



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 206 OF 2018

EMMANUEL OMONDI OTIENO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

(An appeal from the original conviction and sentence in the Chirf Magistrate's Court in Makadara Cr. Case No.2914 of 2014 delivered by Hon. H.M.Nyaga on 25th September, 2018).

1. The Appellant was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section (2) of the Sexual Offences Act No. 3 of 2006**. It was alleged that on 16th day of June 2014 at around 4.00 pm at Umoja II Estate in Nairobi within Nairobi County intentionally and unlawfully caused his penis to penetrate the vagina of FBA, a child aged seven and half years. In the alternative, he was charged with an indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act No. 3 of 2006** in that he intentionally touched the vagina of FBA a girl aged seven and a half years.
2. The Appellant was found guilty of the main charge and convicted accordingly. He was sentenced to serve life imprisonment. Dissatisfied with both the conviction and sentence, he preferred the instant appeal.
3. He relied on written submissions filed contemporaneously with written submissions on 26th March, 2019. He set out five grounds of appeal which I condense into four. They are that the charge sheet was defective, that **Sections 151 and 207(1) of the Criminal Procedure Code** were not complied with, that penetration was not established and that his defence was not considered.

Evidence

4. In total, the prosecution called five witnesses. PW1 was the complainant, then a minor aged seven and a half years recalled the Appellant who was their neighbor going to their house after she returned from school after 4.00 pm and defiled her. The Appellant first confirmed from her if her uncle one JO was around. After she confirmed in the negative, the Appellant pushed her to the bed removed her shorts and a leso on her. He also removed his trousers and underpants and defiled her. He warned her not to tell anyone. Before he left, a friend to PW1 went to the house which prompted the Appellant to rise up and leave. PW1 informed Mima what had happened. Mima was her play mate. After her mother returned home, she reported to her what had happened. She was taken to the hospital and the matter reported to the police accordingly.
5. PW2, JAO was the mother to PW1. She entirely corroborated the evidence of PW1. She added that PW1 reported the incident to her after she returned from work. At the time, she was crying and complaining of pain in her private parts. She exhibited before the court the shorts that PW1 wore on the material date which according to her had creamish and blood stains. She confirmed that the Appellant was their neighbor in the same plot. She produced PW1's Birth Certificate which showed that PW1 was born on 11th February, 2007.
6. PW1 was first taken to MF was filled by one Purity Kajuju, a clinical Officer at the facility. The same was identified by PW2 and produced in evidence by **PW3, Emmy Koskei**, also a clinical Officer at the facility who had worked with Faith Kajuju.
7. According to the hospital report, PW1 sustained a tear on the posterior fourchette that was bleeding on touch. There was massive reddening and bruising of the inner labia walls bilaterally. The hymen was intact. Anal examination was normal. No spermatozoa were seen. Necessary treatment was administered. The PRC Form and the medical certificates were adduced as P. Exhibit 3 and 4 respectively.
8. A further medical examination of PW1 was done by **PW4, Dr. Maundu** a Police Surgery on 19/6/2014. He found no physical injuries, the genitalia was normal and hymen was intact. He adduced the P3 form as P. Exhibit 3.

9. The case was investigated by one PC Chivoli. The evidence of investigations was adduced by PW5, **CPL Faith Mucheru** who took over the investigations. She produced the statement of PC Chivoli as P. Exhibit 7; the shorts PW1 wore on the material date as P.Exhibit 1 and the Birth Certificate as P. Exhibit 2.

10. At the close of the prosecution case, the court ruled that the prosecution had established a prima facie case and accordingly put the Appellant on his defence. He gave an unsworn statement of defence in which he denied committing the offence. He stated that on 17/6/2014 while he was in the house, one David went and informed him that he was required at the AP Camp. When he went there, he found three strange men who drove him to Buruburu Police Station where he was charged with trumped up charges. He stated that the minor had been couched on what to tell the court.

11. The Appellant in his defence pointed to contradictions in the prosecution evidence. He pointed to PW1's evidence that she was defiled in the anus but medical evidence disclosed defilement in the vagina. He pointed to PW2's evidence that she found PW1 crying when she went home whilst PW1 testified that PW2 found her playing with her friend. He also wondered why the investigating officer recorded two statements and why there were two OB reports namely OB21/17/6/14 and 21/20/6/14.

12. In his judgment, the learned trial magistrate held that the Appellant had been positively identified as the culprit. He dismissed his defence and upheld the prosecution evidence as had been duly established.

Analysis and determination

13. The appeal was canvassed by way of both oral and written submissions. The Appellant filed his submissions on 26th march, 2019. The Respondent through learned State Counsel, Ms. Nyauncho made oral submissions. She partially conceded to the appeal on ground that **Section 207(1) of the Criminal Procedure Code** was not complied with.

14. I have duly considered the evidence on record and the respective rival submissions. I arrive at the issues for determination to be; whether the trial was a nullity by virtue of non-compliance with Section 207(1) of the Criminal Procedure Code, whether Section 151 of the Criminal Procedure Code was violated, whether the case was proved beyond all reasonable doubts and whether the Appellant's defence was duly considered.

15. It is paramount that the court first considers whether the trial was rendered a nullity by the non-compliance of Section 207(1) of the Criminal Procedure Code. According to the Appellant, when he was first presented to court, he pleaded guilty because he had been tortured in the police cells. It was after his plea that the court ordered that a mental assessment be conducted on him. He was referred to Mathari Teaching and Referral Hospital for this purpose. When the matter next came up in court, the treatment report was not ready. He however informed the court that he wished to change his plea. He submitted that this did not happen. Instead, the hearing commenced on 2/2/2015 without him not only being subjected to a mental assessment but fresh plea not being taken. This, according to him rendered the trial a nullity, a submission that the Respondent conceded to.

16. It is true as attested by the record of proceedings that when the Appellant was first presented in court, he pleaded guilty. No plea was entered by the court. Thereafter the prosecutor suggested that the Appellant be given more time before the facts of the case could be read. The court then ordered as follows:

“Court: Further mention on 4/7/2014. The accused to be taken to Mathari for assessment of his mental health status.”

17. A similar order was made on 8/7/2014. On subsequent mention dates, the mental assessment report was never filed. The case edged closer to hearing without either the prosecutor or the court having regard to this issue. The hearing eventually kicked off on 2/2/2015. This marked the beginning of the death of the prosecution case notwithstanding that the case was finally heard to conclusion.

18. The first mistake was to allow the hearing to commence before the mental assessment report had been filed. This was a grave error in the sense that the learned magistrate who took the plea in ordering that the Appellant be taken to hospital for a mental assessment must have observed something was amiss with him. A subsequent magistrate made a similar order and indeed mentions were recorded to confirm the filing of the report. It behooved the trial magistrate to ensure that the report was filed so as to ascertain that the Appellant was mentally fit to stand the trial.

19. Furthermore, the order was informed by the seriousness of the offence. Although there is nothing on the record to indicate that the court informed the Appellant of the attendant consequences of pleading guilty to the offence, it is not lost in the mind of this court that hardly any plea of guilty is recorded in offences where the attendant penalties are as serious as life imprisonment or death.

20. Be that as it may, the fatal blow was occasioned by the move to proceed with the trial when in fact, the plea process had not completed. The proceedings of taking plea ended at the point the Appellant said he was guilty in both the main and the alternative charge. For avoidance of doubt, the proceedings of 20/6/14 when the plea was taken were recorded as follows:

“20/6/2014

Before: Hon. E. Ominde CM

Prosecutor: PC II Muriuki

Court Clerk: Abdi

Interpretation: English/Kiswahili

The substance of the charge and every element thereof has been state by the court to the accused person in the language that he/she understands, who bring asked whether he/she admits or denies the truth of the charge(s) replies:

Count 1: I am guilty

Alternative count: I am guilty

Prosecutor: I suggest that we give the accused more time before reading the facts.

Court: Further mention on 4/7/14. The accused to be taken to Mathari for assessment of his mental health status.

Hon. E. Ominde CM

20/3/14”

21. **Section 207(1) and (2) of the Criminal Procedure Code** outline the manner in which a plea should be recorded. They read as follows:

“(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, or guilty subject to a plea agreement;

(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making an order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.”

22. Case law has additionally restated the manner in which a proper plea should be receded; the celebrated case being **Adan v Republic [1973] EA 445**. It enunciated the following procedure:

“(i) the charge and all essential ingredients of the offence should be explained to the accused in his language or in a language he understands.

(ii) The accused’s own words should be recorded and if they are on a mission, a plea of guilty should be recorded.

(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts to add any relevant facts.

(iv) If the accused does not agree with the facts or raises any questions of his guilt his reply must be recorded and any change of plea entered.

(v) If there is no change of plea, a conviction should be recorded and a statement of facts relevant to sentence together with the accused’s reply should be recorded.”

23. I cannot be belabor to state that a proper plea was not recorded. In fact, the court not having recorded whether or not the Appellant was guilty was as good as not having taken plea at all. It follows then that all the subsequent proceedings that were recorded were a nullity. Effectively, the trial was a mistrial.

24. It is now the onerous duty of this court to determine whether a retrial should be conducted. It is trite that key amongst the factors the court should consider is whether a retrial would likely result in a conviction. My reevaluation of the evidence drives me to determine in the affirmative. I have already summarized the evidence and no doubt the prosecution ably established the three key elements of the offence of defilement, namely penetration, identification of the perpetrator and age of the complainant.

25. Another key factor is that a retrial should not aid the prosecution to fill up gaps in their case. This does not obtain in the instant case. The only issue under this head that the Appellant raised is that he was denied the right to recall PW1 and 2 for fresh evidence after he was duly supplied with witness statements.

26. The record shows that PW1 testified afresh twice before finally being recalled for further cross examination after witness statements were supplied. PW2 too was recalled for further cross examination in the same manner. Accordingly, the Appellant was not denied a right to a fair hearing. The prosecution would not therefore be aided to fetch for evidence if a retrial is ordered.

27. It is also trite that the court should consider if a retrial would prejudice the accused. It must also serve the interests of justice. If the Appellant is found guilty, he will be sentenced to life imprisonment. Although he remained in remand custody during trial, this period shall be mitigated by its consideration to constitute part of the sentence imposed. At stake is not only the interest of the Appellant but also of the

victim, a young girl who will have to live with the trauma of the assault for the rest of her life. Therefore, the interests of justice demand that a retrial be conducted.

28. In the result, this appeal partially succeeds. I quash the conviction, set aside the sentence and order that a retrial be conducted. The Appellant shall be escorted to Buruburu Police Station not later than 16th April, 2019 in preparation to plead afresh. He shall be escorted to Makadara Law Courts not later than 18th April, 2019 for purposes of the retrial. The trial court file shall forthwith be returned to this court for this purpose. It is so ordered

Dated and Delivered at Nairobi This 9th April, 2019.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant in Person

2. Momanyi for the Respondent