



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 117 OF 2017

M M D.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.
2. Particulars being that on 19/01/2014 in Kajiado County willfully touched the genital organ namely vagina of D M, a child aged 10 years using his penis.
3. The Appellant pleaded not guilty and after trial he was convicted and sentenced to serve 10 years imprisonment.
4. Being aggrieved by the above verdict, the Appellant lodged petition and grounds of Appeal and raised the following grounds:-
 - 1. That the trial magistrate erred in law and fact by convicting Appellant without a medical examination report as required by law.*
 - 2. That the trial magistrate erred in law and fact by convicting and sentencing Appellant to 10 years imprisonment when there was no evidence of a eye witness.*
 - 3. That the trial magistrate erred in law and fact by failing to observe that there was a grudge between the Complainant's mother and the Appellant an averment that was supported by PW3 hence breaching section 169 of the CPC.*
 - 4. That the trial magistrate erred in law and fact by relying on fabricated evidence tendered by the prosecution.*
 - 5. That the trial magistrate erred in law and when he failed to observe that a birth certificate was not presented in court to support the age of PW1 as required by the law.*
5. The parties agreed to canvass appeal via submissions. The Appellant urged court to put into consideration that prior to sentence he was in custody for 1 year and 2 months thus same ought to be credited on his side and diminish sentence to that extent.
6. The Appellant says he has reformed and ought to be given a non-custodial sentence and that what he has served in custody is enough lessons. He has already acquired skills in various trades he has undertaken within prison and he is a reformed man. He has a wife and one child who used to depend on him wholly.
7. The appeal is opposed and it is submitted that the medical report was produced, and the doctor was cross-examined on the same.
8. The prosecution submitted that the court believed the victim and relied on the provisions of Section 124 Evidence Act thus no need of corroboration.
9. The P3 form indicated the child's age and also confirmed the sexual assault. Thus the offence was proved beyond reasonable doubt.
10. The duty of a first appellate Court as aptly put in the case of **Okeno V. Republic (1972) E.A. 32** is to scrutinize the evidence on record,

make its own findings and draw its own conclusions giving due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses. Guided by the condensed grounds of appeal, I will proceed to analyze and re-evaluate the evidence.

11. The evidence tendered was that PW1 was the complainant who gave a sworn testimony. She testified that one Sunday a long time ago she was with the accused person M M D and her younger sibling S and then M M D told her they go to the room and they went. He then told her to stand up and they did “*tabia mbaya*.”

12. She averred that he removed her pant and did to her “*tabia mbaya*” with his “thing” which she stated that she did not know what it is called, but stated that he put it on the place that she uses to urinate. It was her testimony that he then told her that he could kill her if she told her mother.

13. PW1 informed the Court that after he finished she went to wash the dishes. She later told her mother what had happened and she was taken to Makindu District Hospital and the incident was also reported to the police.

14. PW1 stated that M M D used to graze their goats and she knew him before. She stated that he had done that severally to her before. She identified him as the one before the trial court.

15. Upon cross examination the complainant stated that they left S outside when he told her they go to the room. She stated that S is 4 years old. She indicated that the accused person defiled her during the day but she could not remember what time it was. She testified that her mother did not tell her what to tell the doctor.

16. PW2 was B M1 who testified that on 20/01/2014 she was at home after coming back from selling milk.

17. She stated that on Sunday 19/01/2014 at night her daughter had told her that the accused person does to her “*tabia mbaya*”.

18. She stated that the accused persons sleeps with her and has sex with her and indicated that on that day she had done it. She told her that he does it when she has gone to Emali to sell milk.

19. The witness averred that the accused person was her employee whom she had taken as his son. It was also her testimony that before the said incident he had noticed that the accused person would steal from her.

20. PW2 had therefore reported to the chief and they agreed that he would look for her cattle first before should could release him. She however stated that when her daughter told her of the incident she took her to hospital and later reported the incident to Emali police station. She was later sent to Makindu District hospital where the P3 form was duly filled. She averred that the accused person had stayed at her home for a very long time as he used to herd her goats.

21. Upon cross examination the witness stated that she did not witness the incident but her daughter told her what had happened on Sunday 19/01/2014 and on the next day she took her to hospital. She denied accusing the accused person falsely in this case for allegedly stealing her goats.

22. She indicated that the accused failed to escape after committing the offence because he thought the truth will not be known.

23. PW2 further indicated stated that when her daughter told her of the incident she was scared and from then on she would not leave her behind and would go with her to work.

24. PW3 was B M2 who testified that on 19/01/2014 at 7.30 p.m. he got home and found his mother, his wife and the accused person at the cowshed and his mother told him that M M D had married Kiperian and made her his wife. The witness stated that he got shocked and kept quiet. He went to his house and his wife followed him and he asked her to tell him what exactly was going on.

25. The witness averred that K also known as D M is his cousin as their mothers are sisters. He indicated that his wife told him that their son had done “bad manners” with K and when his mother heard hem beat K and K told her that she had learnt that from M M D.

26. PW3 indicated that he told his wife that they should not accuse M M D without proof. It was his testimony that he had lived with M M D for 2 years and he had even raised his kids. The witness informed the court that on the following day his mother took the child to hospital and the matter was reported to the police. He identified M M D as the accused person herein.

27. Upon cross examination the witness stated that when he heard about the incident he took it heavily because he used to regard the accused person and his mother had a grudge over lost goats. He indicated that he cannot remember who was grazing the goats but the accused managed to recover 6 goats and agreed to pay for the outstanding goats.

28. PW4 was Dr. Mercy Kariuki attached at Makindu District Hospital. She testified that on 24/01/2014 she examined the complainant herein D M.

29. On examination of her genitalia the vagina was red and there was no hymen and there was presence of a whitish discharge from the vagina. The HIV test was negative, pregnancy test was negative, the urine test established bacteria and a vaginal swab showed infection. She opined that there was evidence of sexual assault.

30. The approximate age of injury was one day and the degree of injury was harm. She produced the P3 as exhibit.

31. Upon cross examination the doctor stated that the girl had been treated elsewhere and she only filled the P3 form. She stated that the accused person was not brought to the hospital for examination.
32. She further stated that she would not know who assaulted the girl. She averred that she saw her on 24/01/2014 and she had been treated on 23/01/2014.
33. She admitted that as per the P3 form the incident had taken place on 19/01/2014 the child had been defiled by the accused herein. She indicated that she learnt about the incident on 20/01/2014 when the child told her what had happened.
34. The investigating officer indicated that the mother of the complainant had a treatment card from the hospital where she had taken the child for treatment. She therefore recorded the statements and issued her with a P3 form that was duly filled.
35. On 23/01/2014 the accused person was arrested by AP officers and thereafter duly charged for the offence before the court.
36. Upon cross examination the investigating officer stated that the complainant stated that she was defiled but it was later established by the doctor that she had been indecently assaulted hence the charges before the court.
37. The investigating officer averred that she believed what the child stated and did not know whether the mother of the child wanted to accuse the accused person falsely. She indicated that the child had already been treated before the matter was reported but she was escorted by a police officer when the P3 form was filled.
38. The prosecution closed its case at that point and the accused was put to his defence whereby he gave an unsworn statement and stated that he had no witnesses to call.
39. The accused person stated that on 25/01/2014 he woke up to carry out his normal duties and on that day he had planned to go and look for cattle that had gone missing and that was when he saw AP officers come to his employer's house at around 7.30 a.m.
40. They were pointed to him and he was told to board the vehicle and he did without asking any questions. They took him to Emali police station and he was interrogated on the case before the court. He indicated that he was surprised because he had never disagreed with anybody.
41. He informed the court that it was then alleged that he had defiled the complainant yet the case before the court was of indecent act. He was thereafter charged in court. He stated that he had been falsely accused by B M1 who was his employer due to a grudge they had between them due to cattle that had gone missing on 25/12/2013.
42. He stated that the said goats had gone missing under the watch of PW3 and not him. He indicated that he had asked B M1 to allow him to go home and she told him that he could not until he finds the goats. He stated that the goats missing were 10 and he managed to find 6 and further stated that amongst the goats missing two were his.
43. It was his testimony that in spite of finding the 6 goats out of 10 B M1 refused him to go to his rural home. She instead decided to take him to the area chief Elijah and the chief ruled that once he found the goats he would release him to go home.
44. The accused person informed the court that they were then chased out of the house they used to sleep in at B M1's homestead and they had to move in with their colleague.
45. He indicated that from then on hatred arose and the said B M1 would not even speak to him but would threaten him that she would teach him a lesson that he would never forget. They stayed for about three days and on 25/01/2014 he saw officers come to arrest him.
46. The accused person further stated that at trial B M2 duly testified that someone else had been seen at the scene of the incident and not him (the accused).
47. The said B M2 also confirmed to the court that there was a disagreement between him (the accused person) and his mother. He urged the court to look at both sides while delivering its verdict because he had been falsely accused.
48. After going through the evidence on record and the submission, I find the issues arising are:-

1. ***Whether the Appellant was accorded fair trial and whether the proceedings were defective?***
2. ***Whether the prosecution proved its case beyond reasonable doubt.***

49. On the first ground, the court is forced to look into the process of the *voire dire* employed by the trial court. The same is reproduced namely:-

Voire dire examination of the minor.

Court: What is your name?

Minor: D M.

Court: How old are you?

Minor: I am 10 years old.

Court: [particulars withheld] Primary School. I am in class 2.

Court: Do you go to church?

Minor: [particulars withheld] Church.

Court: What are you taught in church?

Minor: We are taught the Bible and I sing in the choir.

Court: Do you know the difference telling the truth and lying?

Minor: No. But the people who lie will be beaten.

Court: Why are you in court today?

Minor: For nothing.

Court: Minor intelligent. Court finds her fit to give a sworn testimony.

50. There are 2 answers by the child which nullified the same vide “**Court:** Do you know the difference of telling the truth and lying?
Child: No. But the people who lie will be beaten. **Court:** Why are you in court? **Minor:** Nothing. **Court:** minor intelligent. Court finds her fit to give a sworn testimony.

51. The purpose of *voire dire* is set out in the following jurisprudence Section 125 of the Kenya Evidence Act provides that all persons are competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions by reason of tender years, extreme old age, diseased body or mind or any similar cause. Therefore as a general rule all persons are competent to testify including children.

52. Section 124 further provides that notwithstanding the provision of Section 19 of the Oath and Statutory Declaration Act, where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in a proceeding against any person for an offence, the accused person shall not be liable to conviction of such evidence unless it is corroborated with other material therefore implicating him, provided that in criminal cases involving a sexual 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.

53. In light of Section 19 of the Oath and Statutory Declaration Act, if the court is receiving the evidence of a child of tender age, it must be of the opinion that she/he possessed of sufficient intelligence to understand the duty of speaking the truth. If such a child willfully gives false evidence on oath he/she will be guilty of perjury.

THE VOIRE DIRE PROCESS.

54. This is a question and answer process between the child and the court for the purposes of establishing whether the child possesses intelligence to;

- ***Understand the nature of an oath,***
- ***Know the difference between telling the truth and lying,***
- ***Prepare the child to testify truthfully,***
- ***Observe, remember and verbally describe events.***

55. In **John Otieno Oloo v R[i]**, the Court of Appeal held that failure to form an opinion on a *voire dire* examination occasioned a miscarriage of justice.

56. In **Kiune v R[ii]**, the court said that “in any proceeding 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 event his sworn evidence may be received.

57. If the court is not so satisfied, his unsworn 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.

58. The procedure for admitting a child witness was set in **Kinyua v R**[iii]. This was a murder where two school boys gave evidence in court. The accused was convicted and appealed on the ground that the court erred in admitting evidence from the two boys as the trial judge did not conduct a proper *voire dire* and the evidence of the boys was not corroborated as required in **Section 124 of the KEA**. The Court of Appeal held that two steps were to be followed.

59. First, the court must ascertain whether the child understands the nature of the oath. An investigation to this effect must be done by the court immediately the child witness appears in court.

60. The investigation need not be a long one but it must be done and has to be directed to the particular question whether the child understands the nature of an oath. If it appears that the child understands the nature of an oath, the court proceeds to swear or affirm the child to his evidence.

61. Secondly, if the child does not understand the nature of the oath he's not necessarily disqualified from giving evidence. The court, may still receive the evidence if satisfied upon investigation, that the young person is possessed of sufficient intelligence and understands the duty of speaking the truth.

62. The investigation must be done and appear in record. If the court is so satisfied, then it will proceed to record unsworn evidence from the child witness.

63. The court also was keen to note that the boys' evidence was corroborated by an expert who said that the deceased's death was caused by multiple body injuries and burns.

64. The above procedure was affirmed in **Yusuf Opichor v R**[iv]. The court set aside the conviction and the sentence and ordered a retrial on the ground that despite the prosecution's request for the child witness to be examined, there was nothing on record to show the manner in which the child was examined and his response thereto.

65. It found that there was a **section 19 of the Oath and Statutory Declaration Act**, and the procedure set in Kinyua, and this led to vitiation of witness' evidence.

66. In **Musikiri v R**, it was said that even a child does not understand an oath. Nonetheless he may give unsworn evidence. On the issue of corroboration, in **Johnson Muiuri**, it was held that corroboration is necessary in case of unsworn evidence.

COMMON LAW POSITION

67. Under common law, the position is the same regarding child witnesses. The court may take a step towards providing the child with clues aimed at refreshing her/his memory. In addition, judges have the authority to assist the child witness feel comfortable in the formal setting of the courtroom.

68. The judge may; wear casual clothes, rearrange the furniture and hung children's drawing, provide child size chairs, permit the child to testify out of the witness stand.

69. Before the trial the judge may introduce himself to the child and allow him to explore the courtroom, it should also be considered as of importance where the child's family sits during trial.

70. It is also advisable that the child witness is allowed to stay in the court room and feel relaxed being around familiar faces. The number of interviews prior to the trial should be minimal since multiple interviews might subject them to trauma all over again

71. The court detoured out of the same process and substance and failed in its duty rendering the entire process a nullity. This is so because it was crucial for court to diligently establish the fitness of the child to give credible evidence as the court was eventually to rely on principally in her uncorroborated evidence to convict the accused under section 124 Evidence Act.

72. In summary the court finds that the error committed warrants quashing of conviction and setting aside sentence. Court finds that the matter can still be retried taking into account of the nature of the offence and the circumstances of the case.

73. The time lapse from time of alleged offence to date cannot be taken to be prejudicing any party nor the period served by the Appellant.

74. Thus the court makes the following orders:-

1) The appeal is allowed, conviction is quashed and sentence set aside.

2) This matter will be retried by any other magistrate save E. M. Muiru – Resident Magistrate.

SIGNED, DATED AND DELIVERED THIS 11TH DAY OF JUNE, 2018 IN OPEN COURT.

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C. KARIUKI

JUDGE