REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCRA NO. 53 OF 2019

SHADRACK NYAKHA...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

[An appeal against the Conviction and Sentencing by the Senior Principal Magistrate's Court

at Maseno in CMCRCNo. 1512 of 2014 (Hon. R.S. Kipngeno (SRM)

delivered on the 20th day of July 2017]

JUDGMENT

The Appellant, **SHADRACK NYAKHA** was convicted for the offence of **Defilement** contrary to **Section 8 (1) (3)** of the **Sexual Offences Act**, and he was then sentenced to 20 Years Imprisonment.

1. He has raised 8 Grounds of Appeal, which can be summarized as follows;

(1) The Charge was unsound since it was not supported by the evidence on record.

(2) The age of the victim was not established as required by law.

(3) The Prosecution Case was full of contradictions and inconsistencies, hence unsafe to base a conviction upon.

(4) The trial court failed to comply with Article 50 (2) (c) of the Constitution.

(5) The trial court failed to comply with Section 200 (2) of the Criminal Procedure Code.

(6) The prosecution did not call the Investigating Officer, who was an essential witness.

(7) The sentence imposed was unconstitutional, due to its mandatory nature.

(8) The Defence Case was not displaced by the prosecution case.

2. When canvassing the appeal, the Appellant submitted that penetration was never proved. He drew attention to the evidence of **PW4** who testified that when she examined the Complainant, her labia minora and her labia majora were both normal.

3. Secondly, the Appellant drew this Court's attention to the fact that **PW4** attributed the discharge, which he observed on the Complainant, to poor hygiene.

4. Although **PW4** is said to have given the foregoing evidence when she was testifying before the trial court, the Appellant pointed

out that in the P3 Form, **PW4** had indicated that the Complainant's hymen was broken.

5. In the circumstances, the Appellant submitted that the evidence tendered by **PW4** was inconsistent and contradictory.

6. But the Respondent submitted that the absence of the Complainant's hymen was proof of penetration.

AGE OF COMPLAINANT

7. The Appellant submitted that there was no conclusive proof of the Complainant's age.

8. In his view, the Immunization Card ought to have been supported by *"other stronger proofs such as a birth certificate."*

9. The Appellant also expressed the view that the trial court ought to have taken it upon itself to order for the medical age assessment of the Complainant.

10. On her part, the learned Prosecution Counsel, Ms Odumba, submitted that the Complainant's age was proved through the Immunization Card, her father's testimony and the P3 Form. Furthermore, the Complainant also testified that as at the date of the defilement, she was 14 years old.

CONTRADICTIONS & INCONSISTENCIES

(a) The Appellant submitted that whilst **PW4** testified that the Complainant had been defiled 3 times, the Complainant testified that it was the first time to be defiled.

(b) The Complainant's father testified that he is **PMJ**. However, the name of the person cited in the Immunization Card, who is cited as the Complainant's father, was **PM**.

11. In answer to those submissions, the Respondent expressed the view that those inconsistencies were so minor that they

could not have prejudiced the Appellant in any way. The Respondent's view was that the said inconsistencies did not go to the root of the matter.

12. Whether the Complainant was defiled once or twice, the Respondent emphasized that that did not matter, as there was proof of defilement.

SECTION 200 (3) OF

CRIMINAL PROCEDURE CODE

13. It is a fact that the trial of the Appellant took place before two different magistrates.

14. However, the Appellant contends that the record of the proceedings does not indicate how the provisions of **Section 200 (3)** of the **Criminal Procedure Code** was complied with.

15. In answer to that contention, the Respondent pointed out that the whole case started afresh, when a new presiding magistrate took over from his predecessor.

ARTICLE 50 (2) (C) OF

THE CONSTITUTION

16. According to the Appellant, the trial court ordered the case to proceed to trial on 15th September 2016, when the case was only supposed to have come up for a Mention.

17. In his view, the Court ought to have first inquired from him whether or not he was ready to proceed with the hearing.

18. In the absence of that inquiry, the Appellant submits that he was ambushed and therefore he did not have adequate time to prepare for his defence.

19. Accordingly, the Appellant asked this court to find that his right to a fair trial was violated.

20. In response to that submission the Respondent said that the Appellant's rights had not been violated as he had been aware of the charges he was facing, for a period of almost 2 years. Therefore, when he was put to his defence, the Respondent believes that the Appellant cannot have been taken by any surprise.

ESSENTIAL WITNESS

21. The Appellant submitted that an Investigation Officer was an important witness in any criminal case.

22. Therefore, when the Investigating Officer in this case was not called to testify, the Appellant believes that the trial court was deprived of evidence about how investigations were carried out and also why a decision was made to prosecute the Appellant.

23. In the Appellant's opinion, the trial court ought to have adjourned the case, so as to give the Investigating Officer time to complete her maternity leave.

24. In the absence of the Investigating Officer, the Appellant submitted that there were a lot of gaps left in the prosecution case.

25. As the Investigating Officer was on maternity leave at the material time, the Respondent submitted that the failure to call her did not prejudice the Appellant.

26. The Respondent also pointed out that the Appellant did not raise any objections to another police officer who gave evidence, instead of the Investigating Officer.

27. In any event, the Respondent believes that in this case the Investigating Officer's evidence would have been largely that of summarizing the testimony of the other witnesses. Therefore, the Respondent submitted that the said Investigating Officer was not an essential witness.

MANDATORY SENTENCE

28. On the basis of the pronouncement by the Supreme Court in **FRANCIS KARIOKO MURUATETU & ANOTHER Vs REPUBLIC, (2017) eKLR**, the Appellant submitted that the sentence imposed upon him was unconstitutional.

29. The Respondent invited this Court to consider the circumstances in which the offence was committed, and to find that the sentence imposed was appropriate.

DEFENCE

30. The Appellant faulted the trial court for failing to give any consideration to his defence.

31. In his view, it did not matter whether or not he had challenged the evidence tendered by the prosecution to prove the age of the Complainant. The Appellant submitted that, provided the prosecution did not prove its case beyond any reasonable doubt, he was entitled to an acquittal.

32. The Respondent submitted that the prosecution had proved all the ingredients of the offence.

33. Secondly, the Respondent said that when the Appellant was put to his defence, he evaded the events of the day when the offence was committed, and he focused on the manner of his arrest.

34. Thirdly, the Respondent pointed out that the Appellant's contention that he was a stranger to the Complainant, was completely disproved by the evidence tendered by the prosecution.

35. I will now re-evaluate all the evidence on record and make determinations on the issues raised.

36. The trial first begun on 5th December 2014, before Hon. B. Ochieng PM. On that date, the accused informed the court that he was ready to proceed.

37. Thereafter, the trial magistrate was transferred, and it appears that nothing substantive transpired in relation to the trial, until 18th August 2016.

38. The record of the proceedings shows that on 18th August 2016, the case was scheduled for hearing. However, the hearing did not take-off.

39. It is indicated that Hon. R.S. Kipngeno SRM was succeeding trial magistrate, and that he explained to the accused, the implications of **Section 200 (3)** of the **Criminal Procedure Code**.

40. However, there is no record showing what option the accused chose.

41. In my assessment of the record, it appears that the accused was desirous of having the hearing proceed from the stage where it had reached. I so say because that would explain why the court noted thus;

> ***"The proceedings are not legible and will take time typing."***

42. If the accused wished to have the trial commence *de novo*, there would have been no need to have the proceedings typed.

43. The other reason why I believe that the accused had expressed a preference for the hearing proceeding from the stage which it had already reached is that the prosecution asked for a Mention date, so as to enable him ascertain if the witnesses were still available.

44. Following the request by the prosecution, the court fixed the case for Mention on 15th September 2016.

45. As the Appellant has pointed out, the case begun on 15th September 2016, whereas it was only scheduled for Mention on that date.

46. On that date the Complainant testified and she was then cross-examined by the accused.

47. In my considered opinion, if the trial court had ordered that the hearing proceeds from the stage where the case had reached; and if such order was inconsistent with the wishes expressed by the accused, it would be deemed prejudicial to the accused.

48. But when the accused wished to have trial proceed from where the case had reached, yet the court ordered that the trial should start *de novo*, I hold the view that that was not prejudicial to the accused. At worst, the fresh start would only result in some delay in the completion of the trial.

49. In this case it was only the Complainant who had already testified before the trial started anew. I find that the accused was not prejudiced.

50. I also find that there was a substantive compliance with the provisions of **Section 200 (3)** of the **Criminal Procedure Code**, because the court did explain to the accused the implications of that statutory provision.

51. The succeeding magistrate explained that the record of the proceedings was not legible and that it would therefore take long to type the same.

52. I find that the reason given by the succeeding magistrate constituted a prudent use of time and resources, which would otherwise have resulted in greater delays of the trial.

53. PW1 testified that she was 14 years old as at the date when the offence was committed in 2014.

54. As at 2016 when she testified, **PW1** had known the accused for 5 years.

55. On the material day **PW1** was with her sister **(PW2)**, when they were walking home, from school.

56. Both **PW1** and **PW2** confirmed that they met the accused whilst they were still on their way home.

57. The 2 girls testified that the accused asked **PW1** to go to his house after reaching home and changing her clothes.

58. When **PW1** got to the house of the accused, she unplaited his hair. Thereafter, the accused pushed her into the bedroom.

59. Once **PW1** was inside the bedroom, the accused told her to remove her blouse. He told her that he would stab her with a knife if she dared scream. The accused then removed the Complainant’s skirt, and he proceeded to insert his penis into her vagina.

60. The Complainant testified that she felt pain.

61. After the accused had had his way, he told the Complainant to go home. Upon reaching home the Complainant narrated to her sister **(PW2)** about what had transpired between her and the accused.

62. PW2 corroborated that evidence, and said that she passed the message on to their mother.

63. Later **PW1** was attended to at Ipali Health Centre.

64. During cross-examination **PW1** said that although there were neighbours close to the house of the accused, she did not scream because the accused had threatened to stab her.

65. PW2 basically corroborated the testimony of the Complainant.

66. <u>PW3, PMJ</u> testified that he is the father of the Complainant.

67. He testified that the Complainant was *“14 years or thereabouts.”* However, he also produced the Clinic Immunization Card which showed that the Complainant was born on 2nd June 2001.

68. PW3 testified that he is the person who escorted the Complainant to Ipali Health Centre, for medical attention.

69. According to **PW3**, the accused was well known to him, as they lived in the same village.

70. **PW4, LILIAN MIDEGWA** was a Clinical Officer who was the In-Charge at Ipali Health Centre. She testified that she personally examined the Complainant, and then gave her appropriate treatment.

71. Her testimony was that the Complainant's labia majora and labia minora were normal.

72. The Complainant informed **PW4** that she knew the person who had defiled her.

73. **PW5, PC CLARIS FONDE**, was a police officer attached to the Luanda Police Station.

74. She testified because the Investigating Officer, **PC MATILDA WANJOI**, was on maternity leave at the time of the trial.

75. **PW5** produced the Clinic Immunization Card, together with the Witness Statement of PC Matilda Wanjoi.

76. During cross-examination, **PW5** said that according to the Witness Statement of the Investigating Officer, the accused had asked the Complainant to help him unplait his braided hair.

77. After **PW5** testified, the prosecution closed its case. Thereafter, the trial court placed the accused to his defence.

78. The accused gave sworn evidence. He said that he was arrested on 17th November 2014, whilst he was working at a place called Balikalare. He said that he used to work as a mason.

79. After being arrested, the accused was taken to Luanda Police Station, where he was told that he had defiled the Complainant. However, the accused denied committing the offence.

80. During cross-examination, the accused said that he first saw the Complainant in court.

81. The accused indicated that his witness was Patrick, who is his cousin.

82. Nonetheless, the accused did not get Patrick to give evidence, even though the trial court adjourned the defence case severally, to give him time to get the witness.

83. Having summarized the evidence, I now make the following findings;

> (a) The age of the Complainant was proved by the prosecution. The proof was through the evidence of the Complainant, her father and the Clinic Immunization Card.

84. There is no legal requirement that the court should call for the age assessment of the Complainant who is a victim of defilement.

85. I note that in the typed proceedings, the name of the Complainant's father was cited as **M**, whilst in the Clinic Immunization Card, the name is cited as **M**.

86. Having given careful consideration to the totality of the evidence, I am convinced that the correct name is **M**. I so find because even in the Judgment, the learned trial magistrate expressly cited **PW3's** name as **PMJ**.

87. The learned trial magistrate cannot have contemplated that if an appeal arose from the Judgment, the accused would be raising an issue concerning the identity of the Complainant's father. Therefore, when writing his Judgment, he most probably picked up the name M from his record of the proceedings.

88. I did then take a look at the hand-written proceedings, and I verified that the name of **PW3** is **M**.

89. Accordingly, there is no confusion at all about the identity of the claimant's father.

90. Through the evidence of **PW1**, **PW2**, **PW3** and **PW4**, the prosecution proved beyond any reasonable doubt that the age of the Complainant was 14 years, as at the date of the offence being committed.

91. The Immunization Card was particularly significant as it was a document which shows that it was prepared in the ordinary course of work, at Ipali Health Centre. The said card shows that the Complainant was first attended to at the Ipali Health Centre on 15th June 2001.

92. The card clearly shows that the Complainant was born on 2nd June 2001.

93. As regards the alleged inconsistencies about the number of times that the Complainant had been defiled, there was nowhere on the record where **PW1** indicated the number of times.

94. PW3 testified that he had learnt *"from the hospital"* that his daughter had been defiled more than once.

95. PW4 said that the Complainant had told her that the incident on 7th November 2014 was the third time for the accused defiling her.

96. I find no inconsistencies in the evidence concerning the number of times that the accused may have defiled the Complainant.

97. But, in any event, the number of times that the accused had defiled the Complainant is immaterial. Any single act of defilement was sufficient to lead to conviction.

98. As regards the hymen, the hand-written record shows very clearly that the Clinical Officer testified thus;

> ***"On examining finger – hymen broken, white discharge,***
>
> ***On exam finger – Labia majora/minora were normal."***

99. It is inexplicable why the word *"broken"* was omitted after the word *"hymen"*, in the typed record of the proceedings.

100. I direct the learned Deputy Registrar to conduct investigations to ascertain how that error occurred.

101. In the meantime, it is evident that the Clinical Officer consistently testified that the Complainant's hymen was broken.

ARTICLE 50 (2) (C) OF

THE CONSTITUTION

102. As the trial started on 15th September 2016, which date had been scheduled for the Mention of the case, the Appellant may have been taken by surprise, because he was anticipating nothing more than a Mention.

103. However, I do not understand how the decision to have the trial on that date could have deprived the Appellant, adequate time to prepare his defence.

104. On that date, **PW1** testified and was cross-examined by the Accused.

105. Thereafter, it was not until 16th January 2017 when **PW2** testified.

106. Finally, the prosecution closed its case on 23rd March 2017.

107. When the learned trial magistrate put the accused to his defence, the accused indicated that he would give unsworn testimony, and also that he would call one witness. The court set the 13th April 2017 as the date for the defence case.

108. And when that date arrived, the accused told the court that he was ready to proceed.

109. After he concluded his testimony, the accused sought an adjournment because his witness had not come to court. The trial court granted the adjournment, and fixed the 16th of May 2017 as the date for further defence hearing.

110. However, even on 16th May 2017 the witness did not turn up, prompting the accused to seek another adjournment. Once again, the learned trial magistrate accommodated the accused.

111. From the sequence of events, it is noted that from as early as 13th April 2017, the accused expressly said that he was ready to proceed with his defence.

112. In my considered view, he cannot now turn around and say that he had been deprived of adequate time to prepare for his defence.

113. Furthermore, the learned trial magistrate granted adjournments as sought for by the accused, to enable him get his witness to come to court.

114. Accordingly, there is no merit in the Appellant's contention that the trial court had denied him adequate time to prepare for his defence.

ESSENTIAL WITNESS

115. In my considered opinion, the most appropriate manner of establishing whether or not a witness was essential, is by asking

oneself if the absence of that witness would leave a gap in the prosecution case.

116. In effect, a witness who was necessary to enable the prosecution prove one or more ingredients of the offence for which the accused was on trial, is an essential witness.

117. In my assessment the witnesses who had testified had proved that the Complainant was defiled, and that the person who committed that offence was the Appellant. As the age of the Complainant had also been proved, the Investigating Officer would only have been telling the court how he went about gathering the evidence which was then brought to court.

118. In effect, the Investigating Officer was not required, in this case, to adduce some evidence without which there would remain some gaps in the prosecution case. Therefore, the failure to call the said Investigating Officer as a witness neither weakened the prosecution case nor prejudiced the accused.

119. In conclusion, there is no merit in the appeal, and it is therefore dismissed. I uphold both the conviction and the sentence as was handed down by the learned trial magistrate.

DATED, SIGNED AND DELIVERED AT KISUMU

THIS 21ST DAY OF JULY 2021

FRED A. OCHIENG

JUDGE