



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL APPEAL NO. 179 OF 2013

ELIJAH MUTHIKE GAKONO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence of the Principal

Magistrate's Court (E. H. Keago) at Baricho, Criminal

Case No. 306 of 2013 delivered on 8TH October, 2013)

JUDGMENT

1. The appellant **Elijah Muthike Gakono** was charged with the offence of defilement contrary to **Section 8 (1) (2)** of the **Sexual Offences Act**. It was alleged that on 16th March, 2013 within Kirinyaga County he unlawfully and intentionally caused his penis to penetrate the vagina of G. M. a child aged 6 years and eight (8) months. He was tried before the Principal Magistrate's Court Baricho in Criminal Case N. 306 of 2013, was found guilty and convicted. He was sentenced to imprisonment for life.

2. The Appellant was dissatisfied with both the conviction and sentence and filed this appeal raising the following grounds:

(a) The learned Magistrate erred in law and fact by affirming his conviction and sentence on the basis of hearsay evidence of P.W. 2 and P.W. 5 that was riddled with inconsistencies and contradictions.

(b) The learned Magistrate erred in law and fact by failing to find that voire dire examination of P.W. 5 was contrary to Section 151 of the Criminal Procedure Code and cannot form a basis of conviction without corroboration.

(c) The learned Magistrate erred in law and fact by failing to find that the minor did not testify contrary to Section 128 of the Evidence Act.

(d) The learned Magistrate erred in law and fact by failing to hold that the medical evidence casted doubt in the case.

(e) The learned Magistrate erred in law and fact by failing to find that he had no burden to discharge a plausible explanation regarding the offence.

3. The appeal proceeded by way of written submissions. This is a first appeal and I have a duty to analyse, evaluate and reconsider the evidence and come up with my own independent finding but bearing in mind that the trial magistrate had the chance to see the witnesses and assess the demeanor and leave room for that **Okeno -V- R (1972) E.A. 32** refers.

4. The prosecution called five witnesses in support of their case. P.W. 1 Hezron Macharia Maina was the clinical officer who testified that on 17th March, 2013 the OCS Kagio Police Station requested him to examine a patient by name G.W.M. who was aged six years and eight months on allegation of sexual assault. On examination, the labia minora had multiple bruises with redness, hymen had multiple old lacerations and vaginal wall was swollen and red. She had a clear discharge but no blood was noted. He concluded that the child had been defiled. He filled a P. 3 form exhibit 1, treatment notes and post rape case form exhibit 2 and 3. The medical evidence proved that the complainant was defiled. The other witnesses are P.W. 2 P.M.M. who is the complainant's mother who testified that she received the report and took the complainant to hospital. P.W. 3 Gathumi Mathenge is a neighbor of the complainant who had employed the Appellant. He received the report and found that the Appellant had absconded from the farm house with all his belongings. P.W. 4 Deborah Atemu was the

investigating officer. P.W. 5 E. W. who was a minor aged five years testified that she was with the complainant when they went to the house of the Appellant where they were offered rice and 'sukuma wiki.' While there the Appellant defiled the complainant.

5. From the foregoing analysis of the evidence, it is clear that the complainant did not testify. From the record on 6th June, 2013 a minor girl was called and it was recorded that she did not want to talk (page 6 of the proceedings, page 7 of the record. The other minor who was called is P.W. 5 who was not the complainant. There is a lacuna in the prosecution case by failure to call the complainant. The trial magistrate did not indicate the minor who appeared and did not want to talk. Assuming she was the complainant, the trial magistrate ought to have applied the safeguards for a vulnerable witness as provided under the **Sexual Offences Act**. The complainant was aged six (6) years and eight (8) months. She was clearly a vulnerable witness. **Section 31** of the **Sexual Offences Act** provides:

“A Court in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is-

- (a) The alleged victim in the proceedings pending before the court,***
- (b) A child or***
- (c) A person with mental disability.....***

4) Upon declaration of a witness as a vulnerable witness in terms of this Section, the Court shall, subject to the provisions of sub-sections direct that such witness be protected by one or more of the following measures:-

- (a) Allowing such witness to give evidence under the protective cover of a witness protection box.***
- (b) Directing that the witness shall give evidence through an intermediary***
- (c)***
- (d)***
- (e) Any other measure which the Court deems just and appropriate.***

6. It is not clear why the complainant was not called to testify. The witnesses who testified were supposed to corroborate the evidence of the complainant. The complainant is said to be six years and eight months. This is a child who could communicate. The Court ought not to have proceeded without her evidence. A 'voire dire' examination should have been conducted to determine whether she possessed the necessary intelligence to narrate what happened and whether she understands the need to tell the truth. This is what is required where the Court has to receive the evidence of a child of tender years. **Section 19 of Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya** provides:-

“Where in any proceedings before any Court a 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 the oath, his evidence may be received, though not given upon oath, if in the opinion of the Court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth, and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with Section 233 of Criminal Procedure Code Cap 75) shall be deemed to be a deposition within the meaning of that section.

There was a misdirection by the trial magistrate for failure to examine the capability of the complainant to give evidence. A miscarriage of justice was occasioned for the complainant. Under the Constitution, it is now clear that justice must be done to all irrespective of status. **Article 159 (2) (a)** provides:

“In exercise of judicial authority, the Courts and tribunals shall be guided by the following principles:

-Justice shall be done to all irrespective of status.”

The Court should therefore do justice in a criminal case both the accused and the complainant. The complainant was a minor child of tender years who presented herself in Court to get justice but the Court failed to apply the safeguards which are available to protect children. Is this Court supposed to look the other side and say since the complainant did not want to talk the case ends. My considered view is that the Court should ensure that justice is done for the complainant as provided under **Article 159 (2) (a)** of the **Constitution (supra)**.

7. I am also minded of the provision of **Article 53 (2)** of the **Constitution** which provides:

“A child’s best interests are of paramount importance in every matter concerning the child.”

8. From the evidence adduced before the trial magistrate, there was overwhelming evidence against the Appellant. However the evidence of the complainant was crucial to sustain a conviction. It was the duty of the trial magistrate to apply the safeguards available for child witness. In the first place, it is not clear from the record whether the Court was cleared when the child was called and Court observed she did not want

to talk. Secondly the trial magistrate failed to conduct a *voire dire* examination. Thirdly the trial magistrate failed to use an intermediary. I am of the view that in view of the above constitutional provision, a retrial should be conducted for justice to be done for the complainant.

9. An order for retrial depends on the particular facts and circumstances.

“In the case of Benard Lolimo Ekimat V Republic [2005] eKLR the Court of Appeal held the following on the issue of retrial:

In the case of Ahmed Sumar V Republic [1964] E.A. 481, at page 483, the predecessor to this Court stated as follows:

“It is true that where a conviction is vitiated by a gap in the evidence or other defect for 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.”

The court continued at the same page paragraph H and stated:

“We are also referred to the judgment in Pascal Clement Bragan za V R [1957] EA 152. In this judgment the Court accepted the principle that a retrial should not be ordered unless Court was of the opinion that on a 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 the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause a injustice to an accused person.”

There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to court is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it.”

Further in the case of Bob Ayub -V- Republic (2010) eKLR the Court of Appeal held as follows on the issue of retrial:

“The relevant principles to consider when faced with such a matter have been stated severally by this Court. In the case of Murirui Vs Republic (2003) KLR 552 this Court held *inter alia* as follows:-

“3. Generally whether a retrial should be ordered or not must depend on the circumstances of the case.

4. It will only be made where the interest of justice requires it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not.”

I am of the view that the circumstances of this case calls for a retrial in the interest of justice. The case was concluded in October, 2013. It will be possible to trace the witnesses. There will be no prejudice or injustice to the Appellant. I therefore make an order that there will be a retrial of the Appellant by another magistrate other than E. H. Keago at Baricho Court. The proceedings before the trial Court show that the complainant was defiled and the evidence was overwhelming but the trial magistrate failed to take the evidence of the complainant who was a child of tender years despite the law having the necessary safeguards. The case of Bob Ayub (supra) the Court of Appeal ordered a retrial upon considering that life was lost and witnesses could be traced. In this case a helpless minor was defiled. It is in the best interest of the child that there be a retrial. I will allow the appeal. The conviction and sentence are set aside. The Appellant be tried by a magistrate with competent jurisdiction at Baricho Law Courts.

Dated and delivered at Kerugoya this 8th day of February, 2018.

L. W. GITARI

JUDGE

Read out in open Court, Mr. Sitati for the State, appellant present, court assistant Naomi Murage this 8th day of February, 2018.

L. W. GITARI

JUDGE

8.02.2018