



REPUBLIC OF KENYA

AT THE HIGH COURT IN NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 117 OF 2018

BETWEEN

PETER ONYIEGO NYAMWEYA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court

at Makadara Cr. Case No. 5799 of 2014 delivered by E.Suter, SRM

on 23rd March, 2018).

JUDGMENT

1. The Appellant herein was charged with the offence of defilement contrary to **Section 8 (1)** as read with **8 (2) of the Sexual Offences Act**. The particulars were that on the 9th December, 2014 in Industrial Area within Nairobi County intentionally and unlawfully caused his penis to penetrate the vagina of E.R. a child aged two years and eight months. In the alternative he was charged with committing an indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act** in that he unlawfully and intentionally committed an indecent act with I.R. a child aged 2 year 8 months by touching her private parts namely vagina. He was convicted of the main charge and sentenced to life imprisonment.

2. Dissatisfied with both the conviction and sentence, he lodged the instant appeal. He advanced seven grounds to support his appeal. I have condensed them into five. They are that the elements of the offence were not proved, that the charge sheet was defective as he did not understand what he pleaded to, that the medical evidence was contradictory, the he was denied the right to have a legal counsel and that the P3 Form was not adduced by a competent person.

3. Before I reevaluate the evidence, I find it paramount to first address the legal issues raised by the Appellant as this will determine whether or not a retrial should be ordered. The first argument was that the *voire dire* examination was not conducted in a proper manner. **PW1** was a minor aged four years at the time she testified. The trial magistrate conducted a *voire dire* examination at the end of which she ruled as under:

"The court notes that the complainant is aware of herself [sic] and surroundings and has a basic understanding about things. For this reason [sic] the court will have her testify to the best of her ability but she shall not be sworn and in the event that she is stuck she can be assisted by the mother."

4. It was the submission of the Appellant that this was not a proper *voire dire* examination as it failed to test the child's ability to speak the truth as required by the law. Miss Sigei for the Respondent urged that the *voire dire* was proper. It was her view that that the court allowed the minor to be assisted by her mother if need arose.

5. The court is obligated to conduct a *voire dire* examination pursuant to **Section 19 of the Oaths and Statutory Declarations Act**. Under the Act, the examination serves two main purposes. It tests the ability of the minor to tell the truth and the minor's understanding and meaning of the nature of an oath. This creates two scenarios. If the minor understands their duty to tell the truth and nature and meaning of an oath, then their evidence will be taken under oath. If, however, the court is of the view that the minor does not understand the nature and meaning of an oath, then the evidence will be recorded without the minor requiring to be put under oath.

6. A look at the court's proceedings attests that after the minor was questioned by the court, she responded in the following manner;

“My name is B. I go to school at [particulars withheld]. It is down there. I did not go to school today because Mummy told me we come here yesterday. I went school from morning to evening and my father is at work. I do not know where this place is. I just know it is somewhere we have come.”

7. It was after the above examination that the court ruled as indicated above. Clearly the court did not test any of the parameters set out under Section 19 of the Statutory Oaths and Declarations Act. The child was neither tested whether she could speak the truth nor appreciate the reception of taking an oath. The gist of undertaking a *voire dire* examination is to test the competence of a witness and the evidence they shall offer. That is why the parameters of the examination are enunciated in law. The failure to comply with them means that the minor was not capable of adducing evidence in accordance with the law. In this case, it begged how then she was even ordered to testify. This is a case probably that the minor could have been declared a vulnerable witness pursuant to Section 31 of the Sexual Offences Act and directed to testify through an intermediary.
8. The failure to accord with the law ultimately vitiated the entire trial which I declare a nullity.
9. The other issue the Appellant raised was that the requirements Section 200 of the criminal procedure code were not complied with. It was his submission that the court erred in failing to rule on the Appellant's decision to have the matter start *de novo* despite reserving on the same for 26th October, 2016. The Appellant further argued that he had indicated his reason for having the matter begin afresh which was not considered by the court. The Respondent agreed that the court did not rule on the matter. It was the submission that the Appellant changed his mind opting to recall **PW2** after which the court opted not to make the ruling.
10. The trial was initially conducted by Hon. E. Ominde, Chief Magistrate who took the evidence of PW1 and PW2. Thereafter, Hon. E. Suter, SRM took over the conduct of the proceedings. He duly explained the requirements of Section 200 of the CPC to the Appellant who opted that the matter be heard *de novo*. He explained that the questions he asked to the witnesses were not recorded in the proceedings. The prosecution opposed the recalling of PW1 stating that due to her age, she could easily have forgotten her testimony. The court reserved its ruling for 26/10.2016. The court did not deliver the ruling on the due date, explaining that the court does not record the questions but only the answers given by the witnesses in cross examination. It is then that the Appellant requested the recalling of PW2 citing that he did not have a lawyer by the time the two witnesses testified. He argued that he was forced to proceed with PW2 despite his protest on this account.
11. The prosecution requested to be given time to confirm if PW2 would be available and she thereafter on 22.2.2017 testified afresh. As such, there is no doubt that Section 200(3) of the CPC was duly complied with and no prejudice was occasioned to the Appellant.
12. Finally, the Appellant asserted that the witness who gave evidence as **PW5** was not competent to do so. The witness, **PW5** gave evidence on behalf of the police doctor who examined the complainant. In short, the Appellant advanced the argument that the evidence of PW5 was inadmissible.
13. **Section 77 of the Criminal Procedure Code** provides that a medical officer's report may be used in evidence without requiring the maker to present it. Further, **Section 50 of Evidence Act** empowers a court to admit a person's opinion on the handwriting of another as proof of the identity of the maker of the document. In this case, **PW5** testified to knowing the handwriting of the maker of the document. It is clear then that the document was properly produced as there is no mandatory requirement that the maker had to adduce.
14. Having ruled that the trial was a nullity, it is the duty of the court to determine whether or not a retrial should be ordered. Amongst the factors to be considered are whether a retrial would likely result in a conviction, whether it would aid the prosecution to fill up gaps in their case, whether it would prejudice the Appellant and on the whole, whether it serves the interests of justice.
15. As regards proof of the case, the prosecution was required to prove identification of the perpetrator, penetration and age of the complainant. In summary, the prosecution case was that **PW1, I.R.** aged three years was at home on 9th December, 2014 with her sister. She was called by a man known to her and taken to his house. The man, identified as the Appellant sat her on a stool. He then proceeded to defile her. He gave her some food and she went back home. Her mother, **PW2 C.A.O.** came home at about 2.00 pm and found her looking confused. She enquired whether **PW1** had eaten. **PW1**, while holding her own underwear narrated to her mother what had happened. She then observed that there were streaks of a fluid that resembled semen. She reported the matter at the Chief's camp and was advised her to seek treatment. She took PW1 to Nairobi Women's Hospital where she was examined and a PRC Form issued. She went back to file a report with the police. On 10th December, 2014, **PW6, CPL Catherine Wangui** who was the investigating officer escorted **PW1** and **PW2** to the Police Doctor, Dr. Maundu who testified as PW4. **PW4** found that there was bruising on the anterior part of the vaginal wall but no tears or lacerations were observed. The PRC form was produced into evidence by **PW5, Dr. Kinuthia Mbugua**, in charge of the TB department. The same had been prepared by Dr Kinoti. The finding was that the hymen was broken but the outer vaginal area was normal.
16. In this instance the age of the minor is not contested. The Appellant's identification on the other hand was by way of recognition. It is evident that the Appellant was a neighbor of the complainant and her family. It is also evident that the Appellant was arrested by a mob from the compound that both he and the complainant lived. While the Appellant relies on the house number to disprove identification, it is not established that his house was numbered. I find that the evidence of the minor on identification is clear and cogent. In a similar manner, I make a finding that the evidence of penetration was sufficient. This is a case I am of the view will most likely result in a conviction if a retrial were ordered.
17. It is case that involved a minor only aged three years, demanding that justice should be done for the voiceless. The trial began in the year 2015 and although the Appellant was in remand the penalty attendant to the offence though not mandatory mitigates that the trial be heard afresh.
18. In the circumstances, 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 Industrial Area Police Station not later than 31st July, 2019 for purposes of preparing him to take plea not later than 2nd August, 2019. The trial court file shall be remitted back to the trial court. It is so ordered.

DATED and DELIVERED in Nairobi this 23rd day of July, 2019

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

- 1 *Musyoka holding brief for Mogoi for the Applicant*
- 2 *Mr. Momanyi for the Respondent.*