REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NUMBER88OF 2017.

GEORGE NJOROGE WAINAINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from against both the conviction and the sentence of Resident Magistrate Hon. R.Amwayi delivered on 6th of November 2017 in MOLO Court Criminal Case Number71 of 2017.)

JUDGMENT

1. The Appellant was charged before the MoloChief Magistrate's Court in Criminal Case Number 71 of 2017 with **defilement contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act No. 3 of 2006.** It was alleged that;

> *On diverse dates between 8th of August and 11th of August 2017 in Rongai Sub County within Nakuru County he intentionally caused his penis to penetrate the vagina of JC aged 16 years*.

In the alternative he was charged with committing an **indecent act with a child contrary toSection 11(1)** of the **Sexual Offence Act No. 3 of 2006**. It was alleged that:

> *On 8th of August 2017 in Rongai sub county within Nakuru County intentionally touched the vigina (sic)of JC aged 16 years.*

2. The Appellant pleaded not guilty on 15th august 2017. After a full trial he was found guiltyof defilement and sentenced to imprisonment for twenty (20)years.

3. Aggrieved be the conviction and sentence the appellant filed an appeal on grounds that:-

> *a. The Learned Trial Magistrate erred in both law and fact by failing to appreciate that the charge sheet used to prefer charges against the Appellant was incurably defective.*
>
> *b. The Learned Trial Magistrate erred in law and in fact by failing to appreciate that the prosecution case was not proved beyond reasonable doubt as required by law.*
>
> *c. The Learned Trial Magistrate erred in law and fact by failing to find that there were crucial witness who were never called by prosecution to testify as per section 150 of the Criminal Procedure Code.*
>
> *d. The Learned Trial Magistrate erred in law and fact by failing to appreciate that the medical evidence was neither sufficient nor cogent enough to provide corroboration.*
>
> *e. The Learned Trial Magistrate erred in law and in facts by failing to find that the defence raised by the Appellant was cogent and raised considerable doubts against the prosecution evidence.*

4. The Appellant later Amended grounds of Appeal raising the following grounds;

> *a. The Learned Trial Magistrate erred in law and facts in convicting the Appellant whereas the Appellant's Constitutional right enshrined in Article 50 (2) (b) (f) (m) of Constitution were flouted and violated.*
>
> *b. The Learned Trial Magistrate erred in law and facts in failing to take into account and or consider the Appellant defence adequately*

The Case

5. The case for the prosecution was that the complainant aged sixteen (16) years was a student at [particulars withheld] Secondary school. On the 8thof August 2017, Election Day she left home at about 5p.m. to go and buy sugar. According to her testimony, she found the appellant standing next to the shop. The shopkeeper was present. The accused grabbed her hand and pulled her to his house which was nearby. She did not scream because he threatened her with death. Inside his house they went to the bedroom where he ordered her to undress. She removed all her clothes while he removed his trouser and under wear. He then had forceful penetrative sexual intercourse with her. He wore a condom. When she began to bleed he let her rest, but locked her inside the bedroom.

6. In the meantime she was missed at her home. Her brother PW2 was looking for her and learnt on 10th that she was at N's place. He went surveying the place and confirmed she was there. He called his sister PW3.They reported to NyumbaKumi and they all went to appellant's house. They found him seated outside his houseand told him to call the complainant. He called her and she came from the bedroom. They all went to RongaiPolice Station where the report was booked by PW5 No. 60212 Sgt. Mary Busei on 11th August 2017.

6. PW5's testimony was that she escorted the complainant to hospital where she was examined and her Post Rape Care(PRC) form and P3 were completed. On interrogation the girl told her that the appellant had promised to marry her and had taken her to his home where they began to live as husband and wife. According to her the medical examination proved that the girl who was below eighteen (18) years had been defiled.

7. The medical examination evidence was given by PW4 BildadBangoge a senior clinical officer at Rongai Health Centre. He filled the P3 on 14th August 2017. He said he found a whitish discharge from the vagina, a vaginal swab revealed puss cells but no spermatozoa. He said he found that there was penile penetration. That the pus cells were evidence of a UTI which may be due to sexual intercourse. He could not tell when this sexual intercourse was had. However the hymen was intact.

8. In his defence the appellant told the court that he was a carpenter but also sold chang'aa. He has a son and apparently no wife. On the material day the complainant came to his house and told him she had come to get married. He sent her and his son to buy supper while he continued to sell chang'aa. The following day she told him she wanted them to elope. He told her he was not ready and told her to go back home. She left but came back in the evening and told him she had decided to get married. He told her to leave but again she went to the neighbour's place here she stayed until evening. He decided to report to the village elder that there was a girl who had stuck in house and wanted him to marry her. He even went and bought her new clothes. On coming back from buying the clothes NyumbaKumi and the complainant's brother came and arrested both of them.

Submissions

9. The appellant's main ground was that the court never indicated the language that was used throughout the case from plea to finish. He urged the court to find that by failing to indicate the language used by court there was a presumption that the language used was a language that the appellant understood. It is his position that this was a violation of his Constitutional rights under **Article 50(2) (b) (f) (m).**He drew theCourt's attention to the case**Aden vs R. (1973) EA 445 C.A.**where the following guidelines were laid down:

> *i. Charge and all essential ingredients of the offence should be explained to the Accused in his own language or one that he understands.*
>
> *ii. The Accused own words should be recorded and if they are an admission a plea at guilty should be recorded.*

10. He also relied on the case of **Antony Njeru Katiari&Another v Republic [2007]eKLR** for the proposition that;

> **"where proceedings are conducted in a language the accused does not understand, the fact that it was interpreted to him must be apparent on record."**

He also submitted orally where he denied any sexual contact with the complainant. He argued that he had asked her age and she told him she was born in 1998. He also wondered why the shopkeeper was never called as a witness. He submitted that she was not a student that she gave birth after he was imprisoned and got married to another man.

11. In opposing the appeal Ms. Nyakira for the state submitted that the ingredients of defilement were established.That the issue of the complainant's age was an afterthought and was never raised before the trial court. That he said in his defence that he wanted to marry her but never said she was above eighteen (18). His rejoinder was that she had lied about her age.

Analysis and determination

12. This being a first appeal the court is guided by the principles laid out in **Okeno v Republic[1972] EA 32**and **KariukiKaranja v Republic [1986] KLR 19** that the appeal court is mandated to look on the evidence adduced at the trial court afresh, re-evaluate and re-assess it and reach its own conclusion.

13. The issues that arise are therefore:

> **1. Whether the trial was conducted in a language that the appellant understood and if not what are the implications**
>
> **2. Whether the prosecution proved its case beyond a reasonable doubt to warrant the conviction and sentence.**

3. Whether the court considered the appellant's defence.

14. **Whether the trial was conducted in a language that the appellant understood and if not what are the implications**

The record shows that from the time the plea was taken, no language of interpretation was indicated. The trial court had a standard form where it is written:

"Court: which language do you speak/understand?

Accused-

1) English……

2) Kiswahili……..

3) Kipsigis……..

4) Kikuyu……..

5) Other specify……..

Court:

Read outs the charge and all its particulars to the accused person in……language ….."

The record speaks for itself, no language was 'ticked 'out of the list and no other was specified. On the second part where the court could have redeemed itself, the dash remains an empty dash. The court simply recorded **'not true', 'not true'** against the expected response from the accused on Count 1 and the alternative to count 1. Hence as far as the record goes the court failed to comply with **Aden v Republic.**

15. When the trial started on 21st August 2017, the record does not state what the language of interpretation was except that the complainant proceeded to testify in Kiswahili.At the end of PW1's testimony the accused is recorded as saying: **I wish to plead guilty.** Then: Court:**The accused be taken to Provincial General Hospital Nakuru for mental assessment. Further Hearing on 4th September 2017.**On 4thSeptember 2017 the matter proceeded without any follow up on the orders of 21st August 2017. Again there was no indication of the language neither was it indicated at the next hearing on 16th October 2017, or when the ruling on case to answer was delivered, or even when the judgment was read.

16. The accused person was unrepresented. It is clear from the proceedings that he may not have fully understood the purport of the charges facing him hence the request to 'accept' (*kukubali*) the charges. The surprising thing is the court's direction that his mental state be examined yet the trail court did not make any effort to understand the appellant's position. The record does not say why the court thought this was necessary. It appears to me that in his mind he was not denying being found with the girl in his home. And that is what he says in his defence. What he denies is sexual intercourse with the complainant.

17. Why did the trial magistrate think that the accused needed a mental assessment test? Why did the court not follow up on it? What was the court's determination onthe accused's request to change plea?Clearly the trial was flawed from the start;I go back the celebrated case of **ADAN VS REPUBLIC 1973 EA 445** wherethe Court of Appeal for Eastern Africa set out the steps that a plea court should take in order to record a proper plea. That did not happen.

18. Coming to the evidence**.**The complainant testimony of the circumstances of the offence are incredible. That at 5:00p.m. the appellant, in sight of the shopkeeper dragged her to his house? That is not believable. It is also not believable that he kept her under lock and key for four days. She confirms that the appellant was living with his son. There were people who came to buy and drink chang'aa in the appellant's house every day. She even had the time to visit her classmate and take a shower at her classmate's home. Hence there is clear evidence that the plaintiff was not telling the truth when she said that she was locked up in the house kept against her will.

19. The appellant concedes that there were plans to marry the complainant after she demonstrated that she was adamant to be married. Obviously that in itself would still amount to an offence as the appellant was under age.

20. **Was there evidence of penetration?**

The **Sexual Offences Act** defines penetration as follows.

"penetration" *means the partial or complete insertion of the genital organs of a person into the genital organs of another person*

The complainant testified that the appellant had forceful penetrative sex with her until she bled. That cannot be described as partial penetration. And that is the part that is not supported by the medical examination.When the compliant was examined on 12th August 2017 and the PRC form completed, the officer who completed it indicated as follows:

'*Chief complaint/ the presenting symptoms*: ***Was found at the boyfriend's house***'

'*Circumstances surrounding the incident (survivor account) remember to record penetration (how, where, what was used, indication of struggle*: ***No struggle"***

On the genital examination for *discharges, inflammation and bleeding*:***whitish discharge, hymen intact***

21. The P3 was filled on 14th August 2017, three days after the complainant had left the appellant's house. The clinical officer noted that there had been penile penetration, yet the hymen was intact and there were no injuries to the genitalia. He spoke about a UTI caused by sexual intercourse but it was not mentioned in the P3 and neither was the appellant who was arrested together with the complainant tested for the same.

22. It is noteworthy that the complainant did not complain of defilement at the hospital but that she was found at her boyfriend's house. That was the complaint. To the police she told the Investigating Officer that the appellant had promised to marry her and they were living as husband and wife. She did not complain that the appellant had forceful sexual intercourse with her.The officer relied on the above medical evidence to arrive at the conclusion that the complainant was defiled.

23. In **K N v Republic [2016] eKLR**the Court of Appeal was categorical that the element of penetration cannot be presumed. It must be proved. The fact that the complainant and the appellant were allegedly living as husband and wife was not proof beyond a reasonable doubt that they had sexual intercourse.This Investigating Officer did not investigate the case. If the complainant bled, and the appellant used condoms, did she visit the scene to get this evidence? She did not.The case for the prosecution on penetration was doubtful.

The accused's defence

24. The appellant's submission about the age of the complainant was about an issue that did not arise during trial.He testified that he had reported to the village elder about the girl coming to his house and refusing to leave. He did not call that village elder. He appeared to be aware of the fact that he needed to report this matter somewhere. If he is to be believed then he was lax with the complainant. He ought to have been more firm with her, to have reported her to her brother who was well known to him, because all these people were in the same neighborhood. He had the duty as the adult to do more than what he did.

25. In any event the trial was also marred by the failure by the court to indicate the language of the trial thus, a fundamental requirement of any criminal trial. There is no telling whether the appellant was aware of what he was facing. That was prejudicial to him.

26. A retrial would not be merited as upon consideration of the evidence as placed before the trial court, I am of the view that in its totality it left doubts, gaps which ought to have been resolved in the appellant's favour.

27. The conviction herein was not safe. The same is quashed. The sentence is set aside and the appellant is to be set at liberty unless otherwise legally held.

Dated, delivered and signed this 9thday of April, 2020.

Mumbua T Matheka

Judge

In the presence of: Via zoom

Edna Court Assistant

For state MsMburu

Appellant Present