REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CORAM: R. MWONGO, J.

CRIMINAL APPEAL NO. 31 0F 2017

(Being an appeal against the judgment dated 31st May, 2017, of

Hon. P. Gesora, Chief Magistrate, in Naivasha CMCCR No. S.O. 3 of 2014)

MAXWELL MANOTI NYAMUMBE........................APPELLANT

VERSUS

REPUBLIC...RESPONDENT

JUDGMENT

Background

1. The appellant was charged in the lower court with two counts of defilement of a child contrary to section 8(1) (2) of the **Sexual Offences Act No. 3 of 2006.** The particulars of the offence were that on the 19th May, 2014, and also on 25th May, 2014 at [particulars withheld] Village, Gilgil District in Nakuru County the accused defiled ANO, a girl aged 14 years. After hearing the prosecution's five witnesses and the defendant, the accused was convicted in count 2 and sentenced to imprisonment for twenty years.

2. The appellant appeals against conviction and sentence raising the following issues:

a) Whether conviction was based on insufficient, disjointed, contradictory and uncorroborated evidence and no proof beyond reasonable doubt

b) Whether the victim was placed at the alleged scene of crime and was a minor at the material time

c) Whether the evidence of a single witness is sufficient

d) Whether there was penetration by the appellant and proof beyond reasonable doubt

e) Whether the trial breached appellant's constitutional rights to a fair trial

3. This being a first appeal, the court's duty is to reconsider the evidence adduced and to reach its own conclusions being careful to note that this court has not had the benefit that the trial court had of seeing the witnesses and observing their demeanour. The court must weigh the material on record, and consider it objectively and dispassionately. After such review, the court must come to its own conclusions both on the facts and on the law. (See **Okeno v R [1972] EA 32**).

4. In a case of defilement, the essential ingredients for conviction for the offence are: certainty of identification or recognition, penetration and the age of the victim. I now address the issues raised by the appeal.

On insufficient, disjointed, contradictory and uncorroborated evidence.

5. The appellant submitted that the prosecution witnesses gave evidence regarding motorcycle rides but none of the allegations connected him to his specific motor vehicle registration number. Further that the court erred by failing to take notice of the contradictory testimonies of PW1, PW2 and PW3 on the subject of the motorcycle rides.

6. The appellant further states that the complainant testified that she was given a ride on 19th May, and again on 25th May, and that PW3 then intercepted them on the 26thMay, 2014. A further contraction was that PW2 alleged that she received information from a source who was never revealed to court, about the complainant being given rides on 23rd May. PW3 stated he visited PW2 on the 18th May when PW2 told him about the motor cycle rides.

7. The appellant is right that these contradictions are on the record. The question is whether they affect the prosecution's case. The real issue is whether the contradictions do affect the main substance of the case.

8. In **Jackson Mwanzia Musembi v Republic [2017] eKLR** where the issue of contradictions of evidence arose, the court relied on the Uganda Court of Appeal case of **Twehangane Alfred v Uganda Criminal Appeal No 139 of 2001, [2003] UGCA, 6.** There the court noted that it is not every contradiction that warrants rejection of evidence. The court expressed itself as follows:

> ***"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."***

9. In my view the contradictory evidence pointed out does not go to the root and substance of the case on defilement. The issue at hand is the defilement and proof of identity, penetration and age of complainant are the main issues for determination. Ownership of the motorcycle and dates when corroborating witness is neither here nor there. The ingredients of defilement have been properly proved, and the dates do not really affect the substance of the case.

On whether the victim was placed at the scene of crime and a minor at the material time

10. The appellant submits that no witness placed the complainant at the scene of crime and that the victim also failed to give a specific description of the appellant's house even after visiting there twice and in broad daylight.

11. The state's response was that the scene of crime was the appellant's house as testified by PW1 who stated that the appellant directed her to his house where the acts of defilement occurred. That during her cross examination, the appellant did not dispute the that the two of them were in his house. Finally, that the appellant in his defence did not deny being at home on the material nights of 19 th May, 2014 or 25th May, 2014, and did not state his whereabouts.

12. The victim, PW 1, stated she was fourteen years old and in standard 8 at [particulars withheld] School. Her birth certificate was produced as Exhibit 1 by the Investigating officer, PW5, and it shows that she was born on 3/8/2001. She was thus a minor aged just shy of fourteen years at the time the offences occurred.

13. PW1 testified that she recalled the first incident on 19th May 2014 when the appellant gave her a ride on his motorbike and instead of taking her to school he took her to his home and defiled her. She also recalled the second instant of defilement by the appellant, and asserted in cross examination that it was again at his house on 25th May, 2014.This evidence was not shaken on cross examination.

14. The appellant in his sworn testimony submitted that he lived in Gilgil. He admitted that the victim was his boda boda customer that and he ferried her to school. That on the material day he argued with the victim about the charge for carrying her.

15. Although there is no direct evidence of the exact spot where the defilement occurred, there is no doubt from the evidence of PW1 that it was the appellant who defiled her in a house.

On whether the evidence of a single witness is sufficient

16. The appellant submits that apart from the complainant, the other witnesses gave hearsay evidence and the prosecution did not procure a single eye witness who saw the appellant committing the act of the complainant going into the appellant's house and further that the court did not record its reasons for making a finding that the evidence of the complainant was truthful.

17. The respondent correctly pointed out and referred to **section 143** of the **Evidence Act** which provides as follows:

> ***"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact"***

18. In respect of single witness evidence in sexual offences it is also trite law that a single witness is sufficient to convict a person. This was the position held in the case of **George Kioji v R - Nyeri Criminal Appeal No. 270 of 2012** (unreported) where the court stated:

> ***"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, <u>a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone</u>, if the court believes the victim and records the reasons for such belief."***

19. On the above basis the appellant's argument on the number of witnesses does not hold.

On whether there was penetration and proof beyond reasonable doubt

20. The appellant submits that the three elements in the offence of defilement were not proved. He states that the Medical officer's evidence of a broken hymen is not corroborative of the complainant's testimony because it is not indicated whether the hymen was freshly broken or was an old tear and that does not in itself independently implicate him neither is there anything connecting the appellant with the alleged offence.

21. As for age of the victim, that is resolved by the birth certificate Exhibit 1 already referred to.

22. On identification the complainant testified that the appellant was known to her as he used to work in a neighbour's building site and that he used to keep some materials in their home. On both dates the accused met with the appellant during the day. She said he gave her rides on his motorcycle. The accused corroborated this by stating that PW1, the complainant, was his boda boda customer. Thus the identification was by recognition.

23. The third ingredient of the offence, penetration, is defined in **Section 2 (1) of the Sexual Offences Act No. 3 of 2006** as the:

> ***"partial or complete insertion of the genital organs of a person into the genital organs of another person".***

24. The complainant testified that the accused had sexual intercourse with her on two occasions. She stated that the appellant:

> ***"He held and threw me on the bed. He removed my school uniform and inner pant and he used his penis and penetrated my vagina. He had also removed his clothes."***

25. That evidence was supported by the evidence of PW4, the medical doctor, who testified that he examined the complainant and there was evidence of penetration, as the complainant had bruises and inflammation on her genitalia, in addition to a whitish discharge. The doctor produced the P3 form which disclosed a broken hymen, inflammation of the vaginal walls, and bruising of the labia minora.

26. In my view, in the absence of evidence to the contrary, this evidence proves penetration.

The trial court erred in law and fact by conducting the trial in a manner which violated the appellant's constitutional rights to a fair trial.

27. The appellant argues that the trial court failed to inform the appellant of his right to legal representation as provided under article 50(2) of the constitution. He argues that he was facing a serious charge with a minimum sentence of 20 years making this a meritorious case for assignment of an advocate by the state as substantial injustice was likely to incur.

28. He further submits that court failed to notice that the appellant had not been furnished with all material used by the prosecution in the court record and thus compromising his right to adequate time and facilities for the preparation of his defence.

29. The record shows that the court declined to recall witnesses for cross-examination by the defence advocate who was hired during defence hearing. The trial magistrate noted that the witness had testified in 2014, and this was now 2017. He stated that courts must strike a balance so that prejudice is not visited on any party. Further that throughout the trial the appellant had not once made a request to be represented, but instead waited until the prosecution closed its case, which was too late in the day.

30. It is clear the appellant was facing a serious charge with a minimum sentence of 20 years making this a meritorious case for assignment of an advocate by the state as substantial injustice was likely to incur. Thus the failure to inform the appellant of his right to legal representation as provided under **Article 50(2)** of the constitution. Cannot be wished away. ***Article 50(1) (g) and (h)*** state as follows:

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

31. In addition, **Section 40** of the **Legal Aid Act No.6 of 2016** provides for the right to apply for Legal Aid**. Section 43(1)** of the same Act states as follows:

> ***43(1) A court before which an unrepresented accused person is presented shall-***
>
> ***(a) Promptly inform the accused of his or her right to legal representation;***
>
> ***(b) If substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her, and***
>
> ***(c) Inform the service to provide legal aid to the accused person.***

(1A) in determining whether substantial injustice referred to in paragraph (1)(b) is likely to occur, the court shall take into consideration –

> ***(a) the severity of the charge and sentence***
>
> ***(b) the complexity of the case; and***
>
> ***(c) the capacity of the accused to defend themselves***

32. What is the effect of the trial court's failure to inform an accused person of the right to legal representation? It should be noted that the request for legal aid does not mean that it will automatically be granted. The provisions of **Article 50(2)(h)** contain the rider that legal aid be provided if substantial injustice would otherwise result. **Section 43 (4) and (h) (6)** of **the Legal Aid Act** states as follows:

43(4) Where the accused person is brought before the court and is charged with an offence punishable by death, the court shall, where the accused is unrepresented, order the Service to provide legal representation for the accused

(6) Despite the provisions of this section, lack of legal representation shall not be a bar to the continuation of proceedings against a person.

33. What is substantial injustice? **Article 50(h)** makes reference to substantial injustice. **Section 43(1A)** provides for the procedure of determining whether substantial injustice will occur. Three parameters are provided. The charge facing the appellant herein provides for a minimum sentence of twenty years. On the issue of the appellant's capacity to defend himself, I am satisfied that the appellant was capable of defending himself. There was no objection on whether the case should proceed. The record of the trial court shows that all the witnesses were subjected to cross examination by the appellant. The appellant was released on bond and had a surety. All through the trial he had ample opportunity to appoint an advocate. He chose to make his appointment during defence hearing. He has the services of an advocate on appeal.

34. As noted by **Mrima, J** in **Lawrence Ombunga Otondi & Another vs. Republic [2016] eKLR**, I too have not heard counsel say that he was handling the appeal as a pauper brief. I thus presume he was adequately instructed. Further the appellant is not on record as having informed the trial court that he could not afford the services of a legal representative and as such needed the court's intervention.

35. In my view failure to be provided with an advocate for an offence which does not carry a death sentence cannot amount to miscarriage of justice. Lack of legal representation does not lead to automatic acquittal in a criminal case. Conviction would still be possible even with counsel acting. I find there was no miscarriage of justice, that the case was properly prosecuted and that the appellant duly participated. This ground of appeal also fails.

36. The appellant further submitted that the trial court failed to notice that he had not been furnished with all material used by the prosecution in the court record and thus compromising his right to adequate time and facilities for the preparation of his defence.

37. **Article 50(f)** provides for the right of an accused to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence. My view is that the above Article does not specifically call upon trial courts to place on record that on a specific date the presiding judicial officer witnessed the handing over of witness statements and documentary evidence to the accused. Good practice, however, calls upon trial courts to indicate that the defence confirms that such evidence has been supplied and the case can proceed.

38. However, failure to do so does not render the proceedings a nullity leading to an acquittal on appeal. The fact that an accused person informed the trial court that he/she was ready to proceed with the case does confirm the accused's readiness and that the prosecution evidence was availed to the accused or defence counsel unless the contrary is shown. Whether or not the accused is represented by counsel, the constitution should not be interpreted in a manner that suggests that failure to indicate that witness statements were supplied is a confirmation that they were not. In the absence of any complaint by the accused or evidence on record to the contrary, I think this ground of appeal is purely speculative, and must fail.

39. The appellant finally submitted under this head that the court declined to recall witnesses for cross-examination by his advocate who was hired during defence hearing

40. On this, **Section 146(4)** of the **Evidence Act Cap. 80** provides that:

"The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so the parties have the right of further cross-examination and re-examination respectively."

41. **Section 150** of the **CPC** states as follows:

"A court may, <u>at any stage of a trial</u> or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness<u>, or recall and re-examine a person already examined,</u> and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-

examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness."

42. In **Moses Ndichu Kariuki Vs Republic Criminal Appeal No. 228 of 2008 [2009] eKLR**, the Appellant claimed that his right to a fair trial had been breached when he was not afforded an opportunity to further cross-examine the Appellant. The Court of Appeal considered the provisions of section 77 of the former Constitution which is similar to Article 50 of the Constitution, and stated thus:

> ***"In our determination, the right to cross-examine <u>is the linchpin of the concept of a fair trial</u> in that, it has a bearing on the principle of the equality of hearing and the equality of arms without which a trial cannot be said to have been conducted fairly. On our view, denial to cross-***
>
> ***examine in turn means that the defence was not treated fairly and the two requirements of equality of hearing and equality of arms were not satisfied. Our view on this is reinforced by the marginal notes in Section (Article) 77 in that the entire provision is entitled the provisions to secure protection of law. Clearly the failure to recall the complainant for purposes of further cross-examination by the appellant caused prejudice to the appellant."***

43. In **Republic v Salim Mohamed Criminal Case No. 4 Of 2015** [2016] eKLR where the court was faced with an application to recall prosecution witnesses after the accused had changed his advocate, Chitembwe J held that:

> ***"It is clear that Mr. Shujaa was not the one representing the accused when the witnesses to be recalled testified. I do understand the position of the state in opposing the application as it is expensive and takes time to have a witness attend court and testify. Once a witness has testified it takes a lot of effort to convince such a witness to come back to court and testify again. However, Section 146 (4) allows the recalling of a witness who has already testified. Recalling a witness is part of the right to a fair hearing. It should not be felt that the court shielded the witness from further cross-examination unless it can be shown that the request to have the witness called is based on ulterior motive."***

44. In **Joseph Ndungu Kagiri v Republic Criminal Appeal Number 69 of 2012 [2016] eKLR** Mativo J held as follows:

> ***"The question that arises is whether the further cross-examination was a good reason or whether it was necessary for the ends of justice. Counsel had just come on record, he had just been supplied with the proceedings and prosecution witnesses statements and the accused persons had hitherto been unrepresented and did not have the benefit of the witnesses statements at the time the trial proceeded nor did they have the benefit of legal representation. Counsel, in his wisdom deemed it fit to apply to cross-examine the said witnesses and the court overruled this application.***
>
> ***…In this case, it was improper for the court to refuse the application to recall the witnesses, thereby occasioned grave injustice to the accused persons by locking out evidence that could have been brought out by the intended cross-examination. This refusal was in my view to the detriment of the accused persons who hitherto had no legal representation."***

45. The hearing of the case commenced in May of 2014. The appellant's counsel came on board at defence stage in December, 2016. The record does not show that the delays in the hearing were caused by the accused. At the first hearing of defence case on 30th December 2017 the defence counsel applied to cross examine the doctor. The application was contested by the prosecution on grounds that the investigating officer had said they could not trace the doctor, and that re-opening the prosecution's case would prejudice the prosecution.

46. In my view, that was an ingenuous argument. The doctor was a government officer from the Gilgil Hospital, a government hospital. It was not shown that any attempt had been made to look for the doctor or to avail any other officer who could testify in his place. The trial court filled in gaps which the prosecution was responsible to ascertain by attempting to look for another officer and demonstrating such efforts, before a conclusion that he could not be available was made. In my view, the denial of cross-examination was too readily granted, and the denial was prejudicial to the accused.

47. On this ground there is no doubt that the trial magistrate erred, resulting directly in the infringement of the accused's fundamental rights to a fair trial.

48. In the end, I determine that the denial of the accused's right to a fair trial was fatal to the proceedings.

49. Accordingly, I declare that there was a mistrial and do order that the appellant shall be retried. The file shall be remitted back to the lower court for retrial by a magistrate other than Hon P Gesora.

50. Orders accordingly.

Dated and Delivered at Naivasha this 12th Day of February, 2020

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RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Ms Abuga for the State

2. Tombe holding brief for Nyakeriga for Appellant

3. Appellant - Maxwell Manoti Nyamumbe - present

4. Court Assistant - Quinter Ogutu