REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO.157 OF 2014

(Consolidated with criminal Appeal No.159 of 2014)

BETWEEN

1.MORRIS MWENDWA MBAE.........................1ST APPELLANT

2. MARTIN MWANIKI MWANGI.....................2ND APPELLANT

AND

REPUBLIC..RESPONDENT

JUDGMENT

(From Original Conviction and Sentence in the Chief Magistrate's Court at Murang'a

S.O. Case No. 30 of 2013 delivered by Hon J. Wekesa, Ag. SRM on 11th December, 2 KMM014).

1. Both Appellants were jointly charged in the Chief Magistrate's Court at Murang'a in Sexual Offence Case No.30 of 2013. Each was separately charged in counts I and II respectively with the offence of defilement. It was alleged that on the 31st day of October, 2013 at [particulars withheld] in Kahuro District within Murang'a County of the Republic of Kenya, unlawfully and intentionally caused their penises respectively to penetrate into the vagina of NWN, a child aged 13 years.

2. They were also each charged with an alternative charge of an indecent act with a girl contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006 in that they unlawfully and intentionally indecently touched the vagina of NWN, a girl aged 13 years.

3. The Appellants was found guilty as charged and each was sentenced to serve twenty (20) years imprisonment respectively. Dissatisfied with both the conviction and sentence they preferred individual appeals to this court. The appeals have been consolidated for purposes of this judgment.

4. In his Amended Grounds of Appeal filed on 2nd September, 2019, the 1st Appellant raised four grounds of appeal which I have consolidated into three, namely that the prosecution's case was riddled with contradictions and inconsistences, that the investigations were shoddy and that the prosecution did not discharge its burden of proof.

5. The 2nd Appellant too relied on Amended Grounds of Appeal filed on 2nd September, 2019. He was dissatisfied that the learned trial magistrate did not sign his judgment, that the victim was not called for cross-examination, that the trial court relied on hearsay evidence which is not admissible in law and that the prosecution did not prove its case beyond a reasonable doubt.

6. The appeal was canvassed before me on 2nd September, 2019. Both Appellants were in person and they each relied on written submissions filed on 2nd September, 2019. The court also accorded them an opportunity to highlight the submissions. It was in the oral submissions that the Appellants raised an additional ground of appeal, that crucial witnesses were not called to testify. He cited the school mates of the victim who it was alleged found the complainant crying and reported the matter to the teachers. He also faulted the failure to call the teacher who called the mother of the complainant and informed her that he daughter had been defiled. The second Appellant too faulted the failure to call as a witness the person who informed PW2, mother to the complainant, that her daughter had been defiled.

7. The Respondent, through learned State Counsel, Mr. Mutinda opposed the appeal.

Submissions

8. The Appellants took issue with the fact that PW1, the complainant did not complete her testimony. They submitted that she was stood down immediately she began her testimony but the court failed to recall her to complete her evidence and be cross examined. According to the Appellants, the trial court relied on the evidence of PW2, the mother of the complainant in convicting them, which evidence they termed as hearsay since she did not witness the incident.

9. Additionally, the 1st Appellant submitted that the prosecution failed to call crucial witnesses, whom, if they had been called would have shed light as to what transpired. He cited the grandmother who used to stay with PW1 and the children who saw PW1 coming from the toilet crying claiming that she had been defiled. He also cited one teacher, a Mrs Nduati who called PW2 to inform her that her daughter had been defiled. According to the 1st Appellant, the failure to call these witnesses implied that PW2's evidence was uncorroborated and placed a doubt as to whether PW1 was defiled.

10. The 1st Appellant too faulted the police for conducting poor investigations. He pointed to the failure by the Assistant Chief to record a statement on the report that PW2 gave him. Further that after PW1 was taken to hospital, no medical evidence was adduced in court to show that PW1 had been treated save for the P3 form. He added that the evidence of PW5, the Clinical Officer who examined PW1 to the effect that she PW1 was mentally challenged could not be established as no proof was adduced in court.

11. Both Appellants submitted that penetration was not established. On the part of the 1st Appellant he submitted that although PW1's hymen was absent there was no evidence adduced linking him to its absence. It was his view that a DNA test ought to have been conducted so as to rule out his involvement in the offence.

12. The 2nd Appellant on the other had argued that although it was established that PW1's hymen was missing, identification as the person culpable was not established. He asserted that it was not established that penetration had not taken place on any other date other than the date charged.

13. It was the submission of both Appellants that the prosecution failed to prove their case beyond a reasonable doubt. They urged the court to quash the conviction, set aside the sentence and set them free.

14. Learned State Counsel for the Respondent, Mr. Mutinda opposed the appeal. He submitted that the prosecution proved their case beyond a reasonable doubt. He submitted that the victim who was a mentally challenged girl gave evidence that linked both Appellants to the offences. He submitted that the Appellants were properly identified as the culprits. He added that the age of the victim was established by way of a Birth Certificate which was adduced by PW6 (investigating officer) and a P3 Form, adduced by PW5, the Clinical Officer who treated PW1. As regards penetration, he submitted that it was established by the evidence of the victim herself and the medical evidence of the Clinical Officer.

15. Mr. Mutinda urged the court to take cognizance of the fact that defilement cases are rampant in Murang'a County, consequent which both the conviction and the sentence should be upheld.

Analysis and Determination

I have accordingly considered the respective submissions. I have also appraised myself with the record of proceedings. I have noted that the entire trial was a mistrial consequent which it would not be prudent to re-evaluate the evidence at this stage. I say so because the defect may necessitate the ordering of a retrial.

16. The victim NW was marked as PW1 after which the court commenced the *voire dire* examination. Before the examination was complete, the court made the following observation:

> ***"From the above, it is the view of the court that the child may not be in a position to testify in regards to this case as she appears not ready and fidgeting and looking scared when making contact with the accused person herein. We can take her mother's evidence today but court will take hers' later. PW1 be stood down for today. She will <u>be recalled</u>"*** (emphasis mine).

17. After this observation, the court went on to record the evidence of PW2. The case was adjourned and the remaining prosecution witnesses testified to the conclusion of the prosecution case. The learned trial magistrate never at all recalled PW1. The prosecutor too did not sound a reminder to the court to recall PW1. Effectively, no evidence of PW1 was taken. The trial magistrate entirely relied on the evidence of PW2, PW1's mother in concluding that the Appellants were identified as the culprits.

18. In the view of this court, the failure to recall PW1 was grave as she was the only witness who would have set pace of the Appellants' culpability. What PW2 said was purely hearsay evidence. She relied on what had been told to her by PW1 and a Mrs. Nduati both of whom never testified.

19. It is also on record that PW1 was mentally challenged. Although no medical evidence was adduced to this effect, the court on its own motion would have noted that fact and if it was of the view that PW1 could not testify by herself, directs that she testifies through an intermediary pursuant to Section 31 of the Sexual offences Act. This did not happen, again occasioning serious prejudice not only to her but to the entire trial.

20. The net effect of omitting to recall PW1 meant that key evidence was not recorded, not by the making of the witness herself, but the oversight of both the court and the prosecution. I cannot labour to conclude that this scenario presents a good case for a retrial. A retrial will ensure that a satisfactory trial is conducted as it will correct the defect and illegality.

21. In the case of **Opicho** V **Republic (2007) KLR**, 369, the court of Appeal held that:-

> ***"In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial: even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it"***

22. In the instant case, the defect on the trial was occasioned by the trial court's failure to conduct a proper *voire dire* examination and subsequently taking the evidence of PW1. I underscore the fact that PW1 presented herself ready to testify but the court stood her down and never recalled her as promised. This was a fatal blow not only in her interest but it vitiating a proper and impartial trial. It speaks against the tenets of a fair trial and criminal justice process. The injustice can only be mitigated if PW1 is accorded an opportunity to testify. It would not accord the prosecution an opportunity to fill up gaps in their case, as any case, PW1 had already been lined up to testify.

23. I have borne in mind that the trial commenced in January 2014 and the Appellants have since been in remand for a period of close to six years. But again, this is a case in which the Appellants took advantage of a mentally challenged minor; one who could not defend herself and required their protection. The interests of justice must tilt not just towards the Appellants but also towards the vulnerable complainant who could not speak for herself. The injustice of a long trial can be mitigated by ordering a retrial on a priority basis.

24. In summary, I quash the conviction, set aside the sentence and order that a retrial be conducted. I order that the Appellants be escorted to Kahuro Police Station not later than 10th September, 2019 so that they be presented before the Chief Magistrate's Court in Murang'a not later than 12th September, 2019 to take plea. The Deputy Registrar of this court shall ensure that the trial court file is remitted back to the Magistrate's Court on time. The Chief Magistrate must ensure that the trial is conducted on priority basis.

It is so ordered.

Dated and Delivered at Murang'a this 4th day of September, 2019.

G.W. NGENYE – MACHARIA

JUDGE

In the presence of:

1. 1st Appellant in person.

2. 2nd Appellant in person.

3. Mr. Mutinda for the Respondent.