REPUBLIC OF KENYA

IN THE HIGHCOURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 20 OF 2018

BAYAN MAKAROT ....APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(An appeal against conviction and sentence by Hon. M.O OKUCHO, SRM, delivered on 16th December 2016 in Criminal case No. 67 of 2016 at Kajiado)

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) (2) of the Sexual Offences Act, (No. 3 of 2006). The particulars of the offence were that on the 17th day of June, 2016 at around 5.00 pm in Kajiado County, intentionally and unlawfully caused his private parts to penetrate the private parts of SJ, a child aged 8 years. The appellant faced an alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006, the particulars being that on the 17th day of June, 2016 at around 5.00 p.m. in Kajiado county, intentionally touched the private parts of SJ, a child aged 8 years with his private parts.

2. The Appellant denied the charges and after a full trial in which the prosecution called 4 witnesses, he was convicted in the main count and sentenced to life imprisonment.

3. Aggrieved, the Appellant lodged this appeal against both conviction and sentence and raised the following grounds of appeal, namely:

> ***1. The learned trial magistrate erred in law by convicting the appellant for the charge of defiling a child contrary to Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006, since at the time of the said offence the appellant was at a funeral whereof the same ended at around 2.30 p.m. and thereafter, he went to Loitokitok Town where he stayed till 7.00 p.m.***
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> ***2. The learned trial magistrate erred in law and fact by not adequately informing the appellant their constitutional right to adduce and challenge evidence as enshrined under Article 50(2) (k) of the constitution of Kenya.***
>
> ***3. The learned trial magistrate erred in law and fact by convicting the appellant purely on very wobbly evidence of PW1 and PW2, which the trial magistrate treated as the gospel truth on the true statement of account despite the grave inconsistencies in her testimony.***
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> ***4. The learned trial magistrate erred in law and fact in convicting the appellant purely based on the alleged and unchallenged prosecution witnesses' testimony and the fact that the complainant's hymen was raptured.***
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> ***5. The learned trial magistrate erred in law and fact by finding that the testimonies given by the prosecution witnesses were beyond reasonable doubt in proving the charge entered against the appellant and not considering the fact that the appellant was being framed by PW1 the complainant's mother over a land dispute.***
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> ***6. The learned magistrate erred in law and fact by meting out a conviction and sentence in disregard of the inconsistencies between PW1, PW2 and PW3 on the issue of spermatozoa deposit on the complainant's vagina.***
>
> ***7. The learned trial magistrate erred in law and fact in finding that the failure by the accused to cross examine two witnesses was a admission by the appellant of the testimony of the accused (sic) and that the failure to cross examine was an instruction (sic) by the appellant***
>
> ***8. The learned trial magistrate erred in law in assuming that the accused person though having pleaded "Not guilty conceded to all the evidence tendered by the prosecution witnesses after he chose to keep quiet and call no witness during his defence.***

4. The prayed that the appeal be allowed, conviction quashed and sentence set aside.

5. During the hearing of the appeal Mr. Waiganjo, learned counsel for the Appellant, collapsed their grounds to 4 and argued them as grounds 2, 3, 5 and 6. Counsel submitted highlighting their written submissions dated 28th April, 2019. With regard to ground 2 counsel submitted that Article 50(2) (k) guarantees the right to fair trial including the right to adduce and challenge evidence. He faulted the trial magistrate for failing to inform the appellant of his right to challenge evidence adduced by prosecution witnesses and of his right adduce his own evidence to support his case.

6. In Mr. Waiganjo's view, the omission led to the appellant not to cross-examine prosecution witnesses and not to call his own witnesses thereby failing to not put up a defence to the charge against him with the result that he was convicted and sentenced to life imprisonment. Counsel argued that had the appellant been informed of his right to challenge the prosecution's evidence and call his own witnesses the result of the trial would have been different.

7. Learned counsel further submitted that the trial magistrate heavily relied on the evidence of PW1 and PW2 which was contradictory and wobbly. According to counsel, PW1, mother to the minor stated that she found the appellant defiling the minor with his trouser unzipped and that as soon as she saw them, she ran to inform her husband. It is counsel's contention that it was impossible for the witness to have seen the appellant's unzipped trousers if he was on top of the Minor.

8. Counsel further argued that the witness' testimony that she inspected the minor immediately she had an opportunity and after the appellant ran away could not be true because PW3, the doctor who examined the victim found no spermatozoa in her private parts. Learned counsel submitted that the trial court failed to consider that evidence while convicting the appellant.

9. Regarding the evidence of PW2, counsel submitted that although PW2 stated that the victim had been defiled before on two other occasions by the appellant, PW3's testimony was that she has blunt injuries on her private parts caused by penis penetration; that the hymen had been raptured and that the age of the injury was 24 hours old. Mr. Waignjo contended, therefore, that this contradicted the evidence of PW2 that the victim had been defiled on other occasions.

10. According to Mr. Waiganjo, the trial magistrate found that the evidence of PW1, P22 and PW4 placed the appellant at the scene, though PW4 did not state that the appellant was at the scene. He argued that the appellant had stated that on the material day he was away from the scene and that he later went to Loitokitok town with his friends, which is contrary to the evidence of PW1 and PW2.

11. It was learned counsel's further submission that the appellant had testified that there was a land dispute between him and his other brothers on one hand and their brother, PW1's husband, which might have led to bad blood between the appellant and the victim's family. He therefore prayed that the appeal be allowed, conviction quashed and sentence set aside.

12. Mr. Meroka, learned Prosecution counsel, opposed the appeal. He submitted, also highlighting their submissions dated 31st October, 2018, that that Section 8 of the Act, establishes the ingredients of the offence, namely; age and penetration. On age, he submitted that there was age assessment thus the first ingredient was proved. On penetration, he argued that PW3 produced medical evidence corroborating penetration. According to counsel, PW1 and the minor identified the perpetrator who was known to them and that the incident took place in broad daylight leaving no possibility of an error.

13. Learned prosecution counsel submitted that the evidence of the minor who was assisted by an intermediary, placed the appellant in contact with the minor and that the trial court made a determination on the identification of the appellant. He submitted that the evidence of PW2 was in harmony with the law.

14. Regarding the appellant's complaint that he was not informed of his right to challenge the prosecution evidence, Mr. Meroka submitted that the appellant cross-examined all witnesses except PW2 a confirmation that the appellant knew his right to do so. He argued that there is no requirement on the number of questions an accused may ask in cross examination so long as the right was exercised.

15. Counsel further submitted that the appellant elected to give unsworn evidence with no witnesses; that the 24 hour recorded by PW3 was with regards to the examination on 17th June, 2016 and that existence of a land dispute had nothing to do with the injuries sustained by the minor given that the appellant was placed at the scene. He contended that the alleged dispute was not between the appellant on the one hand and PW1 and the minor on the other. He also submitted that investigations by PW4 placed the appellant at the scene and, therefore, the appeal has no merit.

Determination

16. I have considered this appeal; submissions and the authorities relied on. This is a first appeal and this being a first appellate court, has a duty to re-evaluate reconsider and re-analyze the evidence and draw its own conclusions on whether the conclusions of the trial court should prevail or not and give reasons for it. This court should however bear in mind that it did not see the witnesses testify and, therefore, give due allowance for that.

17. In ***Okeno v Republic*** [1972] EA 32, the Court of Appeal set out the duties of a first appellate court thus:

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion... It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make***

allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses…"

18. In ***Kiilu & Another v Republic*** [2005]1 KLR 174, the same Court stated that:

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."***

19. And in **Naziwa v. Uganda** [2014] UG CA 28 (10th April, 2014, the Court of Appeal of Uganda observed that it is the duty of the first appellate court to re-evaluate all the evidence on record and make its own findings of fact on the issues while giving allowance for the fact that it had not seen the witnesses as they testified, before it can decide on whether the decision of the trial court can be supported.

20. This view was reiterated by the Supreme Court of Uganda in ***Fr. Narsensio Begumisa & 3 others v Eric Tibebaga*** [2004] UGSC 18 (22 June 2004), where the Court held that;

> ***"It is a well settled principle that on a first appeal, the parties are entitled to obtain from the court of appeal its own decision on issues of fact as well as of law. Although in a case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions."***

21. The appellant was charge with the offence of defilement and an alternative charge of an indecent act with a child. The prosecution called 4 witnesses whose evidence the trial court believed, convicted the appellant and sentenced him to life imprisonment.

22. PW1, MJ, mother to the minor, told the court that on 17th June, 2016 at about 3.00 pm, the appellant went to her house and requested her to let him rest under a tree within the compound. She left the appellant resting. When she came back, she found the appellant defiling the minor. She rushed to call her husband. The appellant took advantage and ran away. She took the minor to hospital at Entarara from where they were referred to the police. The Police referred them to Loitokitok Hospital where the minor was examined and treated. She then reported the matter at Ilasit Police Station and a P3 was issued which was filled at the Hospital. The Minor also was issued with a Post Rape Care (PRC).

23. She told the court that when she found the appellant defiling the minor, her pants had been removed up to her knees, the skirt pushed upwards and the appellant's trousers unzipped. She told the court that she checked and found spermatozoa in the minor's private parts and that the private parts were swollen. In cross examination the witness insisted that she found the appellant defiling the minor.

24. PW2, No. 61347 CPL Jackson Kariuki, a Police officer appointed by the court as the minor's intermediary, testified that the minor was brought to the police station and that he had interacted with her on several occasions. He told the court that the minor's statement was recorded by CPL Harrison; that the minor had told him that on 17th June, 2016 she was left at home with her other siblings when the appellant went and held her hands, removed her clothes and defiled her threatening to stab her if she screamed. According to the witness, when PW1 returned the appellant ran away but was later arrested by the police. The minor was taken to hospital where she was treated and issued with a P3 form. He testified that according to the minor, the appellant had defiled her on two other previous occasions.

25. PW3 Dr. Alexander Mwai, testified that the minor was taken to Loitokitok Hospital with a history of defilement. On examination the victim had blunt injuries on the ***thorax (***sic) and that the weapon used was penis penetration. He assessed the degree of injury as grievous harm. He filled the P3 Form on 20th June 2016.

26. The witness testified that he also examined the appellant who was unkempt but sober and intact (sic). He also filled a P3 Form for him on the same day 20th June, 2016. He stated that a Post Rape Care form (PRC) had been filled at the same Hospital on 18th June, 2016 and the defiler did not use a condom. The hymen had been raptured and there was laceration as well as discharge from the minor's private parts with foul smell. There were also apothecial cells with no sperms. The minor was put on PEP and STI treatment. The age of injuries was 24 hours. He produced the P3 form and PRC as exhibits 1 and 2 respectively.

27. PW4 No. 85187 CPL Halima Osman, a Police officer attached at Illasit police station told the court that on 19th June, 2016 at 12.00 noon PW1 went to the station with the minor and reported a case of defilement by a known person. PW1 reported that she found the appellant defiling the minor. CPL Halima told the court that they took the minor to hospital where she was issued with a P3 form and age of assessment done. The minor's age was assessed to be 8 years old. She produced the age assessment form as exhibit 4. She also produced the cloths the minor was wearing on the material day, the skirt and shirt as exhibits 5(a) and 5(b) respectively.

28. After considering the above evidence, the trial magistrate was satisfied that the prosecution had proved its case beyond reasonable doubt, convicted the appellant on the main charge of defilement and sentenced him to life imprisonment.

29. The evidence adduced by PW1, mother to the minor, was that she found the appellant defiling the minor; ran to call her husband but the appellant took advantage and ran away. She told the court that the minor's dress had been pushed up with her underwear below her knees. The appellant's trousers were unzipped. She checked the minor's private parts which were swollen. The trial court was satisfied that the evidence of defilement was corroborated by that of PW3, the doctor who examined the minor. The doctor had told the court that he examined the minor and found lacerations in her private parts and there was presence of epithelial and foul discharge. He put the minor on PET and STI treatment. The PRC showed that there had been penetration a fact that was supported by broken hymen.

30. The appellant has argued that he was framed up for the offence because of a land dispute and that it was not possible for PW1 to see his unzipped trousers if he was lying on top of the minor.

31. First, PW1 told the court that the minor's dress has been pushed up; that her underwear was below the knees and that the appellant's trousers were unzipped. It was the witness' evidence that the offence was committed at around 5.00 p.m. which was in broad daylight. The witness did not state the direction she came from and how far she was from the two who were engaged in the act. The appellant did not cross-examine the witness on those issues to cast doubt on her ability to see his unzipped trousers. There would therefore be no basis for the appellant's contention that the witness could not have seen his unzipped trousers.

32. Regarding issue of land dispute, this was a claim by the appellant and it was up to him to establish this fact. It was not the duty of PW1 or even the minor to disprove this fact. It is strile law that he who asserts must prove and therefore the appellant had the duty to prove that this fact. The duty of the prosecution was to prove the appellant's guilt and nothing more.

33. The appellant further contended that he was not informed of his right to challenge the prosecution case and adduce his own evidence or call witnesses to disprove the prosecution case. He also contended that he was not told of his right to call witnesses.

34. I have perused the trial court's record and it is clear that, the appellant cross-examined PW1 an indication he was aware of his right to challenge the prosecution witnesses' evidence. It is also clear from the record that at the end of evidence in chief by PW2, PW3 and PW4, the appellant was given an opportunity to cross-examine those witnesses but opted not to. The trial magistrate recorded; ***"cross examination" "Nil."*** Without any other evidence to the contrary, this court can only take the view that the appellant had no questions to put to the witnesses when he decided not to cross examine them.

35. The appellant contended that prosecution witnesses more so PW2 and PW3 gave contradictory evidence offence and, therefore, the prosecution did not prove its case beyond reasonable doubt. The offence the appellant was charged with is proved when the ingredients of the offence are satisfactorily established; namely penetration and age.

36. With regard to the age of the minor, there is no doubt that her age was established through age assessment as the report was dully file in court. The appellant did not disputed before the trial court and there is no submission on it to the contrary. As a matter of fact, PW3 stated that the minor's age was assessed and determined to be 8 year old. There is no any other evidence to contradict the medical evidence and the age assessment form was produced as an exhibit. Without other medical evidence to the contrary, there would be no reason to doubt the minor's age as assessed.

37. The second ingredient that must be established to prove the offence of defilement is penetration. Section 2 of the Act defines "***penetration***" as the ***partial or complete insertion of the genital organs of a person into the genital organs of another person.*** For the offence of defilement to have been proved, the prosecution must have proved that there was partial or complete insertion of the appellant's genital organs into the minor's genital organs.

38. The victim who was the complainant did not testify. The court appointed PW2 as an intermediary who testified on behalf of the minor because of what the prosecution called Phobia. The intermediary testified on how the minor was defiled. The record does not show that the intermediary was assisting the minor in answering or conveying the answers to the court, He simply took the oath and testified in place of the minor. That leaves the evidence of PW1 as the only person who testified regarding the identity of the minor's attacker.

39. The constitution and the law allow an intermediary to assist a victim in testifying in court. Article 50 (7) states that ***in the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.*** The Article recognizes the right of both the victim and accused to have the services of an intermediary for purposes of ensuring that the right to fair trial is achieved. However section 31 of the Sexual Offences Act only recognizes the right of a victim of a sexual offence to have the services of an intermediary thus drawing a distinction between the accused and the complainant or victim in a sexual offence.

40. Section 31(2) allows the court either on its own initiative or on request from the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), to declare any such witness, other than the accused, a vulnerable witness if in its opinion the witness is likely to be vulnerable on account of the grounds enumerated in that subsection including age, intellectual, psychological or physical impairment; trauma or such other reasons or factors as the court may consider relevant.

41. Appointment of an intermediary is at the discretion of the court where circumstances allow. An intermediary is defined by section 2 of the Act as "***a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counselor, guardian, children's officer or social worker."***

42. What then is the role of an intermediary in a criminal trial should he/she be the mouthpiece of the complainant? The answer to this question can be found in section 31(7) of the Act that is; to convey the substance of any question to the vulnerable witness, inform the court at any time that the witness is fatigued or stressed; and to request the court for a recess.

43. The appointment and role of an intermediary was discussed by the Court of Appeal in ***MM v Republic*** [2014] e KLR, thus;

> ***"It is clear from sections 31 (2) and 32 that, first and foremost it is the duty of the prosecution to ascertain the vulnerability of the witness and to apply to the court to make that declaration before appointing an intermediary. In addition, the court, as we have earlier observed, can on its own motion, through voir dire examination, declare a witness vulnerable and proceed to appoint an intermediary. Any witness (other than the one to be declared vulnerable) can likewise apply to the court for the declaration. The application must not be granted merely because the victim is young or too old or appears to be suffering from mental disorder. The court itself must be satisfied that the victim or the witness would be exposed to undue mental stress and suffering before an intermediary can be appointed."***

44. The Court of Appeal was clear that the trial court must ascertain;

> ***"…the expertise, possession of special knowledge or relationship with the witness through examination of the prospective intermediary before the court appoints him or her. It goes without saying, in view of that role, that an intermediary must subscribe to an appropriate oath ahead of the witness' testimony, undertaking to convey correctly and to the best of his/her ability the general purport of the evidence. The trial court must then give directions to delineate the extent of the intermediary's participation in the proceedings." (Emphasis)***

45. The above position suggests that the intermediary has a limited role to play in a trial and the trial court must therefore give directions on the extent of his/ her role. In that regard, the Court of Appeal stated that;

> ***"The intermediary's role is to communicate to the witness the questions put to the witness and to communicate to the court the answers from the victim to the person asking the questions, and to explain such questions or answers, so far as necessary for them to be understood by the witness or person asking questions in a manner understandable to the victim, while at the same time according the victim protection from unfamiliar environment and hostile cross- examination; to monitor the witness' emotional and psychological state and concentration, and to alert the trial court of any difficulties."***

46. The trial court appointed Corporal Jackson Kariuki and the intermediary and he testified as PW2 after the prosecution told the court that the minor could not testify due to phobia. The trial magistrate had earlier done a voire dire examination but later stood down the minor and adjourned the case at the request from the prosecution. The learned trial magistrate did not do an examination to satisfy himself that the victim had phobia and was therefore a vulnerable witness.

47. Further still, the court did give directions regarding the role of the corporal Kariuki as an intermediary. The witness was not even examined on his suitability as an intermediary but simply took the oath as a witness and went on to testify. He did not put the questions asked to the victim and relay answers to those questions to court. That denied the appellant an opportunity to cross examine the victim and test the truthfulness of her evidence.

48. As the Court of Appeal observed in ***MM v Republic*** (supra);

> ***"The whole object of the proceedings through an intermediary is to achieve fairness in the determination of the rights of all the people involved in a trial and to promote the welfare of a child or vulnerable witness."***

(See also ***John Kinyua Nathan v Republic*** [2017] e KLR.)

49. The victim did not testify and therefore the appellant could not cross examine PW2 because not being the victim, he could not answer the appellant's questions regarding the charge he was facing which would infringe on his right to a fair trial to challenge the prosecution evidence .

50. However, there was direct and independent evidence from PW1, the mother of the child who found the appellant lying on top of the child with his trousers down to his knees and the minor's cloths pushed up and the pants down her knees. There was also medical examination of the child a few hours later which confirmed that she had been defiled. That, in my view, was sufficient evidence linking the appellant with the offence, even without the evidence of the victim. This is so because PW1 told the court that she saw the appellant defile the victim. PW3 the doctor who examined the victim testified that there was penetration evidenced by broken hymen and the presence of epithelial pus discharge with a foul smell.

51. There is, however, a disturbing aspect in the way the evidence of PW3 was accorded with regard to penetration. The learned trial magistrate recorded the doctor to have stated that there was injury on the "Thorax" He again stated in the judgment that there were blunt injuries on the thorax and that the evidence showed that there was penile penetration in the minor's private parts. The trial magistrate referred to the broken hymen, laceration and foul discharge from the victim's private parts as well as the P3 form and PRC. He also referred to the meaning of the word 'penetration' as defined in section 2 of the Act and came to the conclusion that there was defilement.

52. Did the learned trial magistrate mean that penetration could have been on the "***Thorax***" given his analysis of both oral and medical evidence on record to conclude that defilement had been proved? The view I take is that this was perhaps in reference to other injuries the minor may have sustained given that the doctor (PW3) went at length to discuss the injuries he found in the victim's private parts and the medical evidence, which made him conclude that there was penetration.

53. On the appellant's submissions that he was not at the scene, I do not think this should be an issue here. The appellant was seen by PW1 who stated that he went to her home and requested to rest under a tree in her compound but she came back she found him defiling the minor. I have also perused the record but could not see anywhere the appellant raised the defence of alibi. I do not therefore find fault on the part of the trial magistrate on this. On the whole, I am satisfied that the appellant's conviction was safe and therefore dismiss the appeal against conviction.

54. The last question to address is on the sentence. The appellant challenged both conviction and sentence. He was sentenced to life imprisonment as that is the sentence provided for defilement under section 8(1) of the Act. However in ***Francis Karioko Muruatetu & Another v Republic***, SC Petition No. 16 of 2015, the Supreme Court held that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code was unconstitutional. In the Supreme Court's view;

> ***"[M]andatory sentence imposed in section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter***

> ***of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case…the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under Article 25 of the Constitution; an absolute right.”***

55. The jurisprudence now shows that mandatory sentences violate accused person’s right to fair trial and trial courts should where appropriate exercise judicial discretion and give an appropriate sentence as justice of the case may demand. In ***Jared Koita Injiri v Republic*** [2019] e KLR, the Court of Appeal reduced the appellant’s death sentence to 30 years imprisonment following principle established in ***Francis Karioko Muruatetu & Another v Republic*** (supra).

56. In the present appeal, appellant is a first offender who pleaded for leniency in his mitigation but was sentenced to life imprisonment. Pursuant to the above decisions of the Supreme Court and the Court of Appeal I hereby set aside the life sentence imposed against the appellant and substitute it with a sentence of 30 years from the date of sentence by the trial court.

Dated Signed and delivered at Kajiado this 19th Day of July 2019.

E C MWITA

JUDGE