" a vulnerable witness and proceeded to appoint the child's mother (PW1) as the intermediary. The trial court then recalled PW1 to give evidence on 01/02/2013. In my view, the trial court did not contravene any provision of law in declaring the victim child a vulnerable witness and directing that the child's evidence be given through PW1. There was no prejudice occasioned on the Appellant. The child had not been called and PW1 gave evidence present in court.

10. It was PW1's testimony that RM is her fourth born child and that on 09/02/2012 she left his son RM in the care of Appellant as she took her goats to take water from the river. PW1 had employed the Appellant as a herder. The Appellant was left to pound millet and there was no one else at home. At around 4 p.m. – 5 p.m., while PW1 was coming back from the river, PW1 called the Appellant from far to take care of the goats as she went to pound millet. She met the Appellant on the road.

11. It was PW1's testimony that before she could reach home, she found the child sleeping near the kitchen on the stomach. There were two cups next to the child, one had tea and the other had fruit juice. PW1 testified that when the child "RM" saw her, he started crying with a high voice. The child "RM" told her that she wanted to sleep inside the house. As PW1 held the child's buttocks, the child resisted. PW1 tried to have the child sit down but he refused. PW1 inquired from the child what had happened and the child explained that "Gitonga amenidunga". Ge further explained that "Gitinga alinidunga matako."

12. PW1 then removed the boy's pant and examined. She found the child's anus had been lacerated and she could see discharge coming from the anus. PW1 stated that the child's stomach was swollen. She then decided to take the child to where the Appellant was. PW1 then called PW2 (TK) who was nearby and informed her about it. PW1 and PW2 then went to see the Appellant together. The Appellant denied the offence and later the Appellant told them that he had struck the boy's (RM's) buttocks because "RM" had thrown millet at him. They called PW3 who near the shamba to help them. PW3 examined the boy and the Appellant continued to deny the offence. They then decided to take the child to the chief's office. The chief also examined the child's anus. The chief then tied up the Appellant, placed him on a motorcycle and taken to Kathangacini Police Camp. The following day, they went to Gatunga Police Station then Marimati Police Station. They were issued with a P3.

13. PW1 further testified that on the material day, she had sent the Appellant to draw water in the morning and the Appellant told her that he would rush then come back. The Appellant then came back earlier and told PW1 that he wanted to go and herd goats. It was PW1's testimony that the Appellant appeared to be drunk that morning. On the material day, PW1's other children were in boarding in school and her husband works in Nairobi. There was no one else to leave the child with and she never knew the Appellant would do such a thing to her child.

14. PW1 testified that she had employed the Appellant for about 2 ½ weeks and the Appellant later demanded to be paid his due. It was PW1's testimony that she had never disagreed with the accused before that incident. On cross examination, PW1 stated that she had employed the Appellant to do any work she gave him and not just to heard goats. She stated that it was untrue that the Appellant demanded his dues from her in 9th (month not stated).

15. PW2 corroborated PW1's testimony that on the material day at around 5 p.m., she was in her house when she heard PW1 calling her from her house. PW2 then met PW1 at the river where PW1 told her that PW1's child had been defiled. The child was also there. It was PW2's testimony that she saw the child bleeding from the anus. PW2 corroborated PW1's testimony that they then went to where the Appellant was grazing goats and confronted him. PW2 stated that the Appellant denied that he had defiled the child. They then sent another boy to call DM (PW3) who then came and questioned the Appellant but the Appellant denied.

16. They then decided to take the Appellant to the chief where they reported the matter. PW2 testified that after being questioned by the chief, the Appellant admitted he had defiled the child and asked to be forgiven. PW2 then recorded her statement at Gatunga Police Station. She identified the Appellant in the dock and stated that the Appellant had been employed by PW1 as a herder. PW2 further stated that on the material day, the Appellant was looking drunk.

17. DM (PW3) testified that when he was called by PW2 and PW1, he went to where they were which was not far. He stated that he checked the child's buttock and saw blood in the boy's anus. He also stated that there was also a whitish discharge. PW3 corroborated PW2's evidence that the Appellant denied the offence at first but when later questioned by the chief, the Appellant admitted to the offence claiming that he was drunk. It was PW3's testimony that he saw the Appellant was drunk. They took the accused to the AP Camp Kathangacini. They were referred to the dispensary at Kathangacini and the boy was treated and referred to Marimati District Hospital for further tests. PW3 wrote his statement at Gatunga Police Station on another date. He identified the accused in the dock and stated that he knew him because PW3's brother has employed him to graze goats. PW1 is the wife to PW3's brother (SM).

18. Dr. F.O. from Marimati District Hospital testified as PW4. He produced a P3 form (PEXB 1) for the child "RM" that was filled on 16/02/2012 by Dr. Njogu. He testified that he was familiar with the handwriting. Clothes had no blood or tears. On examination of genitalia, there was bleeding on the anal opening at the opening and bruising around the anus. A discharge was noted around the anus. The doctor's findings were that the child had been defiled.

19. On cross examination, PW4 testified that it was possible for the child to insert a finger in his anus but the finger cannot injure the anus or the surrounding area. He could not tell who had defiled the child. He testified that the accused was not taken to the hospital for examination.

20. PW5 was CPL TM. He is based at Gachaui Police Station. He used to be at Kathangacini AP camp. On the material day at around 8 pm, he received a report from the chief of Kathangacini. There was a suspect who had been taken to him on suspicion of having defiled a boy aged 2 years. The child was taken to Kathangacini dispensary. The doctor gave them a note to take the child to Marimanti. PW5 proceeded to arrest the accused who he took to Kathangacini AP Camp. The following day 10/02/12, he took the accused to Gatunga Police Station where the accused was charged with the offence. He identified the suspect in the dock.

21. On cross examination, PW5 testified that the chief told him that the accused had admitted to the commission of the offence. PW5 further stated that upon questioning the accused, the accused told him that he committed the offence because he was drunk. The complainant was a child of tender years who could neither speak nor even stand.

22. P.C. PL was the investigating officer and testified as PW6. He is based at Gatunga Police Station. He testified that on 10/02/2012 at around 11 a.m., the complainant child, his mother, the accused and officer from Kathangacini AP camp came to the police station. PW1 spoke on behalf of the child and stated that the child had been defiled by the accused. PW6 then gave them a letter for the complainant to be taken to hospital. He testified that the child did not want anyone to touch his buttocks. From the hospital, PW6 booked the witness reports and statements. He found that it was on 09/02/2012 when PW1 left the boy to the care of the accused. PW1 returned home to find the child lying down and crying and suspected something wrong with the child. Neighbours were called. The accused was employed to herd goats. the accused was taken to the chief then taken to the AP Camp then to Gatunga Police Station. PW6 later proceeded to the scene and saw how it was. He then proceeded to charge the accused with the offence. PW6 identified the accused as the one in the dock.

23. On cross examination, PW6 stated that he visited the scene and did not find anything to note. He only visited the scene to acquaint himself with the area and to examine the child. He only went to the complainant's house where it is said the child was found lying.

24. The court, having considered the evidence on record, was satisfied that there was a prima facie case made out against the accused who was placed on his defence.

Defence case

25. The Appellant (DW1) gave a sworn statement that he is a herder from Uchweni. In summary, the Appellant alleged that he was framed for the offence because he claimed from PW1 dues for unpaid salary. On cross examination, the accused stated that he grazes the goats on Sunday and PW1 is the one who grazes while he rests. On the material day, he can't remember which day it was. He denied that he stayed at home with the child as suggested. PW1 usually left the child with PW2 when PW1 went away. He was charged because he demanded his money from PW1. He denied that that day he refused to graze the goats. he denied that he assaulted the child because PW1 refused to pay him his wages.

26. This is a first appeal. The law is well settled that the first appellate court has a duty to re-evaluate the evidence adduced before the trial court, analyse it and come up with its own independent finding. The court is however supposed to make allowance for the fact that the trial court had the benefit of seeing and hearing the witnesses to access their demeanour. In ***Kiilu & Another vs. Republic [2005] 1KLR 174*** the Court of Appeal stated that:

> " **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.**"

See ***Okeno vs. Republic [1972] EA 32*** **on the same subject.**

27. In this case, the trial magistrate found that the prosecution had proved the charge of defilement against the Appellant beyond any reasonable doubt.

28. **<u>Section 8(1)(2) of the Sexual Offences Act</u>** provide that:

> **"(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**
>
> **(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."**

29. Under the section, the prosecution was supposed to prove the ingredients of the charge which are:

a. Age of the child

b. Penetration

c. Perpetrator

30. The prosecution tendered evidence to prove the age of the child who it presented in court and the court observed that the child was about three years old. The age of the minor was not in dispute.

31. On penetration medical evidence corroborated the evidence of the complainant that the child was defiled. The prosecution adduced strong circumstantial evidence to prove that no other person could have committed the offence other than the Appellant. The Appellant was also properly identified as the perpetrator of the crime. I will proceed to consider the grounds of appeal.

<u>Whether investigations were properly done</u>

32. The Appellant alleges that the investigations carried out did not cover mandatory provisions of Section 2(1) of the Sexual Offences Act which require that the suspect of the offence should be subjected to forensic/laboratory tests through D.N.A. tests and the results of the investigation should be produced in court as exhibits.

33. Section 36 of the Sexual Offences Act empowers the court to order a DNA test, in order to gather evidence and to ascertain whether the accused person committed an offence. However, as rightly submitted by the Respondent, the provision is not in mandatory terms hence it is not mandatory for a D.N.A. test to be conducted to prove that the offence of defilement was committed.

34. The offence of defilement can be proved by way of oral evidence and circumstantial evidence. This was the holding of the Court of Appeal in **KASSIM ALI v REPUBLIC [2006] eKLR** where it stated that:

> **"…the commission of a sexual offence can be properly corroborated by circumstantial evidence (see <u>Ongweya v. Republic</u> [1964] EA 129).**
>
> **So the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."**

In this case, it was PW1 evidence as the intermediary of the victim that she examined the child "RM" and noted he was feeling pain on the area around the buttocks. On further check, PW1 noted that the child's anus was lacerated and there was a whitish discharge oozing from the anus. She immediately called her neighbours (PW2 and PW3) who also examined the child and testified that that the child had injuries around the anal area. In my view, the evidence of PW1, PW2 and PW3 was well corroborated and it was therefore proper for the trial court to infer that there was no doubt casted to the testimony given by the complainant. It is equally my view that the non-production of blood-stained clothes or pants is a non-issue as the prosecution did prove its case beyond reasonable doubt.

<u>Whether the Appellant's fundamental right to legal representation were infringed</u>

35. Throughout the trial in the lower court, the Appellant appeared in person. It was the Appellant's submission that considering the gravity and seriousness of the sentence, the trial court ought to have ensured that he had representation as required by Articles 50 (2) (g) (h) of the Constitution of Kenya.

36. The cited constitutional provisions state as follows:

> **"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 State expense, if substantial injustice would otherwise result, and to be informed of this right promptly."**

37. The essence of the above constitutional provisions is to provide state funded legal aid scheme which is a right in certain instances where the interest of justice so requires. In the case of **Thomas Alugha Ndegwa v Republic [2016] eKLR**, the Court of Appeal stated that:

> **"The interests of justice in criminal matters are to be determined by considering the seriousness of the offence and the severity of the sentence."**

38. In the **Thomas Alugha Ndegwa's case** ***(supra)*,** the Court of Appeal stated that while the right to legal representation at state's expense is a fundamental human right and essential to the realization of a fair trial, this right is not absolute and there are instances where the same can be limited.

39. The legal and institutional framework for the implementation of Article 50(h) can be found in the Legal Aid Act, Act No. 6 of 2016. ***Section 43(1) of the Legal Aid Act*** sets out the duties of the court before which an unrepresented accused person is presented. Such Court is required to promptly inform the accused person of his right to legal representation; promptly inform him of his right to have an advocate assigned to him if substantial injustice is likely to result; and to inform the National Legal Aid Service ("the Service") to provide legal aid to the accused person.

40. ***Section 43(6) of the Legal Aid Act*** further provide that:

> **"Despite the provisions of this section, lack of legal representation shall not be a bar to the continuation of proceedings against a person."**

41. ***Section 40 of the Legal Aid Act*** requires that a person who wishes to receive legal aid may apply to the Service in writing so long as such an application is made before the final determination of the matter by a court. It is at the discretion of the Service to grant legal aid to the applicant subject to such terms and conditions, as the Service considers appropriate.

42. The case of **Isaac Musyoki Muoki & another v Republic [2019] eKLR** addressed the same issues as raised by the Appellant herein and the court held that:-

> **"33. The appellants further contended that their rights to a fair trial under Article 50(2)(h) of the Constitution were infringed. Article 50(2)(h) of the Constitution provides for the right of an accused person; -**
>
> ***"(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;***
>
> **34. The appellants argued that though they were entitled to legal representation at state's expense in the trial court, the State failed to provide such legal representation and neither was he informed of their rights. It is true that the appellants were unrepresented during their trial. However, just like Mrima, J noted in Lawrence Ombunga Otondi & Another vs. Republic [2016] eKLR, I did not hear them say that they informed the trial court that they could not afford the services of a legal representative and as such needed the court's intervention.**
>
> **35. According to the Constitution, the right to legal representation to an accused person by the State and at the State's expense crystallizes when substantial injustice would otherwise result. The Court of Appeal in the case of David Macharia Njoroge vs. Republic (2011) eKLR analysed several aspects of this right and as regards the applicability of Article 50 of the Constitution, the Court held as follows: -**
>
> **"State funded legal representation is a right in certain instances. Article 50 (1) provides that an accused shall have an advocate assigend to him by the State and at state expense, if substantial injustice would otherwise result (emphasis added). Substantial injustice is not defined under the Constitution, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory.**
>
> **We are of the considered view that in addition to situations where 'substantial injustice would otherwise result.' persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission."**

43. The Appellant in this case never raised the issue that he be given legal representation at the cost of the State at the trial court. In addition, the Appellant actively participated in the proceedings and cross-examined the prosecution witnesses. In the circumstances it is my view that that ground of appeal fails.

· **Whether the P3 form was properly admitted in evidence**

44. The Appellant further submits that the trial was irregularly conducted as the exhibit relied upon (P3 form) was submitted contrary to Section 77(2) of the Evidence Act (Cap 80 of the Law of Kenya. The Appellant states that PW4 was not the maker of the P3 form and produced the same on behalf of doctor Njogu.

45. Section 77 of the Evidence Act provides as follows:

> **“(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.**
>
> **(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.**
>
> **(3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.”**

46. In my view, Section 77 of the Evidence Act does not deal with the issue of who can produce such documents in court. The section permits the court to presume the genuineness of the document. This means that such a document need not be produced by the maker. Failure to call the Dr. Njogu who signed the P3 form did not make the document inadmissible. In any case, PW4 testified that he had worked with Dr. Njogu and was familiar with his handwriting and signature. It is therefore my view that the evidence adduced through the testimonies of the prosecution witnesses confirmed that the Appellant defiled the victim child. The Appellant did not object to the production of the P3 form. No prejudice or miscarriage of justice was occasioned. The fact of penetration/defilement is not proved by medical evidence or D.N.A. test but by oral and circumstantial evidence.

Whether the sentencing was irregular

47. On the issue of the sentence meted, the Appellant submitted that mandatory sentences fail to conform to the tenet of fair trial. He cited the case of ***Denis Kinyua Versus Republic [2017] eKLR*** where it was held that penalties under Sexual Offence Act may be described as straight “jacket” penalties leaving no room for exercise of any discretion by the sentencing court. The Appellant beseeched this court to be guided by the case of **Evans Wanjala Wanyonyi v Republic [2019] eKLR** and **Gideon Majau Gitire alias Kombo**.

48. The celebrated Supreme Court case of **Francis Karioko Muruatetu & another – v- Republic SC Petition No. 16 of 2015** held that the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under **Article 25 of the Constitution.**

49. The court of Appeal was guided by the merits of the Supreme Court decision in **Francis Karioko Muruatetu & another – v- Republic (supra**) in the case of **Christopher Ochieng – v- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011** when it stated as follows:

> ***“In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. ….. Needless to say, pursuant to the Supreme Court’s decision in* Francis Karioko Muruatetu & another – v- Republic (supra*), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years’ imprisonment from the date of sentence by the trial court.”***

50. Having considered the binding decision by the Court of Appeal in Christopher Ochieng – v- R *(supra)*, I hold the view that in the present **appeal where the trial court passed the mandatory sentence on the basis that the court has no discretion in the matter is erroneous.**

51. I find that the appeal on conviction lacks merit and is dismissed.

52. The appeal in sentence succeeds. The sentence of life imprisonment is set aside. It is substituted with a sentence of imprisonment for twenty-two (22) years.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 11TH DAY OF MARCH 2021.

L.W. GITARI

JUDGE