REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 132 OF 2016

RODGERS KALAMA POLA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in Kaloleni Principal Magistrate's Court Criminal Case No.142 of 2016 delivered on 26th October, 2016 by Hon. L.K. Sindani, Resident Magistrate)

JUDGMENT

1. The appellant herein was convicted and sentenced to life imprisonment for the offence of defilement of a child contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No 3 of 2006.

2. The particulars of the charge were that on the 28th June, 2016 in Kilifi County within Coast Region, intentionally and unlawfully committed an act which caused penetration of a male genital organ namely penis into a female genital organ namely vagina of MJW [name withheld] a child aged 2½ years.

3. The appellant on 7th November, 2016 filed a petition and grounds of appeal. On 23rd May, 2017, the appellant's Counsel at that time, Mr. Jumbale, applied for and was granted leave to amend the appellant's grounds of appeal. They are as follows:-

i. That the Learned Trial Magistrate erred in law and fact by making a finding on the appellant's conviction and sentence without considering that the charge of defilement as alleged by the prosecution was not proved beyond any reasonable doubt;

ii. That the Learned Magistrate erred in law and fact by failing to appreciate that the evidence adduced by the prosecution was inaccurate, inconsistent and contradictory to the extent that it was unreliable;

iii. That the Learned Trial Magistrate erred in law and fact in relying on extraneous matters to convict the appellant;

iv. That the Learned Trial Magistrate erred in law and in fact in dismissing the defence offered by the appellant as well as the defence witnesses without any sound legal basis; and

v. That the Learned Trial Magistrate made findings that were against the weight of the available evidence on record since the available evidence was purely circumstantial and insufficient to sustain a conviction.

4. On 16th October, 2018, Mr. Gakuhi, Advocate who was by then representing the appellant, filed his written submissions. Ms Ogweno, Principal Prosecution Counsel, filed submissions on behalf of the respondent, on the same day. In highlighting his submissions, Mr. Gakuhi argued that going by the evidence that was adduced before the Trial Court, the appellant should not have been convicted. Counsel for the appellant submitted that the evidence of the victim, who testified as PW3 was very short and the court noted that her mood was changing and she was not responding to questions put to her. The prosecution requested for PW3 to be stood down to the following day but she was never recalled.

5. It was submitted for the appellant that the proceedings of the lower court do not indicate if the answers on record were in response to questions put to PW3 in voir dire examination. He argued that in the circumstances, PW3's evidence should not be relied on.

6. Mr. Gakuhi further submitted that the appellant who was not represented was not given an opportunity to cross-examine PW3 and was therefore denied his fundamental right to a fair trial. Counsel for the appellant cited the case of **Johnson Muiruri vs Republic** [1983] KLR

where the court held that it is the duty of the trial court to carry out a voir examination to determine firstly, if a child is intelligent enough to testify, secondly, if the child understands the importance of telling the truth and thirdly, if the child understands the nature of an oath. Mr. Gakuhi pointed out that in the present case, questions and answers were not recorded.

7. In regard to the failure by the Magistrate to give the appellant an opportunity to cross-examine the complainant, Counsel for the appellant submitted that the court in the case of **Erick Onyango Odeng vs Republic** [2014] eKLR, stated that it is the Trial Court which has the singular advantage of seeing and hearing live witnesses and being subjected to cross-examination, which he said is the time honored device of testing the truth and correctness of the evidence tendered before the Trial Court.

8. He argued that the mother of the complainant (PW1) testified that PW3 did not tell them who the perpetrator of the offence was. He added that in accordance with the P3 form, the complainant said she did not know who the perpetrator of the offence was. Counsel for the appellant further stated that the Investigating Officer said that the complainant did not mention who the perpetrator of the offence was initially and that the appellant was arrested a month after the alleged incident. Mr. Gakuhi prayed for the appeal to be allowed.

9. Ms Marindah, Prosecution Counsel, argued the appeal on behalf of the respondent. She opposed the appeal and said that the prosecution proved the essential ingredients of defilement, that is, the age of PW3, that there was penetration and the identity of the perpetrator. Counsel for the respondent stated that PW3 was 2½ years old at the time the offence was committed and she could not speak due to the trauma she underwent as a result of the defilement.

10. It was submitted that PW3 mentioned and identified the perpetrator as Baba Rihana, who is the appellant, and that she disclosed the name days later, to her mother (PW1) and the Investigating Officer.

11. The Prosecution Counsel submitted that the Prosecutor in the lower court case applied for PW3 to be stood down and when the case was heard 2 months later, her trauma was apparent.

12. The Prosecution Counsel was of the view that the evidence of other witnesses proved that the offence of defilement occurred as the P3 form indicates that there was vaginal reddening and PW3 had no hymen.

13. It was further submitted that the court relied on the provisions of Section 124 of the Evidence Act to convict the appellant as PW3 had said that the appellant defiled her and that she was consistent in her evidence. It was also submitted that the appellant did not deny that he was a neighbour to PW3 and her family.

14. In regard to DW2 and DW3 who were called as defence witnesses, Ms Marindah submitted that they did not mention the events of 28th June, 2016 and could not account for the appellant's movement on that day. She prayed for the appeal to be dismissed.

15. In response to the respondent's submissions, Mr. Gakuhi stated that in cross-examination, PW1 said that she had earlier on made a report to her husband that the appellant had seduced her and that the Investigating Officer said that he was aware that there was a complaint made against the Village Elder's sons. He further stated that Section 124 of the Evidence Act was not complied with.

Analysis and determination

16. The duty of the first appellate court is to analyze and re-examine the evidence tendered before the lower court and reach its own independent decision, bearing in mind that it has neither seen nor heard witnesses testify, and make room for that fact. In the case of **David Njuguna Wairimu vs. Republic** [2010] eKLR the Court of Appeal reiterated this duty as follows:-

> **"The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."**

17. PW1, SM [name withheld] was the mother to PW3, the complainant. She testified before the lower court that on the evening of 28th June, 2016 while bathing PW3, she tried to wash her private parts but the child was behaving as if she was feeling pain. She explained that PW3 would move backwards when she tried to wash her private parts, which behavior was unusual.

18. PW1 further testified that she prepared food but PW3 did not eat. She noticed that PW3 was not putting her legs together. PW1 checked PW3's private parts and found that she was discharging much dirt and her vagina was open. She indicated that she told her husband to check and he found the child had been penetrated. The following morning they reported to the Police Station where she was told to listen to the child and see if she could find out who the perpetrator of the offence was. PW1 said that she went to Mariakani Hospital and on going back home, she started asking PW3 to tell her the identity of the person who did the act on her. PW3 told her that it was Babake Rihana (appellant). PW1 asserted that she asked PW3 several times about the person who did the act on her (defilement) and she maintained that it was the appellant.

19. PW1 gave evidence that she went to the Village Elder so that he could ask PW3 (who the perpetrator of the offence was) and she said it was the appellant. In addition, PW1 said that at the Police Station, PW3 said the same thing. PW1 stated that the appellant was staying in the same plot as her.

20. It was the evidence of PW1 that the Police went and arrested the appellant. While there, PW3 was asked about the issue and after sweets

were bought for her to make her talk, she said it was the appellant (who defiled her).

21. PW1 said that PW3 was 2 years and 8 months old having been born on 21st July, 2013. She identified PW3's Clinic Health Booklet as MFI - 1. PW1 stated that a P3 form was filled at the Hospital which she identified as MFI -2, PW3's treatment notes were identified as MFI - 3.

22. PW2, SW [name withheld] was PW3's grandmother. It was her evidence that on 29th June, 2016 at 7:00 a.m., PW1 called her and told her to go and see her child (PW3). She checked PW3 and noticed that she was discharging some dirt from her private parts. PW2 said that the dirt was semen. She told them (PW1 and PW3) to go to Hospital. PW2 said that she talked to PW3 after 3 days and on the 4th day as she spoke to her in the absence of other people, she asked PW3 who had defiled her and she said it was the appellant. PW2 stated that they used to live in the same plot with the appellant.

23. PW3 was the victim herein and a minor aged 2½ years. On being asked her name in court, she did not respond. On being asked several times if she knew the appellant, she nodded that she knew him. On being asked several times how she knew him, she kept quiet. She then said she did not know his name but whispered she knew him as Baba Rihana. She further said that it was Baba Rihana who hurt her. On being asked where she was hurt, she pointed to her private parts. At that point the Trial Magistrate noted that the mood of the child had changed and she had not responded to several questions. The Prosecution Counsel prayed for PW3 to be stood down until the following day. She was however never recalled to court.

24. I have gone through the evidence of the other witnesses and established that the prosecution came across headwinds when it came to the evidence of PW3. Due to the lapse on the part of the Prosecutor and the Trial Magistrate in the manner in which the case was conducted. Mr. Gakuhi submitted on issues that were not in the appellant's amended grounds of appeal. This court is enjoined by the provisions of Article 159(2)(d) of the Constitution of Kenya to administer justice without paying undue regard to procedural technicalities. I will proceed to consider the following issues for determination:-

(i) If voir dire was conducted;

(ii) If the appellant's right to a fair trial was violated by being denied an opportunity to cross-examine PW3; and

(iii) If a retrial should be ordered.

25. I have perused both the prosecution's evidence and that of the appellant and his 2 witnesses. It is apparent that voir dire was not conducted on PW3 who was a child of very tender age. After she had difficulties in talking, the Prosecutor did not apply to the court to treat PW3 as a vulnerable witness and thereafter resort to the use of an intermediary. After PW3 was stood down on the application of the Prosecutor, she was never recalled for further examination-in-chief, cross-examination and re-examination.

26. On the issue of voir dire examination, the Court of Appeal in the case **Maripett Loonkomok vs Republic** [2015] eKLR had the following to say on the origin and importance of voir dire examination:-

"But the origin of the rule on voir dire examination of a child witness as we know it today was first applied in the ancient yet landmark English case of R v Braisier (1779) 1 Leach Vol. 1, case XC VIII, PP 199-200, which incidentally was a case involving sexual assault on a girl under 7 years of age. The twelve Judges in that case stated, in part, that;

" ..an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, <u>on strict examination</u> by the court, to possess a sufficient knowledge of the nature and consequences of an oath ... for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence". (emphasis added).

27. In **Maripett Loonkomok vs Republic** (supra), the Court of Appeal held that an appellate court can uphold a conviction in some cases, even when voir dire examination has not been conducted, depending on the circumstances of the case. Having considered the evidence adduced in the lower court, this case does not fall in the category of cases that have been referred to in the above Court of Appeal decision. In this case, the only witness to the incident was PW3 who was a toddler. She should have been subjected to simple questions in voir dire examination for the Magistrate to establish if she was intelligent enough to give evidence and if she understood the meaning of telling the truth. The Trial Magistrate should also have established if she understood the meaning of an oath. At the age of only 2½ years, she probably would not have known the meaning of an oath but the Trial Magistrate was obligated to comply with the provisions of Section 19 of the Oaths and Statutory Declarations Act.

If the appellant's right to a fair trial was violated by being denied an opportunity to cross-examine PW3;

28. Section 50(2) of the Constitution of Kenya provides for the right to a fair trial. The said right extends to an accused person being accorded the right to cross- examine witnesses who adduce evidence against him, be it sworn or unsworn evidence.

29. Section 208 of the Criminal Procedure Code provides as follows:-

"(1) If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence (if any).

(2) The accused person or his advocate may put questions to each witness produced against him.

(3) If the accused person does not employ an advocate, the court shall, at the close of the close of examination of each witness for the prosecution, ask the accused person whether he wishes to put any questions to that witness and shall record his answer".

30. In addition, Section 302 of the Criminal Procedure Code provides as follows:-

"The witnesses called for the prosecution shall be subject to cross-examination by the accused person or his advocate, and to re-examination by the advocate for the prosecution". (emphasis added).

31. In the case of **H.O.W vs Republic** [2014] eKLR, the Court of Appeal stated as follows:-

" ..... That evidence seriously implicated the appellant but, at the end of it, for some reasons unrecorded, it was not subjected to cross-examination by the appellant who was present in court. There was no indication or any record to show that the appellant was afforded an opportunity to cross-examine this witness and no reasons were recorded as to why the procedure was not done. Unfortunately, the appellant was unrepresented and clearly could not apprehend his right to cross-examining the witness. He clearly relied on the trial court which had the duty to invite him, at the end of the witnesses' evidence-in-chief to cross-examine the witness, which invitation did not come forth in respect to this witness".

32. Cross-examination is a critical tool in criminal justice as it gives an accused person an opportunity to test the veracity of the evidence adduced by prosecution witnesses. In the present case, since PW3 was never recalled to finish off with her testimony, she was never subjected to cross-examination. After the prosecution failed to recall her, the Trial Magistrate should have summoned PW3 under the provisions of Section 150 of the Criminal Procedure Code, for cross-examination and re-examination if any, for the just decision of the case. Failure to recall PW3 rendered a fatal blow to the prosecution's case.

If a retrial should be ordered

33. In the case of **Wahuni Ngugi vs Republic** [2012] eKLR, the Court of Appeal had the following to say on the issue of retrial:-

"The law as regards what the court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Samar vs Republic [1964] EA 483, the predecessor of this court stated as concerns the issue of retrial in criminal cases as follows:-

"It is true where a conviction is vitiated by a gap in the evidence or other defect of 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.....a retrial should not be ordered unless the court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for 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. It is evident that the Trial Magistrate and the Prosecutor faltered in the conduct of the proceedings in the lower court. This has therefore led this court *suo moto*, to consider if a retrial should be ordered. The appellant was charged with the offence of defilement of a toddler aged 2½ years. He was arraigned in court on 29th July, 2016 to answer to the charges of defilement. Although he has been in prison custody for almost 3 years, weighing the gravity of the offence and that it attracts a sentence of life imprisonment, I am inclined to order for a retrial as the justice of the case demands that I do so. I further note that under the provisions of Article 49(1)(h) of the Constitution of Kenya, when charged afresh, the appellant will be entitled to bail pending trial, which is a constitutional right. A retrial will determine if indeed the appellant perpetrated the offence against PW3 or if he is innocent.

35. In the said circumstances, I hereby quash the conviction for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. I set aside the sentence of life imprisonment. The appellant shall be arraigned before the Principal Magistrate's Court, Kaloleni on 12th July, 2019 for plea taking.

DELIVERED, **DATED** and **SIGNED** at **MOMBASA** on this **5th** day of **July, 2019.**

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Gakuhi for the appellant

Ms Marindah for the DPP

Appellant present

Mr. Mohamed Mohamud - Court Assistant