



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R. MWONGO, J.

CRIMINAL APPEAL NO. 38 OF 2017

(Being an Appeal from the Original Conviction and Sentence in Criminal Case No. S.O. 36 of 2016 of 6/09/2017 in the Chief Magistrate's Court, at Naivasha - Z. Abdul, RM)

PETER KAMAU NDERITU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Background

1. The accused was convicted in the lower court with the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the **Sexual Offences Act No. 3 of 2006**. He was sentenced to life imprisonment. The particulars of the offence were that the accused on 21st June 2016, at about 10.00am at [particulars withheld] village in Naivasha sub-county within Nakuru County, unlawfully and intentionally caused his penis to penetrate the vagina of AN, a mentally retarded girl aged 11 years. In prosecuting the case, the state called 4 witnesses who were heard at the trial.

2. I note at this early stage, that the first witness, EWW, testified as an intermediary for the complainant. It was explained that the complainant was “dumb” and suffered inability to talk though she could hear. The complainant is PW1’s niece. PW1 also testified as an eyewitness of the offence.

3. Dissatisfied by the lower court decision, the accused filed an appeal. Subsequently, he filed supplementary grounds of appeal seeking that the appeal be allowed, the conviction quashed and that the sentence be set aside. He consolidated all the grounds of appeal, and accompanied them with submissions. The grounds of appeal are as follows:

1. That the learned trial magistrate erred in law and fact in not finding that provisions of section 31 of the Sexual Offences Act No. 3 of 2006 were not properly conformed to and that the appellant was prejudiced.

2. That the learned trial magistrate erred in law and fact in not finding that the complainant’s age was not proved beyond reasonable doubt to warrant a conviction.

3. That the learned trial magistrate erred in law and fact in failing to take into account the defence of the appellant.

4. That, the learned trial magistrate erred in law and fact by holding that the prosecution case was proved beyond reasonable doubt but failed to note that, the evidence she relied on was based on a single identifying witness who was not truthful, there was no warning by the trial magistrate before giving a conviction and that conviction and trial cannot stand in trial.

Issues for determination

4. Having considered the parties’ representations and having perused the record of proceedings and the lower court file, I consider the following to be the issues for determination in this case:

1. Whether an intermediary was required or properly obtained

2. Whether defilement was proved

3. Whether the age of the complainant was proved

4. The effects of relying on evidence of single identifying witness

5. I deal with each of the issues together with the appellant's submissions and my analysis thereof in the following paragraphs.

Whether the complainant required an intermediary and whether the intermediary was properly testified

6. The appellant argued that the trial court failed to conform with **section 31** of the **Sexual Offences Act no. 3 of 2006**, by not bothering to obtain evidence that the victim was mentally retarded or was actually deaf and dumb. In the absence of a psychiatric evaluation, he submitted, the court failed to show the inability of victim to testify. Further, he argued that the court neither declared the victim as a vulnerable witness nor did it direct the appointment of PW1 as an intermediary on behalf of the complainant. In addition, he said there was no explanation by the court in the interest of justice to justify the failure to appoint the intermediary, and to record reasons for appointing the intermediary. Instead the court relied on PW1's oral declaration as an intermediary acting for the complainant.

7. In this case PW1, was the complainant's auntie. She testified on oath that the complainant:

"...suffers a disability. She hears but cannot talk i.e. she is dumb....she cannot talk"

She explained that on the material day she witnessed the incident. The court then stated:

"PW1 testifies as an intermediary on behalf of the complainant seated in court"

8. Intermediaries are described in **Article 50 (7)** of the **Constitution** as follows:

"In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court."

Under Section 2(1) of the Sexual Offences Act an **"intermediary"** is defined as:

"a person authorized by the court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counselor, guardian, children's officer or social worker."

9. In **M. M v Republic Criminal Appeal No. 41 of 2013, [2014] eKLR**, the court recognized that the role of an intermediary is to communicate to the witness the questions put to the witness and to communicate to the court the answers from the witness to the person asking the questions, and to explain such questions or answers, so far as necessary. The court in that case was of the view that the evidence presented in such a case is not that of the intermediary himself or herself but that of the witness relayed to court through the intermediary.

10. Courts can also admit statements or pre-recorded evidence. Under the **Sexual Offences Rules of the Court 2014**, for example, vulnerable witnesses can be examined by, *inter alia*, admitting in evidence a recorded statement made by the witness as evidence in chief or as part of the evidence in chief, or by holding a special sitting for the purpose of examining, in full or in part, the vulnerable witness.

11. The **Indian Evidence Act, 1972**, provides modifications on the recording of such evidence and allows the court to use recorded statements taken with assistance of an interpreter or special educator. **Section 119 of the Indian Evidence Act** reads:

"A witness who is unable to speak may give his evidence in any manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open court. Evidence so given shall be deemed to be oral evidence:

Provided that if the witness is unable to communicate verbally, the court shall take the assistance of an interpreter or a special educator in recording the statement and such statement shall be video graphed."

12. In the case of **State of Rajasthan v. Darshan Singh: Darshan Lal Criminal Appeal No 870 of 2007** the Court was of the view that:

"..... When a deaf and dumb person is examined in the court, the court has to exercise due caution and take care to ascertain before he is examined that he possesses the requisite amount of intelligence and that he understands the nature of an oath, on being satisfied on this, the witness may be administered oath by appropriate means and that also be with the assistance of an interpreter. However, in case a person can read and write, it is most desirable to adopt that method being more satisfactory than any sign language. The law required that there must be a record of signs not the interpretation of signs....."

In view of the provisions of Section 119 of the Evidence Act, the only requirement is that the witness may give his evidence in any manner in which he can make it intelligible, as by writing or by signs and such evidence can be deemed to be oral evidence within the meaning of Section 3 of the Evidence Act. Signs and gestures made by nods of head are admissible and such nods and gestures are not only admissible but possess evidentiary value....."

Language is much more than words. Like all other languages, communication by way of signs has some inherent limitations, since it may be difficult to comprehend what the user is attempting to convey. But a dumb person need not be prevented from

being a credible witness merely due to his/her physical disability. Such a person though unable to speak may convey himself through writing if literate or through signs and gestures if he is unable to read and write.....

To sum up, a deaf and dumb person is a competent witness. If in the opinion of the Court, oath can be administered to him/her; it should be so done. Such a witness, if able to read and write, it is desirable to record his statement giving him questions in writing and seeking answers in writing. In case the witness is not able to read and write, his statement can be recorded in sign language with the aid of interpreter, if found necessary. In case the interpreter is provided, he should be a person of the same surroundings but should not have any interest in the case and he should be administered oath.”

13. In this case, on perusal of the evidence of PW1, I interpret it as indicating that the complainant was a competent witness as explained in the authority above. There was evidence that PW1 is the guardian of the complainant, and that she intended to act as her intermediary. However, there are several errors that occurred in this case: the complainant's statement was not taken; she did not take oath and no record is available that an attempt was made to do so; she was not in fact led in evidence through her guardian so that it appears that she did not participate in the trial at all but merely sat in the stand whilst evidence was given by her guardian, who also happened to be an eyewitness to the incident.

14. Further, whilst the Clinical Officer, PW3, testified and recorded in the P3 Form that the complainant suffered from cerebral palsy or mental disability, no evidence of any tests to ascertain that fact were available in court. In the PRC Form however, the Clinical officer commented:

“The survivor cannot communicate since she is mentally retarded”

15. In answering the section on “Psychological Assessment” in Part A of the PRC Form, the Clinical Officer ticked and underlined the word ‘retarded’ in the responding to the question:

“Mental state (normal, confused, flashback, hyper-aroused, dazed, coma, retarded, extremely calm, etc”) (complete psychological assessment section in Part B)”

However, the Clinical Officer did not submit any psychological assessment.

16. Although the record does not indicate that the court conducted any analysis to substantiate whether complainant was or was not intelligent enough to give evidence, the trial magistrate formed the opinion, expressed in her judgment, as follows:

“I wish to point out that due to the girl's condition, she could not testify and did not also record a statement. However, he was in court seated but did not look ok”

17. If the complainant could hear, as testified by PW1, then she was in a position to give evidence herself, even if it was through help of signs, gestures or in such other manner as the complainant normally communicates, and responses should have come directly from her which is not the case here.

18. Are the above errors of the trial magistrate fatal? My understanding of what occurred at the hearing is that the complainant did not testify. There is no evidence that she wrote a statement either. These appear to have been done by PW1, in effect converting PW1 into the complainant on behalf of the victim.

19. Section 2(1) of the **Sexual Offences Act** speaks to this situation in that “**complainant**” is defined to mean:

“the Republic or the alleged victim of a sexual offence and in the case of a child or person with mental disabilities, includes a person who lodges a complaint on behalf of the alleged victim where the victim is unable or inhibited from lodging and following up a complaint of sexual abuse”

20. Accordingly, I consider the trial court's error was not fatal since the court formed the opinion, having seen the victim, that from her appearance she was “not okay”. Although the trial magistrate should have elaborated on this to give meaning to her assessment, she did not. Thus, the error that needs to be corrected is that regarding the status of the victim which was not properly ascertained but can be ascertained and recorded. An appropriate order could have issued in this case, but as I am satisfied that the intermediary was an eyewitness and could have given competent evidence even in absence of the victim, no order needs to be made.

Whether defilement was conclusively proved

21. The appellant submits that there was no evidence showing that the complainant had been penetrated and that the medical record only indicated that the hymen was intact but labia majora was bruised. There was no blood stain neither were there spermatozoa seen.

22. The ingredients of the offence of defilement are: identification or recognition, penetration and the age of the victim. “**Penetration**” is defined under **Section 2 (1) of the Sexual Offences Act No. 3 of 2006** as follows:

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

23. The fact that the hymen had not been broken does not in itself imply that there was no penetration of the genital organ of the victim by another's genital organ in light of **Section 2 (1) of the Sexual Offences Act No. 3 of 2006** which provides for partial penetration. The Clinical officer's evidence indicated that the complainant had been defiled because the labia majora had been bruised and was inflamed and there was a whitish discharge. The PRC Form indicates that the examination of the victim's genitalia indicated no physical injury

24. In **Erick Onyango Ondeng v Republic CRA No. 5 of 2013 (2014)** eKLR Court of Appeal addressed itself as follows:

*“We do not share the Appellant's suggestion that Dr. Muhombe's report concluded that there was no hymen whilst that of Dr. Kamau concluded that the hymen was intact. Dr. Muhombe's report was that the hymen had some old tears on the lateral and anterior side, suggesting that it was still there. We agree with the first appellate Court that to establish defilement, it is not necessary that the hymen must be broken; even partial penetration of the female genital by male genital will suffice to constitute the offence. In *Twehangane Alfred vs Uganda (supra)* the Uganda Court of Appeal expressed the same view as follow:*

“In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.”

Whether age was proved

25. The appellant submits that the clinical officer used post rape care form where the complainant's date of birth is indicated as 15th June 2006, meaning at the time of the incident the complainant was 10 years old. However, the investigation officer testified that PW1 indicated that complainant was 11 years old. The Health card Exhibit 3 and Charge Sheet indicate the complainant was 11 years old. He submits that there was thus contradictory evidence as to victim's age, and no reasons were given for the age the trial court relied upon.

26. Are the differences in age provided in evidence by the prosecution fatal in this case? I think not. In **Musyoki Mwakavi v Republic [2014] eKLR** it was held that:

“...apart from medical evidence, the age of the complainant may also be proved by birth certificate, the victim's parents or guardian and observation or common sense...”.

27. In addition, the case of **Francis Omuroni v Uganda Court of Appeal Criminal Appeal No. 2 of 2000**, it was held:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...”

28. The trial magistrate noted the different ages that were given in evidence i.e 9-11 years. She decided to rely on the Health Card as that was the most apt medical evidence available. The Health Card indicated the child's date of birth as opposed to the other forms of evidence and placed the complainant at 10 ½ years and to me that was proof enough of age.

29. It is not disputed that there was a discrepancy on the age of the complainant as provided by different witnesses. The discrepancy, however, is not fatal to the prosecution case in any manner as the ages 9, 10 and 11 years all attract the same punishment. **Section 8** of the **Sexual Offences Act** provides that:

“8.(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.”

In light of the foregoing, this ground of appeal fails.

Single identifying witness

30. The Appellant argues that the trial Magistrate relied on the evidence of a single identifying witness which was uncorroborated. Further, that the evidence ought to have been treated with caution and the court failed to warn itself of the danger of relying on such uncorroborated testimony.

31. **Section 143** of the **Evidence Act** provides that:

“No particular number of witnesses shall in the absence of any provision of the law to the contrary be required for proof of any fact.”

32. It is also trite law that the evidence of a single witness is sufficient to convict a person, as held in **George Kioji v R Nyeri Criminal Appeal No. 270 of 2012** (unreported) where the court stated that:

“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, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”

33. There is thus no obligation on the prosecution to call on a particular number of witnesses or produce many exhibits to prove defilement or other sexual offense. The evidence of the victim or a sole witness is sufficient as long as the court believes beyond reasonable doubt that the defilement occurred. Here, the called other witnesses who corroborated the evidence of PW1 who was an eyewitness of the defilement of the victim. Accordingly, this ground also fails. As for the sentence meted by the lower court I observe as hereunder.

34. In conclusion, all the grounds of appeal fail and the appeal is dismissed and the conviction in the lower court are upheld. As for the sentence meted by the lower court I observe hereunder.

35. Despite the court having reached this determination on the merits of the appeal, the court notes from the record of proceedings that there was no mitigation in the lower court. Under the section on mitigation the trial magistrate wrote ‘Nil’ and went on to sentence the appellant to the mandatory sentence.

36. This is contrary to the Judiciary Policy and Guidelines on Sentencing, 2016, and the emerging jurisprudence on offences with mandatory minimum sentences. See **Dismas Wafula Kilwake v. Republic [2018] eKLR**.

37. Accordingly, I remit the matter to the trial court for the holding of a trial sentencing. Mention will be held before the Chief Magistrate on 9th March, 2020.

38. Orders accordingly.

Dated and Delivered at Naivasha this 6th Day of February, 2020

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Maingi for the State
2. Peter Kamau Nderitu - Appellant in person
3. Quinter Ogutu