



REPUBLIC OF KENYA

IN THE HIGH COURT AT MILIMANI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 204 OF 2018

JOSEPHAT KIMANTHI MUTUA APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara Cr. Case No. 5311 of 2013 delivered by W. Oketch on 1st day of March,, 2018).

JUDGMENT

1. **Josephat Kimanthi Mutua** was in the main count charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on diverse dates between the year 2012 and 4th November, 2013 in Nairobi East District within Nairobi County unlawfully and intentionally committed an act which caused penetration with his penis into the vagina of TM a child aged 13 years.

2. In the alternative, he was charged with an indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act** in that he unlawfully and intentionally touched the vagina of TM a child aged 13 years with his penis.

3. The Appellant was found guilty of the main charge, was convicted accordingly and sentence to serve 20 years imprisonment. Dissatisfied with both the conviction and sentence, he preferred the instant appeal. In canvassing the appeal, he relied on the Amended Grounds of Appeal filed contemporaneously with written submissions on 1st October, 2019. He enunciated five (5) Grounds of Appeal which are that **Section 151 of the Criminal Procedure Code** was not complied with, that the prosecution evidence was scanty and contradictory, thus unreliable, that crucial witnesses were not called and vital exhibits were not produced, that the trial court denied him an opportunity to call defence witnesses and that his defence was not considered.

Submissions

4. In his written submissions, the Appellant stated that the entire trial was vitiated and therefore a nullity. He cited the non-compliance with Section 151 of the Criminal Procedure Code in that the minor victim was a person with mental disability whom the court failed to declare a vulnerable witness. He added that the trial court additionally failed to conduct a *voire dire* examination on the minor so as to test her intelligence and ability to testify. In that case, it was his submission that Section 19 of the Oaths and Statutory Declarations Act was not complied with. He referred to the case of **Onserio V Republic [1985] KLR 618** to buttress the submissions.

5. As regards the submission that the prosecution evidence was scanty contradictory and inconsistent, he cited the evidence of PW1 (minor) who testified that the house that was the scene of the crime was a single roomed house, contrary to the investigating officer's (PW5) evidence that the house was double roomed and that one room was used as a bedroom.

6. The Applicant also submitted that crucial witnesses were not called. He pointed to either a bar attendant or manager from the bar where the minor claimed she used to be taken to drink beer. In addition to this assertion, the Appellant submitted that in view of the prosecution's evidence that he had sent money to a doctor who would facilitate in PW1 procuring an abortion, the prosecution was required to adduce the Safaricom M-Pesa transaction showing such money transfer. In the absence of such evidence, the prosecution's assertion remained hearsay evidence and failed to accord with Section 107 of the Evidence Act.

7. As regards the submission that the Appellant's right to a fair trial was violated, the Appellant submitted that he was not accorded an opportunity to call his defence witnesses he had intimated he intended to call. According to him, after he gave his sworn defence, the learned trial magistrate proceeded to give a date for judgment notwithstanding that he wished to call a witness to support his defence. The intended witness, he stated, would have shed more light that he was framed.

8. Finally, the Appellant submitted that his defence was not adequately considered. His defence was that he had a relationship with the mother of the minor victim (PW1) but which broke after he became jobless. He asserted that the soured relationship culminated into PW1 being used to frame him. His view was that had the learned trial magistrate keenly evaluated the defence, he would have arrived at a finding that it dislodged the prosecution case.

9. Learned State counsel, Miss Chege conceded to the appeal on grounds that no *voire dire* examination was conducted on the minor witness who was then aged 13 years. Further that all other prosecution witnesses did not give evidence on oath as required by Section 151 of the Criminal Procedure Code.

10. Miss Chege urged the court to order a retrial, more so, noting that the evidence against the Appellant was overwhelming. She submitted that the Appellant was the step father to PW1. He used drugs to make her sleep after which he would defile her. He thus abused the trust bestowed on him as a father, consequent which he should stand a fair trial.

11. In rejoinder, the Appellant maintained that there was no sufficient evidence that would sustain a conviction. He urged to be set free.

Determination

12. The main issue for determination is whether the court should order a retrial. This is in view of the Appellant's submission that there was blatant breach of both Section 151 of the Criminal Procedure Code and Section 19 of the Oaths and Statutory Declaration Act. The Respondent conceded to the breach but urged the court to order a retrial premised on the submission that a retrial would likely result in a conviction as there exists overwhelming evidence against the Appellant.

13. Section 151 of the Criminal Procedure Act provides that:

“Every witness in a criminal cause or matter shall be examined upon oath, and the court before which any witness shall appeal shall have full power and authority to administer the usual oath”

14. The above provision is couched in mandatory terms that every witness who testifies in a criminal case must so testify under oath. Of course, such provision is not without exception such as regard to testimonies of children of tender years upon compliance with **Section 19 of the Oaths and Statutory Declarations Act**.

15. In the present case, the prosecution called a total of five witnesses. Except for PW1, who was the minor, the rest of the witnesses were adults. The trial court merely recorded their names but failed to indicate whether or not they had been sworn. Immediately after their names were recorded, the court proceeded to record their evidence. This ultimately breached **Section 151 of the Criminal Procedure Code** rendering the entire trial a nullity.

16. Besides, the trial court also failed to record the language in which the trial was conducted as envisaged under **Article 50(2), (b), (c), and (m)** of the Constitution. The same read as under:

“(2) Every accused person has the right to a fair trial, which includes the right:

(b) to be informed of the charge, with sufficient detail to answer it;

(c) to have adequate time and facilities to prepare a defence,

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial.”

17. It suffices to emphasize that an accused cannot be presumed to understand with sufficiency of the charge facing him if it is not indicated what language the court used in the trial. It is a cardinal requirement in a trial that if the accused does not understand the language of the court, an interpreter must be provided and the language of interpretation indicated. It is not sufficient for the record to show that an accused cross examined the witness whereas compliance with his ability to understand and follow the court proceedings have been isolated. The latter scenario obtains in the instant case consequent which the Appellant's right to a fair trial was violated.

18. Coupled with the above, it was submitted that no *voire dire* examination was conducted on the minor who testified as PW1. It is a requirement under Section 19 of the Oaths and Statutory Declarations Act that such examination must be carried out on children of tender age. The said provision reads:

“Where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed on sufficient intelligence to justify the reception of the evidence, and is possessed of sufficient intelligence of justify the reception of the evidence, and understands the duty of speaking the truth”.

19. **Section 2 of the Children's Act** defines who a child of tender years is, as ***“a child under the age of 10 years”***. The Act is not however explicit that this age accrues to exception to conducting a *voire dire* examination to children under the age of 10 years. Indeed, only the case law has settled this question, generally holding that for purposes of conducting a *voire dire* examination, a child of tender years is one below the age of 14 years. In this regard, the court of Appeal in **Samuel Warui Karimi v Republic (2016) eKLR, Court of Appeal, Nyeri, Cr.**

Appeal No. 16 of 2014 had this to say:

“We have not come across any other statutory definition of a child of tender years other than the above (referring to Section 2 of the Children’s Act) which in over was perhaps in formed by the broad interests of protecting children for criminal responsibility and not as a test of competency to give evidence in criminal proceedings. Court decisions regarding the competency of evidence by children of tender years have maintained a higher threshold of 14 years and not 10 years as witnesses of tender years whose evidence must be subjected to voire dire examination.

20. Just as the Court of Appeal observed, the re-known case used as a guide is that of **Kibangeny Arap Korir v Republic [1959] E.A 92 I** in which the then East African Court of Appeal held that a child of tender years is a child below the age of 14 years.

21. In the same decision (**Samwel Warui Karimi**), the Court referred to the case of **MK V Republic [2015] eKLR** in which the Court of Appeal sitting in Malindi considered as unnecessary to conduct a *voire dire* examination on a child aged 15 years. The Court was quick to note that the High Court has accorded different interpretations to who a child of tender years is, for purposes of conducting a *voire dire* examination. It referred to the case of **J.G.K v Republic [2015] eKLR (High Court at Nyeri)** in which it was held that a *voire dire* examination must be conducted on a child below the age of 18 years. In this case, Court of Appeal held that the High Court failed to distinguish the difference between the definitions of “child” and “a child of tender years”.

22. It also referred to the case of **Gamaldene Abdi Abdiraham & Another V Republic [2013] eKLR** (High Court at Garissa) in which the conviction and sentence were set aside on account of failure to conduct a *voire dire* examination on a child of 13 years at the time she testified.

23. The Court went to observe that conducting a *voire dire* examination was germane to a fair trial as guaranteed in the Constitution. Of course, the rationale is that the court must be satisfied as to the manner the child shall testify; whether she/he understands the meaning of taking of an oath and as to the reception of talking the truth.

24. In a more recent decision, of the Court of Appeal in **Patrick Kathurima V Republic [2015] eKLR** held as follows:

“We take the view that this approach resonates with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of Section 19 of Cap 15. We are aware that Section 2 of the Children’s Act defines a child of tender years to be one under the age of ten years. The definition has not been applied to the Oaths and Statutory Declaration Act, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes.”

25. There is therefore no doubt that the definition accorded at Section 2 of the Children’s Act has nothing to do with **Section 19 of the Oaths and Statutory Declarations Act**. The former is a guide to Criminal responsibility of children whereas in the latter case, the decisions of superior courts remain the guide. In that case, in as much as a court must apply common sense in defining who child of tender years is owing to variation in maturity in different children, a *voire dire* examination must be conducted to a child below the age of 14 years.

26. As shown in the Birth Notification Card, PW1, the minor was born on 14/2/1999. From her evidence, the incidents of defilement began sometime in November, 2012. She was thus around 13 years and 8 months as the date of the incident but above 14 when she testified. In my view therefore, it was not necessary to conduct a *voire dire* examination unless the court was of the view that she did not meet the threshold set out under **Section 19 of the Oaths and Statutory**.

27. A look at her evidence shows that she gave evidence in detail and completely answered the questions in cross examination. As such, the fact that a *voire dire* examination was not conducted on her did not vitiate the trial. Nevertheless, just as the trial court failed to do with other witnesses, it was not indicated that PW1 gave a sworn testimony yet she was cross examined. This again was a grave error that vitiated the trial; it was a nullity.

28. It follows that the only recourse is to order a retrial. In the case of **Ekimat Vs Republic [2005] eKLR, 1982** the Court of Appeal held that:

“A retrial should not be ordered unless the court is of the opinion that on a consideration of the admission or potentially admissible evidence a conviction might result, each case must depend on its particular facts and circumstances but an order of the trial court should be made only where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person”.

29. Again, in the case of **Opicho Republic[2009] KLR 369**, the Court of Appeal sitting in Nakuru 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.”

30. Of paramount consideration is whether a retrial is likely to result in a conviction. In the instant case, the Appellant was the step father to the complainant, PW1. He would send her for her from her grandmother’s home to go to Nairobi so that he could do shopping for school for her. Her mother would be away all the weekends. After serving food to the Appellant, PW1 would go to relieve herself after which the

Appellant would spike her food. He would thereafter have sex with her. Occasionally, she would come to when he was having sex with her. In other instances, he took her to a bar, bought her alcohol until she was very drunk. In the stupor of drunkenness, he defiled her. PW1 broke her silence when she reported the ordeal to a doctor in a chemist. The mother was in turn informed and the mother reported to the Police Station. She was taken to hospital and a medical report filed. The same was adduced in court by PW3, a Clinical Officer from MSF Clinic in Mathare. The examination was done on 18/4/2013 and it revealed multiple notches of old tear on the genitalia, an indication of old penile penetrating.

31. In his defence, the Appellant attributed his woes to relationship turn sour between himself and PW2, the mother to PW1. This was attributed to his joblessness as he could not be able to provide for the family. He further alluded that PW1 was a child of bad character. He denied committing the offence.

32. My summary of the evidence drives me to conclude that there is *prima facie*, evidence of the Appellant's culpability. The identification of the Appellant is not in issue. Penetration was also well established and so was the age of PW1 with the Birth Notification Card.

33. I agree the Appellant indicated before he testified in defence that he would call one witness. However, he failed to inform the court after testimony whether he still intended to call the witness. Be that as it may, in a retrial, he would have the opportunity to call the witness he wishes. So far, the prosecution evidence dislodged his defence.

34. Under **Section 8(3) of the Sexual Offences Act**, the Appellant is liable to a minimum of 20 years imprisonment. Following the **Francis Karioko Muruatetu & Another v Republic** case by the Supreme Court, minimum mandatory sentences have been declared unconstitutional. Hence, the court is at liberty to impose an appropriate sentence based on the circumstances of the case and the mitigation an accused offers.

35. The present trial commenced on 1/11/2013. On 22/1/2014, the Appellant was released on bond after spending slightly above two months in prison. Since his conviction, he was only been in remand for one year and 8 months. Cumulatively therefore, he has been in custody for one year and 10 months. This period cannot be deemed as sufficient punishment for such a heinous crime, more so, taking into account that the Appellant being a step father to PW1, abused the trust bestowed on him to protect his children. He deserves a more stringent punishment that would serve as deterrence.

36. I therefore find that the interests of just demand that a retrial be conducted. I accordingly quash the conviction, set aside the sentence and order that a retrial be conducted. The Appellant shall be escorted to Kayole Police Station not later than 21st October, 2019 for purposes of preparing him to take plea at Makadara Law Courts not later than 23rd October 2019. The Deputy Registrar of this court shall forthwith send the trial court file to the trial court for purposes of the retrial. Any exhibits produced shall be released to the investigating officer for further production in the fresh trial. It is so ordered.

Dated and Delivered at Nairobi This 14th October, 2019.

G.W.NGENYE-MACHARIA

JUDGE.

In the presence of:

1. *Appellant in person*

2. *Miss Nyauncho for the Respondent.*