



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 44 OF 2018

NMG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

FACTS

1. The Appeal arises from the judgment delivered on 6th May, 2015 by the Hon.V.O. Nyakundi SRM in CMCR No.10 of 2015. The appellant had been charged on a main charge of Incest contrary to Section 20(1) of the Sexual Offences Act No.3 of 2006; and an alternative charge of Committing an Indecent Act with a child contrary to Section 11(1) of the same Act.
2. That on the 4/05/2015 in Kirigi sub-location in Embu County the appellant being a male person caused his genital organs to penetrate that of GM a child aged 3 years who was to his knowledge his daughter;
3. The appellant was convicted on the main charge and sentenced to twenty (20) years imprisonment.
4. The appellant being aggrieved with the decision preferred this appeal both on conviction and sentence and listed nine (9) Grounds of Appeal inter alia;
 - a) The trial magistrate failed to comply with Section 169 of the Criminal Procedure Code in writing the judgment.
 - b) There was no evidence of penetration
 - c) The evidence of PW1 and PW2 was not sufficient to sustain a conviction as they were contradictory
 - d) There were inconsistencies of prosecution witnesses
 - e) The procedure of declaring the victim a vulnerable witness was not followed
 - f) There was no eye witness
 - g) The defence witness testimony was not considered
 - h) The burden of proof was wrongly shifted to the appellant
5. At the hearing of the appeal the appellant was represented by Mr.Njoroge while Ms Chemenjo was present for the State; the appellant's counsel made oral submission whereas the state had filed written submissions and sought to rely on them.

ISSUES FOR DETERMINATION

6. Upon hearing and reading the submissions of both sides this court has framed only one issue for consideration and determination;
 - (i) Whether this is a suitable case to order for a retrial;

ANALYSIS

7. Upon perusal of the court record this court has noted that there was non-compliance with Section 31(7) of the Sexual Offences Act; that the prosecution applied to have the mother (**PW1**) testify as an intermediary and the application was allowed; as the mother had already testified as **PW1** and had been extensively cross-examined the court ruled that there was no need to re-call her to testify again;

8. The applicable law is found at Section 31(2) which reads as follows;

“(2) The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court’s opinion he or she is likely to be vulnerable on account of –

(a) age;

(b) intellectual, psychological or physical impairment;

(c) trauma;

(d) cultural differences;

(e) the possibility of intimidation;

(f) race;

(g) religion;

(h) language;

(i) the relationship of the witness to any party to the proceedings;

(j) the nature of the subject matter of the evidence; or

(k) any other factor the court considers relevant.”

9. It is the duty of the prosecution to first and foremost ascertain the vulnerability of the witness and to apply to the court to make the declaration before the appointment of the intermediary; the court can also after conducting the **‘voire dire’** examination declare the witness vulnerable and proceed to appoint an intermediary **‘suomotu’**; the key point to note is that the procedure of appointing the intermediary must precede the testimony of the intended vulnerable witness;

10. The record reflects that the intermediary who was the minor’s mother was appointed after the mother had testified and the appellant was not accorded an opportunity to re-call this witness and to cross-examine as an intermediary; it was incumbent upon the trial court after having declared the complainant’s mother as an intermediary to have accorded the appellant the right to re-call her so as to cross-examine her in this context;

11. This may have been a misconception of the rules of procedure on the part of the trial court; nonetheless this court is satisfied that the correct procedure leading to the mother’s appointment as an intermediary was not followed;

12. This court is guided by the Court of Appeal case of **MM vs Republic NRB CRA Case No.41 of 2013** where it was held that the procedure of appointing an intermediary precedes the testimony of the intended vulnerable witness even where the court does it **‘suomoto’**;

13. Counsel for the appellant went on to submit that in not being allowed to recall the intermediary for cross-examination the appellant was thus not accorded a fair trial;

14. Whether to allow a retrial is always dependent on the circumstances of the case; in this instance this court has taken into consideration the defects at the trial in that the appellant was not availed the opportunity to test the evidence of the intermediary; it has also been noted that this mistake was entirely of the trial courts making in its failure to give proper guidance on procedure.

15. Other factors that need to be considered are whether a retrial is in the best interest of justice and whether it will cause any prejudice to the appellant; whether the evidence is sufficient to support a conviction; lastly the availability of the prosecution witnesses who testified at the trial.

16. This court is of the view that this was a suitable case in which this court can order for a retrial; that the appellant would not suffer any prejudice were the court to order for a retrial as he had been sentenced on the 21/11/2018 to twenty (20) years imprisonment; by the time of the hearing of this appeal the appellant had been incarcerated for two (2) years which is not deemed to be long period of time considering that the term imposed was for twenty (20) years; this court has noted that indeed one of the grounds of the appellant’s appeal was that he was not accorded a fair trial; a retrial gives him a second chance to prove his innocence; which therefore puts to rest the issue of prejudice that may have been envisaged.

17. Having perused the record this court has satisfied itself that there is sufficient evidence that may support a conviction; and the material

prosecution witnesses are readily available.

18. This court is satisfied that it would be in the best interest of justice to order for a re-trial as there are valid and sufficient reasons to support a re-trial.

FINDINGS & DETERMINATION

19. For the afore-going reasons this court finds that this is a suitable case to order for a re-trial.

20. The conviction entered against the appellant is hereby quashed and the sentence of twenty (20) years imprisonment is hereby set aside; but the appellant shall not be set at liberty and shall be remanded at Embu Prison pending retrial.

21. There shall be a retrial before a subordinate court with competent jurisdiction.

22. This court directs that the file be placed before the Chief Magistrate Embu on the 14th October, 2020 for Directions.

Dated, Signed and Delivered Electronically at Voi this 1st day of October, 2020.

HON.A. MSHILA

JUDGE