REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 04A OF 2016

AGGREY CHAHINDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*from the original conviction and sentence by Susan N. Mwangi,R.M, in Vihiga SPMC Criminal Case No. 326 of 2013 dated 23/12/2015)*

J U D G M E N T

1. The appellant herein was convicted of the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual offences Act No. 3 of 2006 and sentenced to serve life imprisonment. He was aggrieved by the conviction and the sentence and filed this appeal through the firm of **Athunga & Co. Advocates**. The grounds of appeal are that:

1. The trial magistrate erred in convicting the appellant on the unsworn evidence of a minor which had not been subjected to cross examination and/or corroborated.

2. The trial magistrate erred in law and fact in failing to appreciate that the prosecution failed deliberately to call the alleged eye witness, which failure amounted to doubt as to whether the offence had been committed or not.

3. The trial magistrate erred in law and fact in convicting the appellant on contradictory evidence adduced by prosecution witnesses who were not credible and reliable.

4.The trial magistrate erred in law and facts in convicting the appellant when the ingredients of the charge had not been proved as per the requirement of the law.

5.The trial magistrate erred in law and fact in failing to analyze the prosecution's evidence clinically and thus relying on extraneous facts which had not been adduced by the prosecution thus entering the arena of prosecution.

6. The trial magistrate erred in law and fact in failing to appreciate that the prosecution had not discharged its burden of proof to the appellant.

7. The trial magistrate erred in law and fact by casually failing to appreciate the defence adduced.

8. The conviction was against the weight of evidence.

2. The state opposed the appeal through the submissions of the prosecution counsel, **Mr. Ng'etich.**

The particulars of the charge against the appellant were that on the 2nd April, 2013 in Vihiga County within western Province, he intentionally and unlawfully had penetration by his genital organ namely penis into the genital organ namely vagina of VA (herein referred to as the complainant) a girl aged 5 years.

The case for the prosecution-

3. The prosecution called 6 witnesses. The evidence of the witnesses in summary was that in 2013 the complainant was a girl aged 5 years. She was living with her mother PW3. The appellant was their co-villager. That on the material day at 5pm the complainant's mother PW3 had left the complainant and her siblings at home and went to the market. That the appellant then went to the complainant's home and took the complainant to his home. On getting there he took her to his house. He defiled her. When the complainant's mother returned home she was informed by a sister- in -law called V that the appellant had taken the complaint to his house. She checked the girl and found mucus

coming out of her vagina. She reported to the village elder, vitalis PW5. They went in search of the appellant. They found him and arrested him. Vitalis called the police who went and re- arrested the appellant. The complainant and the appellant were taken to Mbale District Hospital and then to Mbale Police Station. At the hospital, the complainant was examined by a clinical officer PW2 who found her with scarred vagina, fresh bruises and tenderness on the hymen and both labias. He found the cervix and the perineum to be intact. He formed the opinion that the girl had been defiled. On the following day he completed a P3 form. The police investigated the case. The appellant was charged with the offence. He denied the charges. During the hearing the clinical officer PW2 produced the P3 form, the Post Rape Care Form and the treatment notes as exhibits, Pex1, 2, and 3 respectively. Pc Juma PW6 produced the girl's child immunization card as exhibit, PEX4. It indicated that the girl was born on 16/5/2007.

Defence Case-

3. When placed to his defence the appellant gave a sworn statement. He stated in his defence that he resides at Kegoye. That the complainant and her mother were his neighbours. That on the material day he was doing his daily chores at his home. That at around 3-4 pm he went to Mbale town to check on his mother who was ailing. That on his way back home between 6.30 – 7 pm he met with a village elder called Vilalis and another person called Antony Chunguli. They both grabbed him and robbed him of Kshs. 6000/=. A police vehicle then appeared. He was put in the vehicle and taken to Mbale District Hospital and later to Mbale police Station. At the hospital it is only the complainant who was examined. He was charged and denied the charges. In cross – Examination he stated that he had no differences with the complainant and her mother. However that there was a boundary dispute.

Submissions-

4. The advocates for the appellant made oral submissions and urged the court to consider their submissions that were made before the trial court. The advocates submitted that the complainant gave unsworn evidence after the trial court conducted *a voire dire* examination and found that the complainant who was at the time aged 5 years did not understand the meaning of an oath. That the unsworn evidence of the child was not subjected to cross – examination. That the trial court erred in relying on such evidence to enter a conviction.

5. It was submitted that some crucial witnesses did not testify in the case. These were the complainant's sister called E and a neighbour called V who reported to the complainant's mother that the complainant had been taken by the appellant to his house. That failure to call the said persons to testify led to the conclusion that their evidence was adverse to the prosecution case.

6. It was further submitted that the prosecution witnesses adduced contradictory evidence. Instances given of such was the evidence of the clinical officer PW2 who recorded in the treatment notes and in the P3 form that the child told him that she was enticed with *mandaz*i. However that the child in her evidence denied that the appellant gave her *mandazi.* That there were contradictions of the place at which the complainant's mother found her daughter and the place at which the appellant was arrested. That there was contradiction in the number of people who were said to have gone in search of the appellant.

7. The advocates submitted that the ingredients of defilement were not proved. That the P3 form indicated that that was the second time that the appellant had defiled the complainant. However that the clinical officer found the hymen was freshly torn yet hymen can only be broken once. The clothes that the minor was wearing were not subjected to medical examination yet her mother said that when she checked the child she found her with mucus in her vagina. Further that no medical examination was done on the appellant to ascertain of any evidence that could connect him to the offence.

8. The advocates further submitted that the trial court erred by relying on the immunization card in proof of the age of the complainant. They submitted that the defence given the appellant was not shaken by the prosecution.

9. The prosecution counsel, **Mr. Ng'etich**, on the other hand submitted that the ingredients of defilement were proved in the case. That the age of the minor was proved by the evidence of her mother PW3 and by production of the immunization card. That penetration was proved by the evidence of the clinical officer who found the complainant with bruises which was evidence of partial or full penetration. That the testing of clothes would only have served as additional evidence. It was submitted that the appellant was a person well known to the complainant and to her mother. That the conditions were conducive to positive identification and that there was no room for error.

10. Further that unsworn evidence is evidence and it is for the trial court to decide on what weight to place on such evidence. That a court can convict on the evidence of a minor if the evidence is believed to be true.

11. That the appellant has not shown how the evidence of witnesses who were not called would have been adverse to the prosecution case. That the contradictions in case were not grave to the extent of causing injustice to the appellant. The state urgued that the conviction on the appellant was safe. They urged the court to dismiss the appeal.

Analysis and Determination

12. It is the duty of a first appellant court to analyse and re- evaluate the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify – See **Okeno Vs Republic (1972) EA 32**.

13. First is the question of the age of the complainant. It is important that the age of the complainant in a case of defilement be established. This was emphasized by the court of Appeal in **Kaingu alias Kasomo Vs Republic , Mombasa Cr. Appeal No. 504 of 2010** where the court held that:

"Age of the victim of the sexual assault under the Sexual Offence Act is a critical component. It forms part of the charge

which must be proved in the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim."

14. The age of a person can be proved by both oral and documentary evidence. This was the opinion of the court of Appeal in **Mwolongo Chichoro Mwanyembe vs Republic, Mombasa Criminal Appeal No. 24 of 2015** where it was held that:

"…the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof." ".. we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age , it has to be credible and reliable."

15. In this case the mother to the complainant stated that the girl was aged 5 years at the time of defilement. This was supported by the evidence contained in the immunization card that indicated that the girl was born on 16/5/2007 which placed the age of the girl at the time of defilement at 5 years and 11 months. The oral evidence of the mother to the complainant and the evidence contained in the immunization card as to the age of the minor were credible forms of proof of the age of the minor. It was thereby proved that the minor was aged 5 years at the time of defilement.

16. Defilement can be proved by both oral and circumstantial evidence. Where there is medical evidence in proof thereof this can only be treated as further evidence in proof of the charge. This was the holding of the court of Appeal in **AML Vs Republic(2012) eKLR** where the court held that:-

"The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."

The court upheld the same **in Kassim Ali Vs Republic in Mombasa Criminal Appeal No. 84 of 2005** where it stated that:

"(*The) absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence*."

17. In this case the complainant testified that the appellant took her to his house and defiled her. The clinical officer PW2 who examined her found her with a broken hymen that was scarred and with bruises. If the appellant had previously defiled the complainant there was no evidence on the extent to which he had done it on the first occasion as penetration can be partial or complete. The medical reports in his case proved that there was penetration on the complainant. Further medical examination on the complainant's clothes would have offered additional evidence in support of the charge. Penetration was thereby proved.

18. There is no doubt that a person called V was a crucial witness in the case. She told the complainant's mother that the appellant had taken the complainant to his house. V was not called to ascertain aspect of the evidence. The question is whether her evidence was so crucial that without it the case for the prosecution was unsustainable.

19. The trial magistrate cited the case of ***Donald Majiwa Achilwa & 2 Others Vs Republic (2009) eKLR*** where the Court of Appeal held that :-

"The law as it presently stands is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however , the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court in an appropriate case is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution *case- see* ***Bukenya & Others Vs Uganda (1972) EA 549.***

20. The holding in the above case has to be considered together with the proviso to section 124 of the Evidence Act that provides that the court may convict without corroboration of the evidence of a minor in case involving sexual offences if it is convinced that the minor is telling the truth. More so section 143 of the Evidence Act provides that:

"No particular number of witnesses shall, in the absence of any provision of the law to the contrary, be required for the proof of any fact".

In the case against the appellant the evidence of the complainant was corroborated by medical evidence of the clinical officer. That was sufficient evidence to sustain the conviction even without the evidence of V. That V did not testify in the case was not fatal to the prosecution case.

21. There were some contradictions in the evidence of the prosecution witnesses. For instance, the complainant stated that her mother picked her at the home of the appellant while her mother stated that she found the minor at home. The complainant's mother stated that they were 3 people when they went looking for the appellant. Anthony Kangahi PW4 stated that there were more than 10 people who were looking for the appellant. The clinical officer said that the complainant told him that she was enticed with *Mandazi* but the complainant in her evidence denied that the appellant gave her *mandazi.*

22. The position of the law in respect to contradictions and inconsistences in a case are as was stated in **Njuki & others Vs Republic (2002) 1 KLR 771** that where such are raised, it is the obligation of the court to determine as to whether the discrepancies and/or

contradictions are of such a nature as would create doubt as to the guilt of the accused person. That where they do not, they are curable under section 382 of the Criminal Procedure Code. The guide on how to treat such evidence was stated by the Court of Appeal in **Jackson Mwanzi Musembi Vs Republic (2017) eKLR** where the court cited with approval the Ugandan case of **Twahangane Alfred Vs Uganda , Cr. App No. 139 of 2001(2003) UGCA 6 (COA)** that:

> ***"It is not every contradiction that warrants rejection of evidence, with regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate rate untruthfulness or if they do not affect the main substance, of the prosecution's case"***

23. In this case the contradictions and inconsistencies cited above were not grave as to lead to the prosecution evidence being rejected. The only serious contradiction is as to whether the complainant's mother found the minor at the home of the appellant. However this may be attributed to memory loss of the witness who was only 5 years old at the time of the commission of the offence.

24. The appellant raised an alibi defence in which he stated that at the material time he was at Mbale town and that he was arrested at Kegoye primary School when he was on his way home. The complainant's mother (PW3), Anthony Kangahi PW4 and Vilalis PW5 all testified that they arrested the appellant while he was hiding in a house for burning bricks. The evidence that the appellant was arrested at the said place was not challenged in cross-examination of the prosecution witnesses. No question was put to the witnesses that he was arrested at Kegoye Primary School while on the way from Mbale town. The alibi defence was not raised to the investigating officer for its veracity to be ascertained. In **Stephen Nguli Mulili Vs Republic (2014) ER** the Court of Appeal held that a defence of alibi ought to be raised at the earliest opportunity possible. The believable evidence was that the appellant was arrested while hiding in a bricks burning house. That dislodges the defence evidence that the appellant was arrested while on his way home from Mbale Town. The appellant never went to Mbale Town. He was at his home when the minor was defiled. The alibi defence was false.

25. The trial court conducted *a voire dire* examination on the minor and ruled that she gives unsworn evidence. However the minor was not cross-examined upon giving the unsworn evidence. Mrima J had ordered a retrial in this case because the initial trial magistrate had failed to allow cross- examination of the minor who had given unsworn evidence in court. The trial magistrate in the second trial also fell to the same mistake and did not allow cross – examination upon the child giving unsworn evidence.

26. The position of the law is that the unsworn evidence of a child witness is subject to cross-examination. In **D.W. M Vs Republic (2016)eKLR** the Court of Appeal considered the issue and refered to the case of **Sula Vs Uganda(2001) 2 E.A. 556** where the Supreme Court of Ugand held that:

> ***"A child who gives evidence not on oath is liable to cross-examination to test the veracity his/her evidence"***

The court continued that:

> ***"In Nicholas Mutua Wambua & Another Vs Republic, Msa Cr. App No. 373 of 2006(UR) this court when confronted with a similar issue construed section 208 and 302 of the CPC governing trials in subordinate court and the High Court respectively and arrived at the conclusion that cross examination of a child who had given evidence not on oath is permitted by law. The court approved the view taken by the Supreme Court of Uganda in the Sula case that cross -examination of a child who gives evidence not on oath is meant to test the veracity of such child's evidence."***

27. It is therefore the right of an accused person to cross – examine a witness whether the witness has testified on oath or not. In this case the appellant was denied that right. It was the second time in his trial that he was being denied that right. The question then is what the court should do in those circumstances.

29. In **Lawrence Iria Vs Republic(2017) eKLR** Mabeya J cited the Court of Appeal decision in **Loonkomok Vs Republic, Mombasa Crimianl Appeal No. 68 of 2015** where the court held that where ***voire dire*** examination in a case is not conducted but there is sufficient independent evidence to support the charge, the court may still be able to uphold the conviction . As a corollary Mabeya J in the case before him held that:

> ***" ..... where a minor witness gives evidence without undergoing voire dire and where such a witness does undergo voire but is not cross – examined, such omissions should not render the prosecution case fatally defective. The court should revert to the other independent evidence and consider whether it is sufficient to warrant a conviction. The omission should not lead to an automatic acquittal."***

30. I am in agreement with this proposition. As the complainant in this case was not cross- examined the court cannot act on her evidence. Instead the court should consider whether there is other independent evidence in support of the charge in the absence of the evidence of the complainant. In the case there is no such evidence. The only witnesses who could have given such independent evidence did not testify in the case. In the absence of the evidence of the complainant there is no evidence to support the charge that the appellant committed the offence of defilement.

31. There are two options left either to order a re-trial or to acquit the appellant. A re–trial was ordered by Justice Mrima on the same ground that the complainant had not been subjected to cross – examination on her unsworn evidence. When the second trial was conducted the new trial magistrate also failed to subject the complainant to cross -examination on her unsworn evidence.

32.A re-trial will only be ordered where the interests of justice so require and if it is unlikely to cause injustice to the appellant. In **Muiruri Vs Republic (2003) eKLR 552**, the Court of Appeal stated the followings:-

> *" 1) Generally whether a re-trial should be entered or not must depend on the circumstances of the case.*
>
> *2) It will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant: whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not.*

33. When Mrima J ordered a re-trial he cited the Court of Appeal decision in **Samuel Wahini Ngugi Vs Republic (2012) eKLR** where it was held that:

> ***"It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.... In this judgment the court accepted that a retrial should not be ordered unless the court was of the opinion that on consideration of the admissible or potentially admissible a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person."***

34. The appellant was arraigned in court on the 4th April,2013. He was sentenced after the first trial on 30th August, 2013. The re-trial was ordered on 4th December,2014. He was re-tried and convicted again on 23rd December, 2015. In both trials before the lower court the lady called V did not testify.

35. The appellant has undergone two trials already. It is now nearly six years since when he was first arraigned in court. Under Article 50(2) (e) of the constitution, the appellant has a right to have his trial concluded without unreasonable delay. It is my considered view that to order a third trial will be prejudicial to the rights of the appellant to fair trial. And to do so in the sixth year from the time of arraignment in court does not measure up to the tenents of a fair trial. It is a principle of law that a trial has to come to an end otherwise it will be no longer a trial but a persecution.

36. In the foregoing I find that the trial against the appellant was a mistrial but I am constrained not to order a re-trial. The conviction on the appellant is quashed and the sentence imposed on him set aside. The appellant is set at liberty forthwith unless lawfully held.

Delivered, dated and signed in open court at Kakamega this. 4th day of April,2019.

JESSE NJAGI

JUDGE

In the presence of :

Mr. Athunga.....for appellant

Mr. Juma.....for state

Appellant.....present

court assistant .....George

14 days Right of Appeal.