



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**HCCRA NO. 10 OF 2017**

**KENNETH MWENDA MUTUGI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an Appeal from the Judgment of Hon. L.A. Mumassabba (RM) delivered on 18/1/2017 in Chuka Chief Magistrate S/O Case No. 8 of 2016)***

**J U D G M E N T**

1. **KENNETH MWANGI MUTURI**, the appellant herein was charged 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 vide Chuka Principal Magistrate's Court Sexual Offences Act Case No. 9 of 2016***. He also faced alternative charge of committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act** but he was found guilty and convicted in the main charge and sentenced to serve life imprisonment by the trial court.

2. He was aggrieved and preferred this appeal on both conviction and sentence. The grounds of appeal in this petition are as follows:

- (i) That the learned magistrate erred in law and fact by relying on conflicting and uncorroborated testimony.***
- (ii) That the learned magistrate erred in law and fact by relying on a medical report that was inconclusive and not incriminatory.***
- (iii) That the magistrate erred in law and fact by failing to note that there was an existing grudge between the appellant and the complainant's parents.***
- (iv) That the magistrate erred in law and fact by failing to consider the appellant's defence without a cogent reason in contravention of Section 169(1) of the Criminal Procedure Code.***
- (v) That the learned magistrate erred by failing to note that the appellant was not represented as provided for in the constitution.***
- (vi) That the learned magistrate erred by failing to order for DNA test of both parties to ascertain the truth.***

3. The appellant also with leave of this court added four additional grounds in his supplementary grounds which are as follows:-

- (vii) That the learned magistrate erred in law by admitting medical evidence contrary to Sections 33 and 77 of the Evidence Act.***
- (viii) That the learned magistrate erred by admitting hearsay evidence.***
- (ix) That the learned magistrate erred by convicting the appellant against the weight of evidence.***
- (x) That the magistrate erred in law by ordering for cross-examination of defence witnesses when the appellant had elected to give unsworn evidence.***

4. Before I consider this appeal a brief background of the case facing the appellant at the trial is essential to be considered as well. The particulars of the offence as per the charge sheet indicated that on 27<sup>th</sup> September, 2015, at around 12 midnight at [particulars withheld] Location, Tharaka Nithi County the appellant defiled one (name withheld) a girl aged 11 years. The prosecution led evidence from the victim, the victim's mother, the clinical officer and the investigation officer proof their case against the appellant.

5. In brief, the evidence tendered showed that the victim's mother had left her 3 children (all aged 2 years, 3 years and 11 years respectively) at home and gone for a women's Conference at [particulars withheld] and she came back at around 2 am the same night, she found her daughter had been defiled. The victim (PW1) testified and told the trial court that the appellant defiled her "**huku mbele**" and felt pain and when she screamed the appellant threatened her "**Nyamaza ama nikuue!**" The threat made the child to remain silent and when the assailant finished defiling her, he left.

6. The medical evidence was tendered by one Hillary Kanginchi (PW3) who told the trial court that he was a doctor working at Chuka General Hospital and tendered a P3 filled by one Mbaka who was said to be the medical officer who had examined and filled the P3 form (P. Exhibit 2). The P3 showed that the minor had been defiled and the doctor tendered evidence on behalf of his colleague as he was familiar with his handwriting. The medical evidence tendered revealed;

***"Laceration at her vaginal wall's seven O'clock. The hymen was broken and she had blood from her vaginal walls."***

7. The Investigating Officer tendered birth Certificate (P. Exhibit 4) that showed that the minor was born on 4<sup>th</sup> October 2014 which means she was 11 years old when she was defiled. She also tendered treatment notes and (P. Exhibit 3) a Post Rape Care (PRC) Form (P. Exhibit).

The production of treatment notes by the Investigating Officer is one of the grounds in this appeal but I will get back into that shortly.

8. In his defence the Appellant gave unsworn statement of defence stating that he was shocked and surprised when he was arrested. In his view, his arraignment was due to land dispute that arose after the victim's mother demanded to be given a share of the estate of his late father. According to the appellant, the complainant's mother was not recognized as a dependant or a beneficiary to the estate of his father and felt that she fabricated the charges against him to get back at him for standing firm against her demands. The Appellant's mother, Josephine Kangaria testified in his defence and told the trial court that the complainant's mother had snatched her husband from him and had gotten a child together. She however could not tell much about the incident of defilement but supported the complainant's version of events at the material time stating that she had attended a women's group meeting with her and only learnt about the reported defilement when they got back home late in the night.

9. The Appellant has raised issues with the manner in which the medical evidence was tendered. The Appellant through learned counsel Mr. Murithi submitted that it was not enough for Hillary Kanginchi PW3 to state that he was familiar with handwriting of Dr. Mbaka. In his view the witness (PW3) should have laid basis why Dr. Mbaka could not be called as a witness. He has cited the provisions of **Section 33** of the Evidence Act to back up his contention adding that the Appellant was unrepresented during trial and was not asked whether he had objections to the production of medical evidence or the implications of **Sections 33** and **77** of the Evidence Act.

10. It is on what basis that the Appellant contended that the P3 should have been treated as hearsay evidence and of no probative value. He has relied on the decisions of ***Boaz Owiti Okoth –vs- Republic [2014] eKLR***, ***Fahim Sahim Swale –vs- Republic [2001] eKLR*** and ***Jamlick Gachari Mwisikiri –vs- Republic [1987] eKLR***. In Boaz Owiti Okoth, the accused faced charges on forgery and attempts to extort by threats. At the trial, a police witness tendered in evidence a report by an expert (document examiner) despite objection by the defence, the appellate court held that failure by the prosecution to establish basis for production of the report by a witness a witness other than the maker was failed to the prosecution's case in **Fahim Swaleh**, the appellant was convicted with the offence of trafficking in Narcotics (Bhang) Contrary to **Section 4(a)** of the **Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994**. He was convicted and it transpired that the basis of conviction was based on a Government Analyst Report that was tendered by a person other than the maker of the document and the court held that though **Section 77** of the **Evidence Act** presupposes that the document tendered can be admitted in evidence as the genuineness or authenticity of the signature is presumed, there is a presumption that the witness or the maker of the document may not be easily procured due to the expenses and so the provisions of **Section 77** must be read together with the provisions of **Section 33** of the **Evidence Act** which requires that basis be laid properly before such evidence is tendered. In **Gachari case**, the court was faced with a similar situation and held that before a witness who is not a maker of a document can tender such evidence, basis must first be established in accordance with the provisions of **Section 33** of the **Evidence Act**.

11. The Respondent through Office of the Director of Public Prosecution has opposed this appeal. Its main gist of opposition is that the medical evidence (P3) was tendered in compliance with **Section 77** of the **Evidence Act** which presumes that official government reports such as P3 are presumed genuine and the person signing it held the office and qualifications which he professed the to hold at the time when he signed it. The Office of the Director of Public Prosecution through Mr. Momanyi has cited several decisions in this contention.

12. He has cited that decision in ***Republic –vs- Rono Khalif Ahmed [2015] eKLR*** where the court dealt with the issue of production of a postmortem report by the doctor who was not a maker of the documents. The court held as follows:- genuineness

***"In my view Section 77 of the Evidence Act does not deal with the issue as to who can produce such a document. The Section allows the court to presume the genuineness of the document. The Section also states that the court may call the maker of that statement to be examined on the same. This means that such a document need not be produced by the maker. It also means that the court may or may not require the maker of the document to come to court. It thus means that the document is admissible whether or not the maker come to court. That does not mean that its value will be the same if the maker fails to come to court to be examined. When the maker comes to court the evidential value will be much higher as he/she will be subjected to cross examination on the same."***

13. The Respondent has also relied on the decision of ***Naomi Bonari Angasa - vs- Republic [2018] eKLR*** where the court held as follows:

***"Whether the P3 medical form was admissible depends on whether it is produced by the maker thereof or under Section 77 of the Evidence Act. The doctor who examined PW1 and prepared the P3 form was not called Section 77 of the Evidence Act allows a person other than the one who prepared a report such as the P3 form in issue to produce it provided the presumption of***

*authenticity is met .Once the presumption of authenticity under Section 77(2) aforesaid is met the documents is admissible but the trial court may "Suo moto" or upon request by the accused person call the matter of such a document to appear in court for cross examination on the form and the contents of the report".*

#### 14. Analysis and Determination

The Appellant in this appeal listed several grounds in his petition as well as Supplementary Petition filed on 23<sup>rd</sup> October, 2018. In his submissions however, he only chose to pick out only 2 grounds as the basis of this appeal. The grounds are:-

*(i) The production of P3 form by a witness who was not the maker/author of the said P3.*

*(ii) The cross examination of the Appellant's defence witnesses who turned up to testify in his defence.*

15. This court having considered this appeal in totality and the response/opposition made by the Office of the Director of Public Prosecution, frames the following issues for determination.

*(i) Whether the defence witnesses of a deft who chooses to give unsworn statement should be subjected to oath before testifying.*

*(ii) Whether the medical evidence including the P3 form was properly tendered or produced in evidence.*

*(iii) Whether the appellant was prejudiced by not having legal representation and what this court should do.*

*(iv) Whether the trial court considered the appellant's defence at the trial.*

#### 15. Whether the trial court erred in law by subjecting the defence witnesses to oath.

This court has noted from the proceedings from the court below that the appellant upon being found with a case to answer elected to give unsworn evidence in accordance with **Section 211** of the **Criminal Procedure Code** and though initially he indicated that he was not going to call witnesses, he later changed his mind and elected to call two witnesses who were sworn and testified in his defence. The appellant now says that because he had elected to give unsworn evidence, his witnesses should have been allowed to give unsworn statement as well.

17. The contention by the appellant however is misconceived because while **Section 211** confers the right to an accused person to elect whether to give sworn or unsworn statement of defence, that right is not extended to his witnesses the provisions of **Section 307** of the **Criminal Procedure Code** and **Section 146** of the **Evidence Act** makes it mandatory for witnesses called to testify to be sworn examined in chief and the adverse party is given the liberty to cross-examine them before re-examination. Cross-examination of witnesses can only be proper if they are subjected to oath in order to vouch for truth. The court finds the appellant's ground that his witnesses should not have been subjected to cross-examination is to be totally misconceived and unfounded in law.

#### 18. whether the medical evidence including P3 form was properly tendered in evidence.

The appellant has contended that the production of P3 form was improper as the same was not tendered by the author and no basis was laid as why the maker was not called to produce the same. A look at the record clearly shows that the person who tendered both the P3 form and the treatment chits were not the makers of the said documents. To begin with the P3, the doctor who tendered it (Hillary Kangichu PW3) just informed the court that he had worked with Mbaka the Medical Officer who filled the P3 form since 2009 and was familiar with his handwriting. The prosecution apparently failed to lead evidence on the whereabouts of the author of the P3 and why he could not be called to produce the P3.

19. The provisions of **Section 33** clearly gives leeway for the production of documents/expert evidence) if the makers cannot be found or whose attendance cannot be procured without an amount of delay or expense which in the circumstance appears unreasonable. The prosecution or any party who wishes to rely on such evidence are required to get another expert witness from the same field and who is familiar with the handwriting of the author of the document to tender the evidence.

20. The provisions of **Section 77(1)** of the **Evidence Act** provides as follows:-

*" In Criminal proceedings any document purporting to be a report under the hand of a government analyst, medical practitioner..... or anything submitted to him for examination or analysis may be used in evidence."*

The provisions of **Subsection 2** of the same provision makes a presumption that the said document is genuine and the signature thereof is authentic. This provision therefore gives the trial court discretion to admit such documents as evidence which appears to have happened in this instance but first the court must comply with **Section 33**.

21. This court has considered the decisions cited by both parties and from the decisions, what emerges is two school of thought namely:-

a) That the provisions of **Section 77** has been read together with **Section 33** to mean that even if the trial court can admit documentary evidence from a witness other than the other maker basis must be laid first as held in **Boaz Owiti Okoth (Supra) and Fahim Salim Swaley (Supra)**

b) That the provisions of **Section 77** of the **Evidence Act** on its own allows a person other than one who prepared a report such as P3 to produce it provided that the presumption of authenticity is met and if the document is signed by the person who held the office and qualifications which he professed to hold at the time when he signed it (**Section 77(2)** of the **Evidence Act**.

22. This court takes the position that evidence touching on expert opinion should be tendered by experts as provided under **Section 48** of the **Evidence Act** and in situations where the evidence of such experts cannot be procured without unreasonable delay or expense, other experts working in similar field of expertise and who are familiar with handwritings of the unavailable experts can be called upon to tender such evidence as provided under **Section 33** of the **Evidence Act** and such evidence are admissible and by dint of **Section 77 (1)** of the **Evidence Act**, the evidence is presumed genuine and authentic. Courts however has a discretion if called upon to call makers of such documents if the interest of justice so demands. It is therefore apparent that the condition precedent to the operation of **Section 77** is provided under **Section 33** which means that basis has to be laid before a witness other than the maker of a documents can competently tender the evidence.

This section further provides that the court is entitled to assume the genuineness of the signatures (s) appended on such documents, though the court is at liberty to summons such expert for purposes of cross-examination if need be. It is important to note that in that case the doctor who appeared is the one who had filled the P3 form.

23. In **Joseph Bakei Kaswili -vs- Republic [2017] eKLR** the Court of Appeal was faced with a situation where a victim was attended by 3 different medical practitioners but only one appears at the trial. The court held as follows:-

*" Section 33 of the Evidence Act Cap 80 Laws of Kenya deals with admission in evidence of statements made by persons whose attendance to court cannot be procured without an amount of undue delay or expense which in the circumstances of the case appears to the court to be unreasonable Section 77 of the Act on the other hand makes provision for the admission in evidence of medical evidence."*

24. In **Chaol Rotil Angela -vs- Republic [2001] eKLR** the Court of Appeal sitting in Kisumu held as follows regarding the production of evidence by an expert witness other than the maker:-

*" A medical doctor or pathologist is a professionally trained and qualified person. When carrying out a postmortem examination, he is undoubtedly performing and discharging a professional duty. When completing and signing postmortem examination report, he is doing so in the discharge of a professional duty. We think, under these circumstances, that subject to other requirements being met, a postmortem examination report is a document made in the discharge of a professional duty and would be covered by Section 33(b) of the Evidence Act. But before Section 33(b) can apply, the first part of the section must come into operation. The first part lays out conditions precedent without which, any of paragraphs (a) to (h) may not be applied. Once again for the sake of convenience and clarity, we set out below the requirements of the first part of the Section. They are:*

*"Statements, written or oral on admissible facts made by a person who is dead, or cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases....."*

We must however sound a word of caution against the use of expert reports and opinions either under **Sections 33 or 77** of **Evidence Act** without procuring attendance of the experts concerned to give evidence and to be cross-examined on their reports and opinions. It is desirable that an expert should attend court and explain to the court his expert opinion and the grounds upon which the opinion is based.

25. Going by the above decision, it is apparent that the production of the treatment charts at the trial (P exhibit 3) Post Rape Care Form (P Exhibit1) by the Investigating Officer at the trial infringed on the rules of evidence as stipulated under **Section 33** of **Evidence Act** because the Investigating Officer was not an expert in the medical field and therefore rendered the evidence hearsay and of little or no probative value.

26. In **James Bari Munyoris-vs- Republic [2010] eKLR** the court was faced with a similar situation such as obtains in this instance where a doctor called just told the trial court that he was familiar with handwriting of the author of a medical report. Justice Serگون had this to say;

*"It is not enough for a witness to state that he was familiar with the handwriting of a particular witness. The prosecution must show that it took due diligence on their part to secure the attendance of the maker of the document. It must be shown that the witness was absent for reasons beyond prosecution's control. The record shows that Dr. Mburu had been transferred to Kenyatta National Hospital. There was no evidence to show that the police attempted and failed to secure Dr. Mburu's attendance in court....."*

27. In line with the above jurisprudence, it is clear that the prosecution in this case made no attempts to lay any basis why the maker of P3 form could not be available and this court stem from bad practice where medical experts think that all that is required to tender evidence of a colleague is familiarity with their handwriting. This practice and obviously flies in the face of legal requirements as stipulated under **Section 33** that demands that basis for non-availability of the authors/makers of any opinion written or oral be laid before another expert familiar with the handwriting of the expert can be allowed to tender the evidence. It is on that basis that this court finds that the appellant's ground of appeal in that regard is well taken. The question posed however is whether the ground is sufficient to overturn the finding of guilt on the appellant. I will return to the issue shortly herebelow.

28. **Whether the defence was considered by the trial court**

This court has considered the judgment delivered at the trial court and I am satisfied that contrary to the appellant's contention, the trial court

went to great detail in considering his defence. The learned trial magistrate considered that the issue of a grudge raised by the defendant owing to a land dispute but found that the same was not put forward to the victim's mother (PW2) when she testified. The existence of a land dispute therefore was probably an afterthought. The appellant did not deny that she knew the victim and vice versa and that he lived next to their home. The defence witnesses called all could not tell if the appellant was present at the scene of crime as they were also away. The evidence of DW3 being the appellant's mother apart from being of little probative value due to her relationship with the appellant, clearly showed that the victim's mother was away and when they came back at night they both found out that the minor had indeed been defiled. In such circumstances or in the face of such evidence, the trial court was in order to find that the defence was "**feeble**" and unbelievable that does not mean that the defence was not considered. It was duly considered but found to be weak as compared to the evidence tendered by the prosecution. The judgment of the trial court complied with the provisions of **Section 169(1)** of the **Criminal Procedure Code** and I do not find that the appellant has any reason to fault the judgment in that regard.

29. On the question of legal representation, it is true that an accused person has a right to choose to be represented by counsel as provided under **Article 50(2)** of the **Constitution**. The right to a fair hearing includes a right to legal representation as held in **David Njoroge Macharia -vs- Republic [2011] eKLR**. That right is however not absolute and an accused person has to convince the trial court that his case is of a serious nature raising complicated legal issues that it would only be fair that an advocate be appointed to act for him if he cannot afford one. He cannot be heard to proceed with a trial without an advocate only to raise an issue when he is found guilty. To allow appeals only on such grounds would be frivolous and against the administration of justice.

30. Now to go back to the gist of this appeal which is production of expert evidence without laying proper basis as provided under **Section 33** of the **Evidence Act**, is that this court having found the production of the medical evidence wanting for the aforesaid reasons, however finds that in sexual offences cases the provisions of **Section 124** of **Evidence Act** provides as follows:-

**".....in a criminal case involving a sexual offence, where the only evidence is that of the alleged victim of the offence the court shall receive the evidence of the alleged victim and proceed to convict the accused if, for reasons recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."**

In this case the trial court found that the offence occurred with close proximity between the victim and the assailant (appellant). The victim knew the perpetrators as she identified him by torch light and she knew him as a neighbour. The identification was found to be "**foolproof**" as recognition was by voice and appearance. The assailants threatened the minor "**Nyamaza nitakuua**". the trial court found the minor "**candid, consistent and very straight forward**." She found her evidence "**credible and fool proof**." This court has re-evaluated the evidence of the victim and finds that the victim's mother (PW2) corroborated her testimony well. She told the trial court that she returned home at night to find her daughter;

**" Lying on her back with her legs wide open..... with blood in her vagina and sperms."**

The appellant's own mother testified that when they got back home with the complainant's mother,

**" the complainant told her mother she had been defiled. I confirm the complainant was at home alone. I do not know what happened."**

The above evidence in my view even after discounting the medical reports whose production was tampered with by the prosecution, this court is satisfied that going by the provisions of **Section 124** of the **Evidence Act**, there was still sufficient evidence to return a verdict of guilt against the appellant simply because the evidence against him was credible and overwhelming. Of course this court has found that he did not raise any objection to the production of medical evidence by PW3 but perhaps because he was not represented, this court shall give him the benefit of doubt otherwise I have concluded that he is just trying to look for any straw with which to hang on and get away from the jaws of the law.

In the end I find no merit in this appeal. Despite the legal hiccups experienced at the trial which really was avoidable, this court finds that the evidence tendered by the prosecution was overwhelming and sufficient to prove beyond reasonable doubt that the appellant committed the offence against a minor proven again beyond doubt that she was aged 11 years. This appeal is dismissed. The conviction and sentence is upheld.

**Dated, signed and delivered at Chuka this 18<sup>th</sup> February, 2019.**

**R.K. LIMO**

**JUDGE**

**18/2/2019**

Judgment signed, dated and delivered in the open court in presence of Kaimenyi for Murithi for Appellants and Momanyi for Respondent.

**R.K. LIMO**

**JUDGE**

**18/2/2019**