



REPUBLIC OF KENYA

IN THE HIGH COURT OF KIAMBU KENYA

CRIMINAL APPEAL CASE NO. 119 OF 2017

PETER WANYONYI SHABAN.....APPELLANT

-VERSUS -

REPUBLIC.....RESPONDENT

(Being an appeal from Gatundu Criminal Case No. 700 of 2012 by Hon. Kinyanjui, (Ag. SRM) on 1st August, 2014)

JUDGEMENT

1. **Peter Wanyonyi Shaban**, the Appellant, was charged with the offence of defilement of a child contrary to **Section 8(1)** as read with **Section 8(2) of Sexual Offences Act No.3 of 2006**. The particulars were that on **10th day of August 2012** in **Gatundu North** within **Kiambu County**, intentionally and unlawfully committed an act which caused penetration with his genital organs namely penis into the genital organs namely vagina of **HNK** a child **aged 5 years old**.

2. In the alternative, he faced the charge **of committing an indecent act** with a female Contrary to **Section 11 (1) of the Sexual Offence Act NO. 3 of 2006**. Particulars being that on **10th day of August 2012** in **Gatundu North** within **Kiambu County**, unlawfully committed an indecent act with **HNK aged 5 years** by touching her genital organ namely vagina.

3. Having been taken through full trial, he was convicted and sentenced to **life imprisonment**.

4. Aggrieved, he appeals on grounds that;-

1) The learned Trial magistrate erred in Law and in fact in convicting the Appellant who was not properly identified and failure to do identification parade on Appellant who was unknown.

2) The learned Trial Magistrate erred in Law and in fact in convicting Appellant on flawed proceedings with contradictions and conflicts on case which was not proved beyond reasonable doubt.

3) The learned Trial Magistrate erred in law and in fact in convicting the Appellant without properly evaluating and analyzing evidence that the Appellant had only arrived around village the day before attack and could not commit offence not knowing his surroundings.

4) The Learned Trial magistrate erred in law and in fact in convicting the Appellant on evidence based on faulty finding of Voire dire contrary to section 19 of oaths and statutory declaration Act.

5) The learned Trial Magistrate erred in law and in fact convicting the Appellant even though DNA was not conducted on Appellant yet it was purported he was arrested almost immediately to confirm whether what the complaint had was connected to the Appellant.

6) The learned trial Magistrate erred in law and in fact in convicting the Appellant on circumstantial evidence not proved beyond reasonable doubt.

7) The learned Trial Magistrate erred in law and in fact in handling the proceedings casually failing to record, coram, language used or interpreter of court availed and also the language used by PW1.

8) The learned trial Magistrate erred in law and in fact in admitting the evidence of children who can be manipulated.

9) The learned Trial Magistrate erred in Law and in fact in convicting Appellant on evidence where age was not proved.

5. Facts of the case were that a person identified as the appellant went to the home of the victim and found her playing with her siblings, **PW2 SM** and **PW3 JW**. He sent PW2 to go and purchase a cake from the shop and took the victim to the farm where he violated her sexually. After the ordeal he ran away but went and told **PW3** to check on her. He went and found the victim crying. They went and reported the matter to their grandmother and mother respectively, who eventually reported to the police. Investigations carried out culminated into the arrest of the Appellant.

6. Upon being put on his defence, the appellant denied having committed the offence. He testified that on the **10th August, 2012** at about **10.00 a.m** while on his way to PW7 **GKN's** home to complete the work that he was doing the previous day, he used a footpath and in the process trespassed onto PW6 JW's farm, an act that angered her. She said that people had stolen her avocado and bananas and accused him of having passed by on the 9th. Being a stranger in the area, only his employer, PW7, knew him. PW6 vowed to find him. On arrival at PW7's home he was served with food and he worked until **1.00 -2.00 P.M.**, when he saw a group of people in company of PW6, who pointed at him and they attacked him. He scooped soil, threw it at them and ran away. However, on reaching near the centre the same group ambushed him and assaulted him until he became unconscious. He was arrested and taken to the police station and accused of having committed an act he did not commit.

7. The appeal was canvassed by written and oral submissions. It was urged by **Ms Celyne Odembo**, learned counsel for the Appellant that the Appellant was not properly identified. That the trial was not fair as the trial court did not indicate the language used and it did not give an opinion on the child's intelligence. That the case was of dock identification which is not the best identification; the child did not recall the date of the event and on cross-examination she did not know the appellant.

8. She argued that children's testimony having not been **water tight**, it needed corroboration through **DNA test** and the children were manipulated to mention a dark new man working in the neighborhood. That there was a likelihood that the child was defiled by a person she knew as she agreed and followed him to the farm.

9. The prosecution was faulted for shopping for a proper court to hear the matter. The trial court on the other hand was faulted for not noting considerable contradictions and failing to analyze evidence on the date the prosecution closed its case which meant that the decision was premeditated.

10. The Respondent (State) through learned state Counsel, **Mr. Maatwa** opposed the appeal. He urged that ingredients of the offence were proved. That the case was proved, penetration was not in dispute and the object used was a male genital organ. That the evidence of the minor was corroborated by that of PW2 and PW3. That the offence was committed during the day, all children said they did not know the appellant before but they identified him. That the appellant was arrested a few hours later by people known to him therefore conducting an identification parade was not necessary. That his conduct of running away pointed to a guilty person. And, there was no requirement for corroboration as provided by **Section 124 of the Evidence Act** if the court believed the victim. However, he added that there was corroboration in the matter.

11. Further, he urged that it was not necessary for the court to give reasons at the ruling stage as that would be pre-empting the judgment. That the case was not based on circumstantial evidence as the appellant was identified. He was known to the grandmother of the minors and his employer which made it a case of recognition.

12. On the issue of the language used, he argued that it was clear in that it was in Kiswahili as indicated on the court record and having participated in the case. That *voire dire* was done and failure to form an opinion by the court was not fatal as the child was five (5) years old.

13. This being a first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. (**See Okeno vs. Republic (1972) EA 32**).

14. To prove the case beyond reasonable doubt, the prosecution was duty bound to prove;

(i) The age of the victim

(ii) The act of penetration and,

*(iii) Positive identification of the perpetrator of the act (see **Fappythen Muthoka Ngui vs Republic (2012) eKLR**)*

15. PW4 **EWK** the mother of the victim adduced in evidence an immunization card which was evidence of the child having been born on the 27th day of **September 2007**. In the case of **Mwalengo Chichoro Mwajembe vs Republic, Criminal Appeal No. 24 of 2015 (UR)** it was stated thus:

‘This Court stated that age “can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof.”

16. This was proof of the age of the child who was five (5) years old at the time of the incident.

17. PW1 the victim was subjected to *voire dire* examination whereby the court directed her to give unsworn evidence and was subjected to **cross examination**. The purpose of conducting **voire dire examination** is to establish if a child understands the duty of speaking the truth. In the case of **Maripett Loon komok vs Republic (2016) eKLR** the court of Appeal was of the view that;

“It follows from a long line of decisions that *voire dire* examination on children of tender years must be conducted and that failure to do so does not *per se* vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child’s intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that;

“In appropriate case where *voire dire* is not conducted, but there is sufficient independent evidence to support the charge... the court may still be able to uphold the conviction.”

In the case of **Johnson Muirurivs. Republic (1983) KLR 445** the court of Appeal stated thus;

“1. “Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a *voire dire* examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.

2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.

3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child’s ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.

4. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.

5. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction.”

18. The fact that the court failed to record its opinion may suggest that it did not satisfy itself of the fact of the child having been capable of stating the truth therefore just allowed the child to present what she understood. Her evidence, therefore would call for some other evidence to corroborate it.

19. In her testimony she alluded to the fact of having been molested by the individual. She stated that the person made her lie down and he lay on her, removed her clothes and did bad things to her by urinating on her place for urinating and she was in pain.

20. PW5 **Stephen Mwangi Irungu** a clinical officer examined her and noted a perforated hymen with blood stains and the child was in pain. A high vagina swab conducted showed a few pus cells, red blood cells though no spermatozoa were noted. He opined that it was a case of sexual assault with urinary infection.

21. Penetration is defined by **Section 2 of the Sexual Offence Act thus;**

“The partial or complete insertion of the genital organs of a person into the genital organ of another person”

22. Evidence adduced proved partial penetration of the victim.

23. This therefore, brings in the issue of the perpetrator of the act of penetration.

24. In her testimony PW1 referred to the appellant as her assailant. On cross examination she stated that she did not know the appellant’s name. On re-examination, she stated that she knew the appellant before. PW2 her eight (8) years old brother, on cross examination stated that he did not know the appellant before as he had never seen him. PW3 the complainant’s seven (7) years old sister stated that she used to see the appellant along the road.

25. None of the children were where the appellant was found prior to being arrested. PW6 JWM, the complainant’s grandmother stated that the children went to the shamba and told her that the complainant was urinated on by a person she (PW6) had deterred from passing near their home earlier on. Therefore she decided to check on the person who had told her that he was doing casual jobs nearby. She decided to go and look for the person who had told him where he went to work. She remembered him vividly as he communicated in Kiswahili and he did not look like a Kikuyu. She found him at the employer’s place. According to her, the child went along and the appellant went towards them then asked for water and as they went to get it he started running away.

26. **PW7 GKN**, who had assigned the appellant some duties went home on **10th August, 2012** to find him working. On seeing him, the appellant asked for 20/= to buy cigarettes. He went to the road and was called by PW6 who alleged that the appellant had defiled the complainant. All over sudden he saw the appellant running towards the hill. He was pursued by some people who caught him. He explained that he was running away following the allegations.

27. **PW8 No. 74954 Corporal Jonathan Cheruiyot** re-arrested the Appellant and when the victim was taken to him, she was crying and she could not talk. In his defence the appellant explained that he ran because people attacked him with sticks while others punched him.

28. The Appellant's complaint is that identification in the circumstances was not **water tight**. PW2 who was older than the rest alludes to having given the perpetrator water prior to being sent to the shop to check if there was a cake. He had never seen the person before which means that he was a total stranger. The mother of the children, PW4, was categorical that the children did not see the person after his arrest. PW6 their Grandmother however, implied that the child saw him prior to his arrest. PW6 alleged that the lady owner of the farm where the appellant worked stated that he left the field. This implied that he had the opportunity of having committed the act. But, her evidence was contradicted by that of PW7 who had given him work. He stated that at 1.00 P.M. The Appellant was working on the farm. In fact, **PW8** the Investigation Officer stated that the Appellant was working some **500 metres** away from PW6's place. The allegation that the children had seen the Appellant as he trespassed on the land of the PW6 was also not confirmed by the children. These contradictions went to the substance of the case which the trial court should have interrogated. (**Also see Twehangane Alfred vs Uganda (2003) UGCA 6.**)

29. The charge herein was read to the appellant in Kiswahili, a language he was stated to have understood and he responded. Throughout the trial he was represented by an advocate who did not raise the issue of the accused having not understood the language. In the case of **Boniface Kamande & 2 others –vs- Republic (2010) eKLR** the court stated that:-

“Lastly we deal with the issue of language. In the particular circumstances of these appeals, we are satisfied the appellants fully understood the language used in their trial. The considerations we have set out in respect of the issue of the constitution must equally apply to this issue, hereby, the presence of advocate and at various stages of the trial and none pointing out that an appellant did not understand the language being used”

30. It is also contended that **DNA** should have been done to prove the fact of having committed the offence. It has been held that a fact of rape or defilement is not proved by a **DNA** test but by way of evidence (**“See AML –vs- Republic (2012) eKLR”**).

31. It was also erroneous on the part of the Appellant to allege that evidence of the child required corroboration pursuant to **Section 124 of the Evidence**. The alluded to provision of the law provides thus:

“Notwithstanding the provisions of section 19 of the Oath and statutory declaration Act, where the evidence of a child of tender years is admitted in evidence with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him”

“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth”

It is clear that the court can receive evidence of a child of tender years and act on it without corroboration if it finds the child truthful, a fact that should be recorded.

32. From the foregoing, looking at the contradictions that I have pointed out and the fact of the children having not identified the assailant who went to the farm with the complainant after the appellant's arrest, it was not safe for the trial court to return a verdict of **“guilty”**.

33. In the result, I find the Appeal having merit, which I allow. Consequently, I quash the conviction and set aside the sentence meted out. The appellant shall be set at **liberty** unless otherwise lawfully held.

34. It is so ordered.

Dated, signed and delivered this 12th day of September 2019

HON. L. MUTENDE

JUDGE