REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL CASE NO. 140 OF 2018

LAWRENCE KIRUMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the Senior Resident Magistrate Honourable P. W Wasike in Kapsabet Principal Magistrate's court Criminal Case No. 3066 of 2014 dated 11th December, 2018)

JUDGMENT

LAWRENCE KIRUMA, the appellant herein was charged in the lower court with a main count of defilement, contrary to *Section 8(1)* as read with *Section 8(2*) of the *Sexual Offence Act No. 3 of 2006.*

The particulars of this offence are that on the night of 8th October 2014 at [particulars withheld] village, within Nandi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of *"SC"*, (a minor complainant whose name is withheld) a child aged 9 years.

In the alternative the appellant faced a charge of committing an indecent act with a child, contrary to *Section 11(1)* of the *Sexual Offences Act, No. 3 of 2006.* The particulars herein are that on the 8th day of October 2014 at [particulars withheld] within Nandi County, the appellant intentionally and unlawfully caused his penis to get into contact with the vagina of *SJ*, a child aged 9 years.

Having gone through the proceedings in this case I do find it interesting, and raises various legal procedural challenges. On 19th November 2015 the complainant was to adduce evidence. As would be expected, the court conducted a voire dire given the age of the complainant which was indicated as 10 years. The record shows only the answers the child gave to questions probably put to her by the court. Such does not comply with the correct procedure given by the court of appeal in the case of ***Johnson Muiruri –vs- Republic [1983] KLR 447,*** where the court stated that it is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided, and not be forced to make assumptions.

After the court conducted the said voire dire, a finding was made that she shall give unsworn evidence but be cross examined. The minor gave unsworn testimony upto a point when she remained mute. On application by the prosecutor she was stood down to be counselled. The matter was adjourned to 9th February 2016. On 9th February 2016 the prosecution made an application for the complainant to give her evidence through an intermediary on the ground that she was traumatized. The defence advocate opposed the application on the ground that the court had not ascertained that the complainant was incapable of testifying on her own.

The prosecution said they could avail her for court's assessment. The court however referring to the proceedings of 19th November 2015 where the complainant had turned mute after adducing some evidence, was of the opinion that an assessment would amount to further torture of the child and therefore allowed the prosecution's application. The ruling was that her evidence is to be adduced through an intermediary as prayed. At 11.00 a.m the children officer addressed court and said she had spoken to the minor who had gained confidence to speak. The prosecutor buttressed the point by stating that they could proceed with her evidence as could testify by herself. The defence did not object to the suggestion and intermediary was abandoned.

The court conducted voire dire again and as it happened on 19th November 2015 only answers given to the court by the girl were recorded. The court ruling this time differed from the one of 19th November 2015 as the court decided that the minor shall give sworn evidence. No reason was given for the finding. The minor was sworn and gave some evidence to a point where she said, "He removed his trouser and his "kaiboi" and bikers." The court asked what "kaiboi" means and the mother (PW-1) answered his bikers. It is not clear whether the question was put to the minor or the mother who gave the answer. The mother at the time was not a witness and neither was she an intermediary. After that the minor went mute. The prosecution revisited the earlier application to have her adduce evidence through an intermediary. The defence did not object. The court made a finding that the complainant is to testify through an intermediary, the children officer, *Mrs. Wanyama*. The minor was declared a vulnerable witness under *Section 31* of *Sexual Offences Act*. *Mrs. Hellen Wanyama* was sworn and

gave evidence as PW-3. She informed the court what she was allegedly told by the minor in December 2015. She also alluded to the fact that she had gone through statements. After her evidence in chief she was cross examined by the advocate. This adopted procedure raises the question as to who is an intermediary and his or her role under the *Sexual Offences Act No. 3 of 2006*. *Section 2* of *Sexual Offences Act* on interpretation, states that "intermediary" means a person authorized by a 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.

However, a look at *Section 31* of *Sexual Offence Act* which define the roles of an intermediary, it is made clear that an intermediary is not only a person authorized by a court of law to give evidence on behalf of a vulnerable witness, but is also a person authorized to assist a vulnerable witness adduce evidence. *Section 31 (3)* states, "*The court may, if it is in doubt as to whether a witness should be declared a vulnerable witness in terms of Subsection (2), summon an intermediary to appear before the court and advise the court on the vulnerability of such witness.*" *Section 31 (4)* indicates: -

Upon declaration of a witness as a vulnerable witness in terms of this Section, the court shall, subject to the provisions of *Subsection (5)*, direct that such witness be protected by one or more of the following measures:-

(a) …….

(b) Directing that the witness shall give evidence through an intermediary;

(c) ……

(d) ……...

(e) Any other measure which the court deems just and appropriate.

31(7) states:-

"If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may:-

(a) Convey the general purport of any question to the relevant witness;

(b) Inform the court of any time that the witness is fatigued or stressed; and

(c) Request the court to recess.

31(10) states: *"A court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary."*

While given my experience I do find it easy to understand circumstances under which an intermediary can assist a vulnerable witness offer evidence in court, and the place of such evidence in the Evidence Act, it is disturbing on how to treat evidence given entirely by an intermediary on behalf of a vulnerable witness, based purely on what she or he was told by the said vulnerable witness. The questions I have in mind are; how it is distinguished from hearsay evidence and its use and relevance in cross examination, given that the witness in court is not the one who witnessed the incident and the evidence is not his or hers. It can be a challenge to the defence and the court. A look at *Article 50(7)* of the *Constitution* shows that:-

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

In my view this makes it clear that the role of an intermediary cannot be to offer evidence on behalf of a vulnerable complainant and or an accused person, but to assist such present their own case or position in court by way of evidence. In such case it is the witness who will be cross examined through the intermediary and not the intermediary. The court of appeal in appreciating this position, in ***Criminal Appeal No. 52 of 2015 of John Kinyua Nathan vs Republic [2017] eKLR,*** expressed that:-

"The expertise, possession of special knowledge or relationship with the witness must be ascertained by the trial court through examination of the prospective intermediary before the court appoints him or her. It goes without saying, in view of that role, that an intermediary must subscribe to an appropriate oath ahead of the witness' testimony, understanding to convey correctly and to the best of his/her ability the general purport of the evidence. The trial court must then give directions to delineate the extent of the intermediary's participation in the proceedings."

Further on the role, it was stated that:-

"The intermediary's role is to communicate to the witness the questions put to the witness and to communicate to the court the answers from the victim to the person asking the questions, and to explain such questions or answers, so far as necessary for them to be understood by the witness or person asking questions in a manner understandable to the victim, while at the same time according the victim protection from unfamiliar environment and hostile cross-examination; to monitor the witness' emotional and psychological state and concentration, and to alert the trial court of any difficulties."

The court then concluded:-

> ***"From what we have said, we conclude that it was in error for the two courts below to treat the evidence of the complainant's mother as that of an intermediary, the steps leading to such appointment having not been followed. It was sufficient to rely on her direct evidence as an independent eye witness."***

Back to our case, the complainant gave evidence twice partly, one unsworn and the other sworn, before the intermediary stepped in to offer evidence on her behalf. The trial magistrate did not state the position of such evidence offered by the complainant. She was not even cross examined on it. It was just abandoned without a word. The said intermediary was not examined and sworn as an intermediary. She was simply sworn as a witness. Her entire evidence was based on hearsay, of what she was allegedly told by the complainant in December 2015. It is not known the basis of which she was given the said information as she is not the investigating officer and the court had not directed so. She is a children's officer. The basis on which she went through statements in the case is not known. She could as well have told the court what she read in the alleged statements. The trial court relied mostly on her "evidence" in finding the case in favour of the prosecution and against the appellant to arrive at a conviction. In the judgment, on page 5, the beginning statement reads;

> *"The minor through the intermediary told court that while the minor was on the way back home from school ……."* The record is however clear that the minor never told the court anything through the intermediary. The proceedings are clear that the minor was to testify through an intermediary but how that changed to intermediary testifying on behalf of the minor is unclear. The prosecutor on 9th February, 2016 the prosecutor applied, *"I do pray that the complainant does testify through an intermediary."* The court on its ruling stated, *"……I therefore allow the complainant's evidence to be adduced through an intermediary as prayed."*

Again when the order was reversed and fresh application made, the prosecutor stated, "I do pray that we revisit to my earlier application, we can adduce evidence through an intermediary."

The court ruling on this was:-

> "The complainant to testify through the intermediary, the Children Officer, Mrs Wanyama."

The foregoing shows the intermediary was to assist the minor (complainant) adduce evidence, rather than her offering evidence on her behalf.

Having considered the foregoing fundamental procedural error which questions the admissibility of the evidence of PW-3 as that of the complainant, and its credibility given the questions on the relevance of its cross examination, I find no use in weighing the rest of the evidence of which can hardly form a prima facie case against the appellant. The grave error gives rise to a mistrial of which entitles the appellant to an acquittal. The conviction is therefore hereby quashed as well as the sentence. The appellant is set free unless otherwise lawfully held.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 4th day of March, 2020.

In the presence of:-

1. The appellant

2. Mrs. Limo for State

3. Mr. Gregory - Court assistant