REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO.17 OF 2016

MACHARIA KIAMA .....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

(Appeal against the conviction and sentence by Hon C.MBURU- RM in NYERI CMCr Case no 22 of 2014 of 29th February 2016)

JUDGMENT

This appeal brought to fore an issue I find necessary to address at the outset; the fact that our criminal justice system as it is in place now is ill placed to deal with persons who are differently abled. Though courts try, we still have provisions in our laws that speak 'lugha iliyopitwa na wakati'. Small example, we still have in our Penal Code section 146 which speaks of '**Defilement of idiots or imbeciles',** descriptive words that are not only derogatory but amount to '*matusi*' or insults in their use**,** a provision that was left intact when the Sexual Offences Act was enacted in 2006, and which out of synch with the Persons with Disabilities Act or the Constitution's definition of disability.

It is only recently that certain provisions dealing with persons with mental illness were declared unconstitutional. See **Joseph Melikino Katuta v Republic [2017] eKLR B K J vs Republic [2016] eKLR** and **Hassan Hussein Yusuf vs Republic [2016] eKLR, Republic v S O M [2018] eKLR, R vs Festus Mbuthia Nyeri HCCRC 119 of 2003.**

So, how does a court determine the 'language' that a person, described as 'deaf and dumb' in the subordinate court herein understands? Is a 'language assessment' is required to determine the language of understanding of a person who is hearing impaired? Can a sign language interpreter interpret for an accused person who has never gone to school to learn sign language? If the accused has never learnt sign language in school, how should the court proceed? When a sign language interpreter states that an accused person is 'incoherent' in the sign language, and the case proceeds with the same interpretation, is there a miscarriage of justice?

The accused person was charged with Attempted Defilement contrary to section 9(1) (2) of the Sexual Offences Act No.3 of 2006. In the Alternative charge he was charged with committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No.3 of 2006.

He appeared in court on 3rd June 2014 when the prosecution told the court "*I am told that the accused is deaf and dumb*"

The matter was adjourned TO 9th June 2014 when the Executive Officer was directed to avail an interpreter. One Mary Njoki was availed – she made oath and stated that she was a Judiciary employee who had trained at the University of Nairobi at the "sign language Project".

The charges were read to the accused who pleaded not guilty. The language was indicated simply as "sign language".

After the taking the evidence of four prosecution witnesses the sign language interpreter Mary Njoki made a request on 25th February 2015

> *" I request if the court can conduct a model examination on the accused to ascertain his **level of disability because on non-coherence** of the challenge trial(sic) to detect the level of hearing and mental head(sic). His challenge is that he is deaf now and he cannot speak. We may need further examination on the same"*

State counsel- *I do not object to the application. The interpreter is in a better position to interpret the conversation with the accused and is she opted then we can have it done on the accused person.*

> Mary Njoki- *The accused says he works as a painter every Saturday on houses.*
>
> Court- *In view of the guided advice by the sign interpreter Mary Njoki, the court is of the view that she is better placed to advice*

court on the education of the accused person who is deaf and dump(sic). As such, the accused person is to be taken for a medical check up to ascertain his level of disability and marital status. He shall be escorted to Nyeri PGH for mental checkup and to check his level of disability.

Mention on 11th October 2015 for orders."

By then the report was not ready and the court ordered that;-

"Accused person to be escorted for mental checkup as per the orders of 25/2/15. Matter to be mentioned on 8/4/15 for further orders. Accused is informed of the date through writing on a piece of paper.

The consultant psychiatrist Provincial General Hospital Nyeri vide a report addressed to the CM's court Nyeri dated 26th March 2015 described Macharia Kiama as ***"deaf and dumb for the last three years"*** History was take ***"through Kenyan sign language Interpreter"*** and speech was described as ***"Kenyan Sign Language only"***. He formed the opinion that the subject under examination had ***"no psychiatric diagnosis in deaf/mute …...fit to plead via interpreter".***

On 8th April 2015, the above report was received and the court determined *that* ***"the report indicates that the accused person if fit to stand trial, his mental status is normal….and that he may be prosecuted in court…."***

The next witness was PW5.

PW1 was the minor by name SMK the court indicated she was 3 ½ years old and proceeded to conduct voire dire. I reproduce the same hereunder.

PW1 Viore Dire:

SMK a minor aged 3 ½ years.

Question by court; what is your name?

Minor; SMK

Question; How old are you?

Minor; I am 2 years old.

Question by court; Do you attend Sunday School?

Minor; yes. I go with mom.

Question by court; Do you attend school?

Minor; I attend [particulars withheld] school.

Question by court; Do you attend church?

Minor; No, I attend with my mother.

Question by court; Do you know why you are in court?

Minor; so that we stay here.

Question by court; Do you know accused?

Minor; I know accused. I do not know his name. I have never seen accused.

Court- After conducting the voire dire, the court is of the view that the minor does understand why she is here.

Court-Minor gives unsworn evidence.

Minor- The accused held my hand. He removed his clothes. He is called Kibaya. He removed my clothes and then returned me and then he put his clothes on. He then removed my clothes. Then he did not do anything else.

Court-The minor

Prosecutor- I request that I do a pre-trial with the minor and the minor's mother since I had not done it earlier. I request for an adjournment at this stage.

Court- Application for adjournment allowed. The matter will be heard on 23/7/14. Mention 15/7/14.

Upon the child giving her testimony the prosecutor sought for and was granted an adjournment to conduct "pre-trial" with the minor and the minor's mother since I had not done it earlier" . The application for adjournment was granted from 30th June 2014 to 23rd July 2014. The matter could not start until 22nd September 2014 when the sign language interpreter was present.

On that date, the court conducted another voire dire-

"*I am SMK. I live in G (redacted by court) I live with K. He is my brother. He is older. I also live with my mother and father. I attend school. My mother takes me to school. My teacher is called Teacher M. I wear blue uniform when I got to school. Accused is not my friend. I know I am here to say what happened.*

Court- *The child does state that she understands that she is in court to testify. She is in court to testify since I am satisfied she understands the need to speak truth.*

Then the child continued.

The accused removed my clothes. He knelt down the he lied on me. He then pressed on me on the forehead. He removed my clothes and knelt down. He pressed on me. He removed my clothes all of them then removed my school uniform. I was heading to school. It was in the morning. No one came to rescue me. After that he did not do anything else. I then went home. I did not go to school"

PW2 AWK was the mother to the complainant. She told the court that complainant was 4 years old but she did not have her birth certificate born on 16th July 2010. On 30th May 2014, she escorted her child to school but left her at the Shopping Centre to go the rest of the way alone as was her practice. She then went to work- apparently in a hotel within the shopping Centre. It was then that one Leah Wanjiku (PW3) came running and told her that *"Kibaya the accused had removed my daughter's clothes and had also removed his clothes"*

According to her testimony she rushed to the scene and found the accused person holding her daughter's hand. The daughter was crying. She demanded for the accused to release her daughter's hand but the accused refused. The child's clothes were soaked in water. She took the child from the accused and then took her child to hospital having rang her husband to approach the accused and take him to the police. She went to G (redacted) Health Centre where upon examination it was found that the child had not been defiled *"but there was an attempt"*. She then went to the police station where she was issued with a P3 which was completed on 12th June 2014.

Leah Wanjiku was PW3. She told the court she was at her place of work in Nyaruai's kitchen on 30th May 2014 when she heard a dog barking. Nyaruai (PW 7) sent her son one Moses Wachira to check why the dog was barking. He came back and said he had seen nothing. He was sent again to check. He came back and said he had found a child crying 'at the hospital'. This appears to have been a typo as Moses Wachira was asked to specifically check for the child on the roadside. He came back and said there was a child crying. It could have been on the roadside. It was then that PW3 was sent by Nyaruai to check. She went and found.

"*Kibaya kneeling down and then asked us not to say anything……He had put back his clothes. He was now dressing up the child when I saw him. It was in a bush near Nyaruai's home"*

She testified that the scene was about 2 meters from Nyaruai's home and Nyaruai told her to go tell the child's mother. She went, told the mother, who collected the child and took her to hospital. She observed that the child was covered with grass.

PW4 **Geoffrey Gachuthe Muthengi** testified that he was a boda boda operator at G shopping centre. He found **JKM**, the father to the complainant tying to escort the accused to the police station. He assisted him to escort the accused who was suspected of trying to defile a child.

PW5 **Milka Muthoni** was a medical officer from Nyeri County Referral Hospital. She presented the P3 form for SMK – aged 3 ½ years old who was examined on 12th June 2014. That the child was lured into a thicket by a known person but was rescued she was calm, in fair general condition and clam. She confirmed that in the P3 there was nothing of significance.

PW6 **JKM (JKM)** was the father to the complainant. He was operating a hotel in G shopping centre at the material time where his wife was working. He learnt from one Mama Makuri that Kibaya had taken his daughter. His wife went and he followed her. He apprehended Kibaya and took him to the police station.

PW7 **Teresia Nyaruai** was at her home on 30th May 2014 plucking tea in the shamba. She heard the neighbour's small dog barking. She sent her son Moses Wachira to check. He came back and said he had noticed nothing. Three times – on the 4th time she told him to check on the roadside. He said he found a child crying. She and PW3 went to check on the child. It was about 1 meter from her homestead which does not have a fence. She said

"*We can see Macharia standing and the child holding his hand. I did not see him do anything. The lady I was with said she knew the girl. I recorded my statement on 30th May 2014. I went to the bush and saw the accused rising up. He was picking his trouser*

up while holding the child as he left the bush. Leah went to call the child's parent. Macharia refused with the child saying he was taking her to school"

PW8 **NO.65639 PC Patrick Mwenda** attached to Gichira police post testified that on 30th May 2014 about 10:50am he was at the Police Post when the accused was brought by members of the public on allegations of rape. On speaking to the people they told him that he had attempted to defile a 3 ½ year old. He booked the accused person and referred the complainant to hospital. He recorded statements and visited the scene.

The accused person never cross-examined the witnesses.

The court found that a *prima facie case* had been established and put him on his defence.

The record shows there was another interpreter- Moses Murigu Waweru when the ruling was delivered and the accused indicated he would make a sworn statement and not call any witness.

The record shows-

"DW1 Male Adult Sworn States in Kiswahili"

He went on the state his name and that he did not recall the exact place where he comes from. He denied committing any offence *"people saw me attempting but I did not defile the girl"*

On cross-examination he told the court that he was assisting the girl to cross the road so as not to be hit by a car, that he was escorting her to school. He denied having removed her clothes or his clothes. He did not know why he was brought to court. He just found a child at the road side and was assisting her to cross the road. That the child cried because she did not know him. That he fled because people wanted to lynch him, and the girl ran towards the members of the public who came.

DW2 **Diana Mumbi** testified that the accused always left home at 7:30am. That on the material date she heard that people wanted to lynch the accused. She went there. He told her he was just assisting the child to cross the road. On cross-examination she said the accused was not of fair sound mind.

The trial magistrate considered all the evidence before her and found that the age of the child was proved despite the lack of a birth certificate that on the authorities she relied on it was not necessary to prove the age of the victim of the offence of attempted defilement.

In her analysis she stated that

"Attempted defilement is a failed defilement. That is why the intention to penetrate the minor is a key ingredient"

Relying on the reasoning of Mrima J in **Charles Nega Vs.Republic (2016)Eklr**

> ***"When a court of law is faced with any charge on an attempted offence, care has to be taken to ensure that the attempt, as opposed to mere acts of preparation, is proved since however strong the evidence may be if it only relates to actions in preparation to commit a certain crime, that cannot justify a conviction on an attempted charge. For clarity purposes, the evidence must be led which goes beyond the preparatory stages and right to the doorstep of possible commission of the offence. It ought to be demonstrated that the accused had committed the last act to the actual commission of the specific offence attempted. Likewise, the intention to commit the crime must also be proved."***

Section 388 of the Penal Code defines "attempt" as follows: -

> *"388 (1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention, he is deemed to attempt to commit the offence.*
>
> *(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.*
>
> *(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence."*

It was necessary that the prosecution prove:-

> *-That the accused person had committed actions that were beyond preparation and was at the door step of possible commission of the offence.*
>
> *-That the accused person had the intention to commit the offence.*

The trial Magistrate relying on Section 124 of the Evidence Act found that the prosecution had established the offence of attempted defilement beyond a reasonable doubt. She found the accused guilty –convicted him and sentenced him to 10 years' imprisonment.

The accused person aggrieved by the conviction and sentence, filed his appeal through the firm of Muhoho, Gichimu & Co.Advocates.

He raised the following grounds of appeal:-

1. THAT the learned Trial Magistrate erred in both Law and in fact in convicting the accused person on evidence that did not meet the threshold of beyond reasonable doubt that is required in the circumstances of the case.

2. THE learned Trial Magistrate erred in Law and in fact in failing to find that the prosecution failed to prove that the prosecution did not satisfy the ingredient or the elements of the main charge upon which he was convicted.

3. THE learned Trial Magistrate erred in Law and in fact in failing to consider and totally disregarding the appellants defence.

4. THE learned Trial Magistrate erred in Law and in fact in failing to find that the evidence before the court did not support the charge sheet.

5. THE learned Trial Magistrate erred in Law and in fact in convicting the accused person on contradictory evidence thereby causing a great miscarriage of justice.

6. THAT considering the circumstances of the case the learned Trial Magistrate erred in giving the sentence meted against the Appellant which was harsh and excessive and against the weight of the evidence on record.

I heard oral submissions by both counsel for the appellant and Mr.Magoma for state.

During the hearing of the appeal there was a sign language interpreter in court and a relative one Diana Mumbi. I observed that the appellant had difficulty following the interpretation by the interpreter. Mr. Muhoho began by reminding me of my obligation as per **Okemo Vs.Republic** and went on to point the inadequacy of the evidence in providing the charge against the appellant.

-First that the trial court failed to establish through voire dire whether the child was capable of telling the truth.

-That the evidence given by Leah Wanjiku and Teresia Nyaruai was contradictory. The failure to call Moses Wachira was fatal for the case for the prosecution. **Bukenya Vs.Republic**

-That the allegation that the accused person 'spoke' to the 2 witnesses telling then not to say anything was not interrogated by the court yet the court was already aware that accused was "deaf and dumb" – what language did he use?

-That the state failed to establish any *intent –men rea* on the part of the accused person.

-The court did not consider the defence.

-The issue of language of the court – what language did the court use?

The interpreter 's concerns about the coherence of the accused person during the trial were never addressed instead the accused was sent for mental examination.

In opposing the appeal, the state argued that the court carried out a proper voire dire. The complainant identified the accused as the perpetrator by name. that she narrated that he removed her clothes, that her age was established, and the witnesses saw him in the bush in which the child, that accused person's mental status was okay and he had an interpreter all the time.

In rejoinder Mr.Muhoho submitted that appellant was not denying he was with the child but he had no intention of defiling her.

I have carefully considered the evidence and submissions before me. The only issue is whether the state proved the charge of attempted defilement beyond a reasonable doubt.

I was concerned by the manner in which the court treated the testimony by the child. The record contains two versions of the child's testimony. The complainant was taken through a voire dire and she testified. That evidence remained on record. The state then sought an adjournment and proceeded to start afresh, with a new *voire dire* without determining the fate of the evidence already on record. The trial magistrate ought to have determined that the matter was starting afresh before proceeding with the fresh voire dire and the child's evidence. It appears that the prosecution were not satisfied with what the child had said and sought time to go and prepare the child to come and testify the way they wanted. To say the least that was prejudicial to the accused person.

It is the duty of the prosecution to prepare his witnesses before the trial and if he has not done so- he has no business putting the witness on the stand, and especially for a vulnerable witness like this child. This is how witnesses get re traumatized. It also creates the impression that after the child's testimony the prosecution needed to fix the child's evidence. This was a child who by virtue of the age ought to have been declared a vulnerable witness under Section 31 of the Sexual Offences Act and / or given special counseling to enable her testify.

By putting her in the witness box before preparing her, the state prejudiced not only her case but the fair trial of the appellant. The child said that accused removed her clothes. The first time she said he removed her clothes but did not do anything else. The second time she said he removed her clothes, pressed her on the forehead, knelt down, lied on her, pressed on her, removed her clothes, then removed her uniform, did nothing else and that no one went to rescue her.

These additions in the evidence read together with what was said by the child the first time point to an effort to get the child to say certain things in a certain way. Secondly, it also led to her contradicting the adult witnesses who said they rushed to her rescue. She never mentioned any of them.

According the prosecution, the first eye witness was Moses Wachira, the son to PW7. He is the one who saw the child for the first time and reported to PW3 and PW7. According to PW7 he reported that he had only found a child crying on the road. The 2 witnesses rushed to the scene which was not very far. Though they were there together, their testimony was not together. Each of them saw her own things- PW3 that the accused had already put on his clothes. She does not state how she knew that the accused had undressed before yet she never saw him, and she had not spoken to the child, neither did she say she was she told by Moses (which would have been hearsay anyway) that he had found the child and the accused naked. Her testimony makes her look like the author of the nakedness theory in this case as she had no evidence before getting to the scene that the accused and the child were naked at some point.

On her part PW7 said she never saw anything. She saw the accused holding the child's hand while the child was crying. The issue about the accused lifting his trouser came after prompting by the prosecutor that she had recorded a statement to that effect. If it was really true would she need prompting? I doubt anyone would want to protect a child molester regardless of their state of mind of disability.

PW3 is the one who came up with the story of the child having been undressed and the accused having removed his own clothes. She never said that the child told her that the accused had undressed her.

Nowhere in the case for the prosecution did the child tell anyone, not her mother nor PW2 and PW7 that the accused had undressed her.

PW3's testimony is not truthful and bears a tinge of exaggeration. She alleged that on finding the accused and the child, the accused told them not to say anything. How did he do that yet he could not speak? She did not demonstrate, and the court did not query how that was possible, or how he communicated that, yet the court took that as evidence of guilt on his part.

There was no evidence of any attempt to penetrate the child. The story about accused 'pressing' the child appears to be an afterthought, given at the prosecution's 2nd attempt at giving the child's side of the story.

The possibility that the accused person was assisting the child to cross the road does not sound far-fetched. Moses Wachira is reported to have found the child crying on the roadside. These other stories appear to be the creation of PW3.

On language it is true that it was not listed as a ground of appeal ***but*** it is clear from the record that the trial court lost it when it sought a mental assessment without a language assessment yet it was what the interpreter asked for. The possibility that the appellant may not have fully participated in the proceedings having the proceedings in a language the court had not established he was well versed in sufficiently not to suffer prejudice. One can see this in his defence. The record that he made it in Kiswahili? There is Kenya Sign Language and there is Kiswahili. Did he actually state that people saw him attempting but he did not do anything? It is difficult to collaborate that with his denial of the charges. My assessment is that this was yet another evidence of language incoherence. The court never interrogated the accused to find out what language he was conversant with. Whether he had ever attended any school and learnt the language or if so – which language? This was necessary especially after the sign language interpreter expressed her concerns. The mental checkup as to whether he had the capacity to stand trial, was useful but did not address the concerns. And in any event by this time the key witnesses had already testified.

The whole language issue may explain why the accused, who was not represented, never asked a single question. The court made the presumption that the accused person understood Kenya sign language that led to a miscarriage of justice as not every deaf child gets the opportunity to go to school.

In any event accused was said to have lost his hearing three years prior to the time of trial and the court did not go on to establish whether after that he had learnt sign language. In my view, this failure on the part of the court resulted in the appellant not following the proceedings properly.

The upshot is that the case for the prosecution was riddled with inconsistencies and contradictions, it was not investigated, and was conducted in a language in which the appellant was not sufficiently coherent.

The conviction was unsafe. The same is quashed. The sentence is set aside and the appellant at liberty unless otherwise legally held.

Dated, delivered and signed at Nyeri this 4th day of March 2019.

Mumbua T.Matheka

Judge

In the presence of:-

Court Assistant: Juliet

State counsel-Magoma

Appellant –present

Ms.Elizabeth Wambui sign interpreter –present

Ms.Nyakio holding brief for Mr.Muhoho.

Mumbua T.Matheka

Judge

4/3/19