REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. 7 OF 2020

GAMAINA GISIRI CHACHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment by Hon. N. Karimi Resident Magistrate in Kehancha Principal Magistrate's Court S. O. A. Case No. 30 of 2020 delivered on 18/1/2020).

JUDGMENT

Gamaina Gisiri Chacha, the appellant was convicted by Hon. Mesa, Principal Magistrate Kehancha on 30/1/2019, for the offence of defilement contrary to Section 8(1) and (2) of the Sexual Offences Act.

The particulars of the charge are that on 18/8/2018 at [Particulars Withheld] village in Kuria West, intentionally caused his penis to penetrate the vagina, of CB a child aged seven (7) years old.

In the alternative, he faced a charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offence Act. No finding was made on this charge.

Upon conviction, the appellant was sentenced to serve life imprisonment.

Dissatisfied with the said judgment, the appellant preferred this appeal. A Petition of Appeal was filed in court on 8/6/2020 by Nyagesoa Advocate. The Petition contains 30 grounds of appeal which can be condensed into the following: -

i) **whether the appellants fundamental rights to fair hearing under Article 50(2)(j) was breached;**

ii) whether the charge was defective;

iii) whether the offence of defilement was proved to the required standard;

iv) whether the trial was unfair by the appellant being denied a chance to cross examine the victim;

v) whether the sentence was harsh and excessive.

The appellant therefore prays that the conviction be quashed and sentence set aside.

This being a first appeal, this court has a duty to revisit all the evidence tendered in the trial court, analyse and evaluate it and arrive at its own determination. The court has however to bear in mind that it neither heard nor saw the witnesses testify and has to make allowance for that fact. See **Okeno =vs= Republic (1972) E.A. 32.**

The prosecution called a total of five witnesses in support of their case. **PW1, EK**, the mother of the complainant (PW2) stated that on 18/8/2018, as she arrived back home from Migori, she met the appellants wife who informed her that the appellant had defiled her daughter, **PW2 CM** PW1 then met the appellant, who had been arrested by members of public. She found her daughter, observed her and found sperms and blood stains and they took her to the police station and later she was treated at Nyayo Sub County Hospital at Isebania. PW1 identified the appellant as a neighbour in the place where she had rented a house.

PW2 who was aged about seven (7) years gave unsworn evidence after the court conducted a voire dire examination. She recalled that the appellant whom she knew found her washing dishes, told her to go behind the house in a field, slept on her, removed his 'dudu' for urinating

and put in her 'dudu' for urinating and that he warned her not to tell anybody. A boy came and beat the appellant with his fists and he was taken to police station.

PW3 Dennis Chacha, a Clinical Officer at Isebania, examined PW2 on 18/8/2018 about 7:00p.m. He found that PW2 had sustained an injury to the hip joint and was limping. He found that she had bruises to her vagina which were bleeding. He found a tear and bruises to parts of her genitalia and the hymen was broken and the under wear was blood stained with white spots which he suspected to be sperms which were confirmed by the laboratory tests. He concluded that the girl was defiled. He estimated her age to be 6 – 9 years old.

PW4 Dick Okonji recalled that on 18/8/2018 about 3:30p.m to 4:00p.m, he was going for a meeting and used a short cut through a river and noticed a red cloth in the bush and found a young boy alone and decided to find out why he was there alone. He then noticed an old man in a red short lying on a young girl and her pant was next to them. When he asked that man what he was doing, he stood up with his trouser half removed. He noticed the girl was crying; that the man picked a stone and threatened to hit him but he hit it and it fell. He shouted for help and two men came to his aid as the man tried to run away. The two men refused to help and he gave chase and the man hid in a bush. He went back to the scene, found a sack and coat. He suspected them to be the perpetrators. He waited there until a woman and a child came for them and he told them that they could not collect them till police or the owner to come came for them because he has found the minor defiling a child. The woman left the child there and when another man came, the child told him what had happened to the complainant. When the woman did not come back, PW 4 followed and found the suspect arguing with the complainant's father and identified him as the proprietor. With the help of the complainant's father, they went back to the scene, together with the appellant where the wife took the sack. They managed to take the appellant to the police.

PW5 PC Felista Kariuki recalled that on 18/8/2018 about 8:00p.m she was at the police station when members of public took the appellant to the police station alleging that he had defiled a child. PW5 escorted the complainant to the hospital. She later charged the appellant for the offence.

When called upon to defend himself, the appellant gave an unsworn statement. He denied committing the offence; that the complainant's father accused him of having an affair with his wife and defiling the child yet he cannot engage in sex since he had been injured.

I have considered the submission of both **Mr. Nyagesoa** for the appellant and **Mr. Kimanthi Senior Assistant Director for DPP**. The Respondent generally opposed the appeal. I will first deal with two key grounds that may determine the appeal. The first ground is whether the offence of defilement was proved. It is the appellants submission that there was no evidence to convict the appellant of the offence. On the other hand, Mr. Kimanthi submitted that PW1, PW2 and PW3 identified the appellant as the culprit, and that PW3 actually found the appellant in the act.

To prove an offence of defilement, the prosecution has to prove the following ingredients:

i) Proof of penetration;

ii) Age of the Complainant, that she/he was a minor;

iii)Proof of identity of the perpetrator.

Age of complainant:

As regards the age of the complainant, I noted that PW1 did not state the age of PW2. It seems the prosecutor never put that question to her. Similarly, it seems the prosecutor or the court did not ask her age. She only told the court that she was in standard one. The court subjected PW2 to a *voire dire* examination and the court ordered that she gives unsworn evidence because she did not possess the necessary intelligence. The court therefore realized that PW2 was of a tender age. The clinical officer who examined the complainant also observed that she was aged between six to nine (6-9) years. In conclusion, I find that the complainant was a child of tender age of about 6 – 9 years old.

Of Penetration: Section 2 of the Sexual Offences Act defines penetration as follows:

means "the partial or complete insertion of the genital organ of a person into the genital organs of another person."

PW1 vividly narrated in detail how the appellant inserted his 'dudu' for urinating into her 'dudu' for urinating. Ordinarily children will refer to their genitalia as "dudu". She was examined on the same day and PW4 found that her hymen broken, tear and bruises to the genitalia and presence of spermatozoa. Besides, PW3 stated that he found the appellant lying on PW2. It was not for nothing that the appellant could have been lying on a small child of tender age like that with his trouser pulled down. There is no doubt that penetration took place and it was proved beyond doubt.

Identity of the perpetrator:

As admitted by the appellant himself he is not a stranger to the complainant. PW2 admitted to knowing him before. PW1 explained that the appellant was a next door neighbour where she had rented a house. The offence was committed in broad daylight. PW3 who did not know the complainant and the appellant testified to having found the appellant in the act of defiling PW2. He narrated the efforts he made to arrest the appellant on the same day. I have no doubt that the appellant was properly, identified as the perpetrator.

Whether the appellant's right to fair hearing under Article 50 (2) (m) was violated?

I have perused the court record. I noted that the appellant was not asked what language he understood and the plea was taken without the court indicating what language the appellant understood. Though the appellant seems to have responded and cross examination was in Kiswahili, the court should have indicated what language the appellant understood in terms of Article 50(2)(m) which provides as follows:-

> **"50(2). Every person has the right to a fair trial which includes the right….**
>
> **(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial."**

Whether appellants rights under Article 50(2) (g), (h) were violated:

Counsel also submitted that Article 50(2) (g) and (h) were violated. The said Articles provide as follows:

> **(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 expenses, if substantial injustice would otherwise result, and to be informed of this right promptly;**

I have perused the record. I have not seen any where that the court recorded that the appellant was informed of his right to choose an advocate of his own choice. The said right is supposed to be explained to an accused promptly, which should be before plea or soon after that before the hearing commences, so that if an accused wishes to source the services of an advocate, he can engage one, or choose to proceed in person. If he cannot afford counsel, then he can apply for legal aid. This right was discussed in **Chacha Mwita =vs= Republic Petition No. 33 of 2019 and Joseph Philip Kiema =vs= Republic (2-19)eKLR.** The Right to fair hearing is not a right that can be limited and the trial court therefore violated the appellant's rights to fair hearing by not complying with the above provisions and the trial was rendered anullity.

After PW2 testified, the magistrate recorded as follows:

> **"The court will not allow the victim to be subjected to cross examination owing to her lack of sufficient knowledge and exposure."**

The appellant was thus not allowed to cross examine the complainant. Section 208 of the Criminal Procedure Code provides:

> **"(1) If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence (if any).**
>
> **(2) The accused person or his advocate may put questions to each witness produced against him.**
>
> **(3) I f the accused person does not employ an advocate, the court shall, at the close of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any question to that witness and shall record his answer."**

In **Sula =vs= Uganda (2001)2 E. A. 557** the Supreme Court of Uganda stated as follows:-

> **"Although an accused person is not liable to cross examination if he chooses to give unsworn testimony , the law does not prohibit the cross examination of a child victim who has not given a sworn testimony because she did not understand the nature of oath. A child witness who gives evidence not on oath is liable to cross examination to test the veracity of his / her evidence."**

In **Nicholas Mutula Wambua =vs= Republic Criminal Appeal No. 373 of 2006** the Court of Appeal stated:-

> ***"The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross-examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined.... It would appear that misconception arises from a view that because accused persons are not cross-examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined".***

The trial court erred in not allowing the appellant to cross examine PW2 to test the veracity of the evidence. Having found that the appellant's rights to fair hearing were violated, the question that arises, is what this court should do. Should this court order a retrial? In the celebrated case of **Ahmed Sumar =vs= Republic (1964) EALR**, the Court said:

> *"It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.……In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial*

should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person

That decision was echoed in the case of Lolimo Ekimat vs. R, Criminal Appeal No. 151 of 2004 (unreported)when this Court stated as follows:

> ***. . .****the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it.*

In **Fatehali Manji =vs= Republic (1966)EA 343**, the East Africa Court of Appeal said as follows:-

Although some factors may be considered such as illegalities or defects in the original trial, the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether on a proper consideration of the admissible or potentially admissible evidence, a conviction might result from a retrial at the end of the day, such a case must depend on its own particular facts and circumstances and an order for a retrial should only be made where the interests of justice require it."

In this case, the errors were made by the trial court. The offence was allegedly committed on 18/8/2018 about three (3) years ago. The offence that the appellant faced is a very serious one, committed against a child of tender age who will suffer trauma the rest of her life. It is in the interests of justice that the culprit faces appropriate sanctions. The witnesses were the appellant's neighbours and I believe they would not be difficult to trace. From the potentially admissible evidence on record, it is likely that a conviction may result.

The appellant was sentenced on 30/1/2019, two and half 2 ½ years ago. He has not served a substantial part of the sentence. All factors considered, he will not suffer prejudice if an order of retrial is made. I therefore quash the conviction, set aside the sentence and order that there be a retrial at Kehancha PM's Court. The Appellant is hereby released to police custody to be produced before the Court in Kehancha on 13/10/2021 for a fresh trial. The Court should give this matter priority being a retrial.

It is so ordered

DATED, SIGNED AND DELIVERED AT MIGORI THIS 7TH DAY OF OCTOBER 2021

R. WENDOH

JUDGE

JUDGMENT DELIVERED IN OPEN COURT AND IN THE PRESENCE OF: -

MR. KIMANTHI. STATE COUNSEL

APPELLANT IN PERSON

MS. NYAUKE COURT ASSISTANT