



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL APPEAL NO. 70 OF 2018

CHK alias M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from Resident Magistrate's Court at Baricho SO Case No.29 of 2016

delivered by Hon. E.H KEAGO on 27th November 2018)

J U D G M E N T

The appellant was charged with defilement contrary to **Section 8(1)** as read with **Section 8(2) of the Sexual Offences Act**. It was alleged that on 30th August 2016 in Kirinyaga County the appellant, unlawfully and intentionally caused his penis to penetrate the vagina of CNK a child aged ten (10) years. The appellant pleaded not guilty. After a full trial, the appellant was convicted and sentenced to imprisonment for life. The appellant had also been charged with an alternative charge of indecent act with a minor contrary to **Section 11(1) of the Sexual Offences Act**.

1. The appellant was dissatisfied with both the conviction and sentence and lodged this appeal which initially raised seven grounds. They were later amended as follows:-

- 1. The learned trial magistrate erred in law and fact by holding that the prosecution had proved its case against the Appellant to the required standard of law whereas the evidence on record is not sufficient to make such a finding .***
- 2. The learned magistrate erred in law and fact by holding that, an offence under Section 8(1) as red with Section 8(2) of the Sexual Offences Act No.3 of 2006 had been established which finding was contrary to evidence adduced in court.***
- 3. The learned magistrate erred in law and fact by holding that medical reports or evidence adduced in court proved an offence under Sexual Offences Act whereas the medical documents produced in court did not corroborate or prove the ingredients of an offence of defilement under Section 8(1) as read with Section 8(2) of the Sexual Offence Act.***
- 4. The learned magistrate erred in law and fact by not finding that the evidence of the complainant (minor) was doubtful, uncorroborated and was unsafe to find a conviction under the relevant laws of evidence.***

2. The facts of the case are that the complainant CNK is girl who was aged ten years at the time this offence was committed. On the date the offence was committed, her mother had gone to pick tea and instructed the appellant to take her (complainant) to school. When the complainant went home, she took some porridge then went inside the house to wash the utensils. While there the appellant pounced on her and covered her face then pushed her on the bed. He removed her clothes then did bad manners by inserting his penis in her vagina. The complainant felt pain and started crying. She later told her mother what had happened. The complainant reported to Baba Michael who took her to Kabonge. Police Officers interrogated her. She was then escorted to hospital at Kagumo where she was treated. Later she was examined at Kerugoya District Hospital by Mr. Stephene Ngige, a clinical officer. He found that the complaint was ten years old at the time of examination. On examination, the clothes were soiled and she appeared to be psychologically traumatized. Her lips were swollen and tender. She had bruises on the vaginal canal. The hymen was torn and there was a whitish vaginal discharge. The clinical officer concluded that there was penetration. A high Virginal swab revealed a lot of spermatozoa. She filled a Post Rape Care Form and a P3 Form which she produced as exhibit 1&2. A birth certificate was produced in court showing that the complainant was born on 17th July 2010. The appellant was arrested and charge.

3. The appellant was put on his defence and opted to give unsworn defence. He gave a short defence and told the court that the he stays at

Kagumo and works as a security guard. He said he had nothing to tell the court.

4. This appeal proceeded by way of written submissions. The appellant filed submissions. For the respondent submissions were filed by Ms Beatrice Muthoni Ngatunyi, a Senior Prosecution Counsel for Director of Public Prosecution. I have considered the submissions and the proceedings before the trial magistrate. This is the first appellate court and it has a duty to evaluate all the evidence and come up with its own independent finding. The only limitation is that I have to bear in mind that unlike the trial court, I had no opportunity to see and hear witnesses when they testified and leave room for that. This is unlike the trial magistrate who had the opportunity to see the witnesses and assess their demeanor. In the case of *Okeno -v- Republic 1972 E.A 32* it was held that a 1st appellate court had a duty to evaluate the evidence and come up with its own independent finding. This has been reiterated by the Court of Appeal in the case of *Kiilu & Another -v- Republic (2005) KLR 177* where it stated with regard to the duties of the first appellate court:

“ An Appellant in 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.

It is not the function of a first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; 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.”

Analysis of the Evidence:-

The prosecution called five witnesses PW1- was the complainant who testified on how the appellant defiled her and she reported to her mother. The complainant gave sworn evidence after a *voire dire* examination was conducted. The appellant was given an opportunity to cross-examine her but the record shows that he had no questions. She gave her evidence in Kiswahili. When the plea was taken, the court indicated that the appellant understands Kikuyu. When the appellant gave his defence, he used Kikuyu language. I have pointed out the issue of the language since it is one of the grounds of appeal and I will deal with it later.

5. The second witness was No.215647 APC Simon Muchugu (PW2) who gave evidence in Kiswahili and it was translated in Kikuyu. His evidence is that on 30th August 2016 at 1.04 pm he was at Kagumo AP Post when the complainant and her mother went to the Police Post and reported that Stanley had defiled the child. He gave them a note to go to hospital. They went and came back with a report confirming that the complainant was defiled. He went and arrested the appellant and took him to Kabonge Police Post. In cross-examination he told the court that he found the appellant in his house and was about to leave.

6. JN (PW3) was the complainant’s mother who gave her evidence in Kikuyu language. She told the court that on 30th August 2010 she had gone to pick tea and returned home at around 1.00pm and found that the complainant had been defiled. She accompanied the complainant to hospital and she was examined. A Post Rape Care Form and a P3 form were filled. She also produced a letter showing that the complainant was born on 10th July 2010.

7. The appellant was given an opportunity to cross-examine the witness but he had no questions.

8. No.66783 PC David Muganda (PW3) who was actually the 4th witness gave evidence in English and the court indicated that it was translated in Kikuyu. He testified that on 30th August 2016 while on duty at Kabonge Police Post he received the appellant who was escorted to the Post by APC Simon Muchugu (PW2) and APC John Kirua accompanied by the complainant and her mother. He interrogated the complainant and she told him that the appellant whom she referred to as her father tied her with a long trouser on the legs and covered her mouth with stockings then defiled her inside the house. He placed the suspect in the cells then escorted the complainant to Kerugoya Hospital where she was examined and a P3 form was filled. He obtained a birth notification and the birth certificate showing the date of birth of the complainant. The reports showed that the complainant was defiled. He recorded the statements of witnesses and then charged the appellant. When given the opportunity to cross-examine, the appellant had no questions.

9. Stephen Ngige (PW4) who was the 5th Witness was a clinical officer at Kerugoya hospital. He testified that he examined the complainant and filled a Post Rape Care Form and a P3 form for the complainant. He testified that the witness was psychologically traumatized. Her lips were swollen and tender. The complainant was about ten years old. On the genitalia, the hymen was torn and she had bruises on the vaginal canal and whitish vaginal discharge. He confirmed that there was penetration. In cross-examination he told the court that he examined the child and was tested for H.I.V which was negative.

10. The appellant gave his defence which I have analysed above.

Determination:

The appellant was charged under **Section 8(1) & (2) of the Sexual Offences Act** which provides:-

“ (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.”

The prosecution had the burden to prove the three ingredients under the charge of defilement which are:-

- 1) Penetration
- 2) Age of the complainant
- 3) Identity of the perpetrator

On the issue of penetration, the complainant gave evidence that the appellant penetrated her genital organ with his penis. The testimony of the complainant on the fact of penetration was corroborated by medical evidence adduced by the clinical officer. The evidence of the complainant was not challenged. It is evidence which was in fact reliable. The appellant was given an opportunity to cross-examine the complainant but he did not. The court had no reason not to rely on the evidence. **Section 124 of the Evidence Act** provides:-

“ Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), 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.”

The complainant was credible and the testimony was confirmed by medical evidence. **Section 2 of the Sexual Offence Act** defines penetration as follows:-

“means the partial or complete insertion of the genital organs of a person into the genital organs of another person.”

I find that the prosecution adduced sufficient evidence to prove penetration by the fact of the torn hymen and the presence of spermatozoa in the vaginal swab of the minor. The submissions by the appellant it can safely be concluded that he did not dispute the evidence as he never cross-examined the complainant and when it came to his defence he had nothing to say. I find that there was overwhelming evidence to prove the charge. It is trite law that the prosecution bears the burden of proof all throughout the criminal trial. The burden never shifts. It is my finding that upon evaluating the evidence tendered penetration was proved with cogent evidence.

11. The 2nd ingredient is the age of the complainant. The age of the complainant in Sexual Offences is fundamental and requires prove due to the fact that it determines the provision under which an offender will be charged and the sentence to be meted out. Under **Section 8(1) (2)** a person is charged if the victim of the Sexual Offence was below the age of eleven years, it provides in part, ***“aged eleven years or less”***. It can therefor be concluded that what the prosecution set out to prove is that the complainant was below the age of eleven years. In this case the charge stated that the child was aged ten years. The prosecution produced a birth certificate which shows that the complainant was born on 10th July 2010. Simple calculation will show that by 30th August 2016 when the offence was committed the complainant was seven years old. The age given on the charge sheet and the birth certificate are at variance. The question is whether this disparity was fatal to the prosecution case. My view is that it was not because what the prosecution was required to prove is that the victim was a child below the age of eleven years. The **Sexual Offences Act** under **Section 2** defines a child to mean, ***“has the meaning assigned thereto in the children Act.”***

The definition of the child is any human being under the age of eighteen years. It would be important to give the age of the child on the charge sheet but I take the view that the charge will still be proper without giving the age of the child but simply stating that she is below the age of eleven years as stated under **Section 8(1) and (2)** of the **Sexual Offences Act**. The prosecution would then have the burden to prove that indeed the child was below the age of eleven years. It is my finding that the variance of age on the charge sheet and the birth certificate is not fatal. It is noted that the prosecution did not have the birth certificate at the time of preferring the charge. There is nothing to show that the discrepancy was intentional. Secondly, this issue was not raised during the proceedings. The discrepancy did not occasion a miscarriage of justice and it is curable under;

Section 382 of the Criminal Procedure Code.

“ Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice: Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

The appellant did not challenge the age of the complainant during the trial. No miscarriage of justice was occasioned as the appellant would still have been charged under the same section. As submitted by the State, the Court of Appeal No.2/2014 the learned Judge held that any error in drafting the charge is cured under **Section 382** of the **Criminal Procedure Code**. I find that the prosecution discharged the burden to prove the age of the complainant beyond any reasonable doubts.

12. The appellant was not a stranger to the complainant. The offence was committed in broad daylight which rules out any possibility of mistake. The appellant was well known to the complainant as a step or foster father. This is a fact which was not in dispute. I find that the prosecution proved beyond any reasonable doubts that the appellant was the perpetrator.

13. The appellant has raised various issues in his submissions. The first ground is fair trial which he submits was ignored. His contention is that he had informed the court that he only understands Kikuyu language and that there was no interpretation. The right to fair trial is entrenched in the Constitution. The right to fair trial for an accused are enumerated under **Article 50(2)** of the **Constitution**. **Article 50(2)**

(m) provides that:

“ Every accused person has a right to a fair trial which includes the right to have the assistance or an interpreter without payment if the accused person cannot understand the language used at the trial.”

The right to fair trial is one of the rights which cannot be limited, **Article 25** of the **Constitution** provides that;

“Despite any other provision in this constitution the following rights and fundamental freedoms shall not be limited-

(c) the right to fair trial.”

The courts have a duty to ensure that every accused person gets a fair trial when he appears in court. This right stems from the principle in criminal justice that an accused person is presumed innocent until proven guilty. The right to fair trial has been stated to be one of the cornerstones of a just and democratic society without which the rule of law and public faith in the justice system would inevitably collapse. The principle that the right to fair trial cannot be limited as also recognized under the Universal Declaration of Human Rights which under **Article 10** states that the right to fair trial is inalienable. See the Supreme Court of Kenya in ***Francis Karioko Muruatetu & Another –v- Republic Petition No. 15/2015*** where the Court stated with regard to the right to fair trial:

“ Indeed the right to fair trial is bit just a fundamental firth. It is one of inalienable rights enshrined in Article 10 of the Universal. Declaration of Human Right and in the same vein Article 25 © of the Constitution elevates to a non-derogable right which cannot be limited or taken away from a litigant.”

14. In this case the appellant in holding on straws to claim that his right to fair trial was violated. A review of the proceedings will show that indeed the appellant informed the court that he understands Kikuyu language. The record of the trial magistrate is fundamental in the administration of justice. The record shows that the plea was explained to the accused in English and was interpreted in Kikuyu. All the evidence of witnesses who testified in other language other than Kikuyu was translated in Kikuyu. The trial magistrate did not record the language which PW4 used. However there was a court interpreter in court and like with other witnesses, it is expected that his evidence was translated to Kikuyu language. This is shown by the fact that the appellant cross-examined the witness an indication that he understood the language.

15. The appellant has further stated his first application to prepare for his defence was rejected and the court ordered the hearing to proceed. The appellant is not being candid on this ground. His first application to prepare his defence was made on 16th November 2016 when he has supplied with witnesses statements. He requested for one week to prepare his defence. The matter was fixed for hearing on 19th December 2016 which gave him more than seven days which he had requested. The hearing did not take off until 21st March 2017 when the appellant said he was not ready. The court observed that the date was taken in open court in the presence of the appellant and ordered the case to proceed as the appellant was reminded during the mention on 14th March 2017 that hearing would be 21st March 2017 giving him seven days to prepare.

16. The court has a duty to balance the interests of all the parties, a timely disposal of the case and the time for appellant to prepare his defence. The witnesses are fatigued by the delay in prosecuting the case. The trial magistrate has discretion to grant or refuse adjournment. It is trite that judicial discretion must be exercised fairly.

Section 205 of the Criminal Procedure Code provides:-

“ (1) If, at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court which made the order of adjournment, the court may, unless the accused person is charged with felony, proceed with the hearing or further hearing as if the accused were present, and if the complainant does not appear the court may dismiss the charge with or without costs.

(2) If the court convicts the accused person in his absence, it may set aside the conviction upon being satisfied that his absence was from causes over which he had no control, and that he had a probable defence on the merits.

(3) A sentence passed under subsection (1) shall be deemed to commence from the date of apprehension, and the person effecting apprehension shall endorse the date thereof on the back of the warrant of commitment.

(4) If the accused person who has not appeared is charged with a felony, or if the court refrains from convicting the accused in his absence, the court shall issue a warrant for the apprehension of the accused person and cause him to be brought before the court.”

The discretion was exercised fairly as the appellant had been given sufficient time to prepare his defence. I find that the right of accused to fair trial was not violated in any way.

17. The appellant has challenged the *voire dire* examination which he says that flimsy and it was difficult to decipher whether the child really understand the purpose or importance of the telling the truth.

18. **Section 19 of the Oaths and Declaration Act** provides:-

“ (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.

(2) If any child whose evidence is received under subsection (1) wilfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of an adult with imprisonment.”

19. It is trite that the question as to whether a witness is a child is a matter which depends on the trial magistrate when after observing the child will decide whether it is a child of tender years and whether he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth. The Court of Appeal in the case of *Kibangeny arap Kolel –v- Republic (1959) E.A 92* stated that the expression ‘*child of tender years*’ for the purpose of **Section 19 of the Oaths and Statutory Declarations Act** means, “*in the absence of special circumstances, any child of any age, or apparent age, of under fourteen (14) years.*” This indicative age has been followed by courts. In *Johnson Muiruri –vs- Republic (1983 KLR 445)* where the Court of Appeal was dealing with a matter where the child was 13 ½ years old and the court had approved the step taken by the trial court, it stated:

“ The learned Judge substantially followed the correct procedure before allowing her to be sworn by recording his examination of her whether she was possessed of sufficient intelligence to justify the reception of her evidence and that she understands the duty of speaking the truth,”

The trial magistrate has a duty to observe the child and decide whether she is a child of tender years. The next step is to examine the child in order to determine whether she is possessed of sufficient intelligence to justify the reception of her evidence and whether she understand the duty of telling the truth. It is important for the court to record both the question and answers during that examination.

At page 14 of the record the trial magistrate proceeded as follows:-

“ Voire dire examination conducted.

- I am CNK 10 years
- I go to school at G. Primary in Standard 4
- I go to Gospel church
- I go to Sunday school
- We are told to tell the truth
- A liar goes to hell”

“Court:-

The child understands the importance of telling the truth. She can be sworn in”

The foregoing shows that the trial magistrate conducted a *voire dire* examination but failed to record the question and the answers. Furthermore, she did not indicate whether the child was intelligent enough to justify taking of her evidence. Be thus as it may, the rights of accused to fair trial was not violated. It is good practice for the court to record the question and the answers put during *voire dire* examination but failure to do so does not vitiate the evidence or the trial for that matter. It is not a must that the questions answers be recorded. While dealing with this issue, the Court of Appeal in the case of *Patrick Kathurima -v- Republic [2015] eKLR* stated:-

“ It is best though not mandatory in our context that the question put and the answers given by the child during the voire dire examination be recorded verbatim as opined by the English Court of Appeal in Regina -v- campbell (Time) December 20, 1982 and Republic -v- Lal Khan (1981) 73 C.A 190 for the benefit of the appellate court which must satisfy itself that important procedure was properly followed.”

I find that in the absence of a mandatory requirement that the questions and answers during *voire dire* examination be recorded, the evidence of the complainant was properly received. The ground of appeal on the subject is without merits.

Finally the appellant submits that the sentence of life imprisonment which was imposed on him was harsh and manifestly excessive. He relies on **Francis Karioko Muruatetu (Supra)**.

“ Indeed the right to fair trial us bit just a fundamental firth. It is one of inalienable rights enshrined in Article 10 of the

Universal. Declaration of Human Right and in the same vein Article 25 © of the Constitution elevates to a non-derogable right which cannot be limited or taken away from a litigant.”

In this case the appellant was charged under **Section 8(2) of the Sexual Offences Act** which provides that a person convicted for defilement shall be sentenced to imprisonment for life. The trial magistrate found that the sentence provided for was deserved. The court exercised its discretion fairly on sentencing in view of the aggravating factor that the appellant confessed during mitigation that he was H.I.V positive. Chances are that he infected the victim in this case. The sentence meted out was the sentence provided under the law and it was deserved in view of the circumstances of this case. I therefore find no reason to interfere with the discretion of the trial magistrate in sentencing. For the reasons I have stated I find that this appeal is without merits and is dismissed.

DATED, SIGNED AND DELIVERED VIA ZOOM AT CHUKA THIS 9TH DAY OF APRIL 2021.

L.W. GITARI

JUDGE