REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 18 OF 2017

THOMAS KIMANI KINUTHIA..APPELLANT

=VRS=

THE REPUBLIC...RESPONDENT

{Being an appeal against the Conviction and Sentence of Hon. J. Kituku (Mr.) – PM Kiambu delivered on the 18th day of November 2015 in the original Kiambu Chief Magistrate's Court Criminal Case No. 192 of 2014}

JUDGEMENT

The appellant was charged with Defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act and in the alternative indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act.

The particulars of the main charge were that on 13th January 2014 at about 3pm at Muchatha within Kiambu County, he unlawfully and intentionally committed an act which caused penetration of his genital organ (penis) into the genital organ (vagina) of RM a child aged 13 years.

In the alternative charge it was alleged that on 13th January 2014 at about 3pm at Muchatha within Kiambu County he unlawfully and intentionally touched the vagina of RM a child aged 13 years with his penis.

The prosecution called three witnesses and the sum total of their evidence was that on the material day the complainant a thirteen-year-old class 2 mentally challenged child was on her way home from school when the appellant intercepted her and took her to his house. He removed all her clothes then his and then inserted his **"thing for urinating"** into her private parts. A cousin of the appellant who had noticed the appellant taking the child to his house went there and found him in the act. She took the child to the child's guardian and grandmother CAO (Pw1). The matter was reported to Karuri Police Station before the child was taken to Karuri Hospital where on 15th January 2014 she was examined by clinical officer Rahab Waweru (Pw3) who observed that she had a discharge in her vagina, a fresh tear on the hymen, the hymen was missing and her pant was soiled with a clear fluid. Pw3 also observed that the child was mentally challenged and that she had been seen by another medical practitioner on 13th and 14th January 2014, prior to the examination. The appellant was subsequently arraigned for these offences.

In his defence all the appellant said was that he lived in Banana; that he was a casual labourer; that he did not know why he was arrested and that he wished the court to consider the evidence on the record.

When the trial Magistrate retired to evaluate the evidence he found the appellant guilty of defilement, convicted him and sentenced him to twenty (20) years imprisonment.

This appeal is against the conviction and sentence. The appeal is premised on 10 grounds contained in the Amended Petition of Appeal filed herein by Maxwell M. Njeru Advocate on 8th August 2019. Those grounds are that: -

> **"1. THE Learned Magistrate erred in law and in fact in holding that the ingredients required for the offence of defilement had been proved to the required standard.**
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> **2. THE Learned Magistrate erred in law and in fact in relying on the prosecution's evidence that was scanty, inconsistent, disjoined, unreliable and full of glaring and material contradictions.**
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> **3. THE Learned Magistrate erred in law and fact in finding that the prosecution's case had been made out which case was premised on hearsay and uncorroborated evidence.**

4. THE Learned Magistrate erred in law and in fact in not considering that vital and necessary witnesses were not called in contravention of provisions of the Criminal Procedure Code.

5. THE Learned Magistrate erred in law and fact by failing to comply with mandatory provisions of the Criminal Procedure Code and the Evidence Act.

6. THE Learned Magistrate erred in law and in fact by failing to find that the voire dire examination did not meet the standards set by the law.

7. THE Learned Magistrate erred in law and fact by reaching conclusions on facts and giving opinions not founded in law and or supported by the evidence tendered by any witnesses.

8. THE Learned Magistrate erred in law and fact in finding that the prosecution had proved its case beyond reasonable doubt.

9. THE Learned Magistrate erred in law and fact in not according the Appellant his constitution right to a fair hearing in contravention of mandatory provisions of the Constitution, 2010.

10. THE Learned Magistrate erred in law and fact by meting out an illegal conviction not provided for by the law."

Counsel for the appellant canvassed the appeal through written submissions to which Prosecution Counsel responded orally.

In brief, Counsel for the appellant submitted that the evidence adduced could not sustain a charge of defilement and that the age of the complainant and the identification of the perpetrator both of which are crucial elements of the charge were not proved. On age, Counsel submitted that no evidence was adduced at all. Counsel submitted that the only piece of evidence that would have suggested the complainant's age was the P3 Form. Citing the case of **Dennis Abuya V Republic [2010] eKLR,** Counsel submitted that the P3 Form alone was not conclusive evidence of the age of the appellant. He urged this court to find that age was not proved beyond reasonable doubt. Counsel further submitted that the evidence the trial Magistrate relied upon to convict the appellant was scanty, disjointed, contradictory and uncorroborated and that it also consisted of hearsay. Counsel contended that Mary, the alleged eye witness ought to have been called to testify as her failure to do so rendered the evidence of Pw1 hearsay. Counsel urged this court to note that the trial Magistrate failed to state that he believed the complainant and submitted that this was fatal to the prosecution's case. On this he relied on the cases of **BKN V Republic [2013] eKLR** and **James Ouma Onyango V Republic [2019] eKLR**. Counsel also took issue with the omission by the prosecution to produce a treatment card to which the clinical officer (Pw3) had made reference and submitted that there was no medical evidence connecting the appellant to the commission of the offence. Counsel contended that even **Section 124 of the Evidence Act** could not apply as the trial Magistrate did not record that he believed the complainant let alone the reasons for doing so. Citing the case of **James Ouma Onyango V Republic (Supra)** Counsel urged this court to draw an adverse inference from the omission to call Mary as a witness.

Counsel further submitted that the appellant's right to a fair trial was violated as the trial Magistrate did not observe the mandatory provisions of **Section 200 (3) of the Criminal Procedure Code**; that the trial Magistrate did not conduct the voire dire properly and did not afford the appellant his right to examine the witnesses as provided under **Article 50 of the Constitution and Section 146 (4) of the Evidence Act**. Counsel urged this court to follow the decision of the Court of Appeal in **Moses Ndichu Kariuki V Republic [2009] eKLR**. Counsel contended that the conviction was illegal and it ought to be quashed.

On the sentence, Counsel submitted that the same was extremely excessive given that it did not consider the appellant was a first offender and did not take into account the time he had spent in remand.

On his part, Prosecution Counsel Mr. Kasyoka submitted that all the elements of the offence of defilement had been proved beyond reasonable doubt. He stated that the age was proved through the evidence of the clinical officer who stated that the complainant was 13 years old and relied on the case of **Richard Wahome V Republic Criminal Appeal No. 61 of 2014** to support his submission that even oral testimony suffices to prove the age of a victim of a sexual offence. Counsel submitted that penetration was corroborated by the P3 Form and that identification of the perpetrator was not in doubt. He disputed that there were inconsistencies in the prosecution's case or that it was based on hearsay. On the submission that the prosecution omitted to call necessary witnesses, Counsel noted that the prosecution was compelled by the court to close its case before it called all the witnesses it intended to call. He however submitted that **Section 143 of the Evidence Act** is instructive that there is no number of witnesses required to prove a case. Counsel contended that the conviction rested on the evidence adduced and that the appellant was accorded a fair hearing and the sentence was lawful.

In his reply, Counsel for the appellant reiterated his earlier submissions and urged this court to find merit in the appeal and allow it.

As the first appellate court my duty is to analyse and evaluate the evidence in the lower court so as to arrive at my own independent conclusion while bearing in mind that I did not see or hear the witnesses who gave evidence **(see Okeno v Republic [1972] EA 32)**. Having done so I am satisfied that the ingredients of the offence of defilement to wit **age of the complainant, penetration** and **identification of the appellant as the perpetrator**, were proved to the standard required in criminal cases. The proviso to **Section 124 of the Evidence Act** removed the strictures of corroboration in sexual offences and much as the complainant in this case was mentally challenged she so vividly narrated what was done to her as to leave no doubt in my mind that there was penetration of her genital organ by the perpetrator. She also positively identified the appellant and I am not persuaded that the omission to call Mary the alleged eye witness vitiates the case. The trial Magistrate conducted a voire dire which though not detailed was sufficient to disclose whether the complainant was a competent witness. The record shows that the complainant was very confident and she ably fielded questions from the appellant. Be that as it may, the conviction against the appellant cannot stand as his right to a fair trial was violated by the **non-compliance** of **Section 200 (3) of the Criminal Procedure Code** which states: -

> **“(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.”**

In the case of **Ndegwa V Republic [1985] KR 535** the then Court of Appeal stated of the application of **Section 200 of the Criminal Procedure Code**:-

> ***“….. No rule of natural justice, no rule of statutory protection, no rule of evidence and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration…..”***

Indeed, **Article 25 of the Constitution of Kenya 2010** guarantees that the right to a fair trial cannot be limited. In the case of **Mark Limo Chesire V Republic [2019] eKLR** the Court of Appeal deciding on the non-compliance with the Section stated: -

> ***“Section 200 (3) provides in peremptory terms that it is the duty of the trial court to inform an accused person of his right to demand that any witnesses be resummoned and reheard. It would appear therefore that failure to inform the accused of those options would result in a mistrial as it would amount to an infringement of the right to a fair trial under article 50 of the Constitution.”***

The court subsequently held: -

> ***“…..We are satisfied that there was non-compliance with the mandatory provisions of Section 200 (3) of the CPC. The consequences of such failure leads to a mistrial. The appellants’ rights to a fair trial were therefore infringed and violated under Article 50 (1) of the Constitution.”***

In the instant case the succeeding Magistrate duly explained the appellant’s rights under **Section 200 (3) of the Criminal Procedure Code** to which the appellant clearly replied that he wanted all the witnesses to be recalled. It is however not clear from the record whether it was deliberately or by oversight that the appellant’s right was overlooked. What is clear is that the witnesses were not recalled and the succeeding trial Magistrate proceeded with the trial as if nothing had happened. I find that this oversight which was without any explanation whatsoever amounted to a violation of the appellant’s right to a fair trial and resulted in a mistrial.

As I have stated however there is evidence to support the charge and as the appellant has served only four years of the twenty (20) years sentence and there shall therefore be no prejudice to him if a retrial be ordered, I find this is a proper case for a retrial.

Accordingly, the conviction against the appellant is quashed and the sentence of twenty (20) years imprisonment is set aside and he shall be presented to Kiambu Chief Magistrate’s Court for a retrial by a Magistrate other than J Kituku. It is so ordered.

Signed and dated this 15th day of October 2019.

E. N. MAINA

JUDGE

Dated and delivered in Kiambu this 17th day of October 2019.

C. W. MEOLI

JUDGE