



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 97 OF 2014

BENSON WAWERU MWITHUKIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Honourable M. A. Otindo Resident Magistrate,

delivered on 2nd May, 2014 in Nakuru Chief Magistrate's Court Adult Criminal Case No. 291 of 2012)

JUDGMENT

1. The Appellant herein is Benson Waweru Mwithukia. He was charged before the Nakuru Chief Magistrate's Court with a single count of defilement contrary to section 8(1)(4) of the Sexual Offences Act. It was alleged in the charge sheet that on 02/12/2012 at [particulars withheld] village in Njoro district of the former Rift Valley Province, the Appellant unlawfully and intentionally inserted his male genital organ namely the penis into the female genital organ namely the vagina which caused penetration of a child named MN aged 4 years.

2. The Appellant faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars regarding date, place and victim were the same as those in the principal count save that the alternative count alleged that the Appellant committed the indecent act by touching the genital organs namely vagina of MN with his genital organs, namely penis.

3. The Appellant denied the charges and a fully-fledged trial ensued. The Prosecution called four witnesses and closed its case. The Learned Trial Magistrate formed the opinion that the Appellant had a case to answer and placed him on his defence. The Appellant gave a sworn statement and did not call any witnesses. At the conclusion of the case, the Learned Trial Magistrate convicted the Appellant of the principal charge and sentenced him to life imprisonment as provided for in the statute.

4. The Appellant is aggrieved by both the conviction and sentence and has preferred his first appeal to this Court. His Counsel filed Supplementary Grounds of Appeal which he orally argued during the hearing of the appeal. The three grounds are as follows:

*1. That the learned magistrate erred in law in convicting the Appellant on the offence of Defilement whereas the trial process was defective and a nullity on the basis that the court did not comply with the mandatory procedure for declaring a witness vulnerable and again the court failed to follow the requisite procedure before taking the testimony of an intermediary as provided for under the provisions of **Sections 31 and 32 (1) & (2) of the Sexual Offences Act as read together with Rule 7(8) and Rule 7(12) of the Sexual Offences Rules, 2014.***

2. That the learned magistrate erred in law when she proceeded to convict the Appellant without appreciating the fact that the complainant (victim) had not adduced any evidence to suggest partial or complete penetration of her genital organs so as to support the offence of defilement and further that the evidence adduced was weak and/or did not add up meaning that the offence of defilement was not proved to the required standards of proof beyond reasonable doubt.

*3. That the learned magistrate erred in law by proceeding with the trial and thereon convicting the Appellant without taking cognizance of the fact that the Constitutional Rights of the Appellant (then accused) had been violated for the trial proceeded without the Accused Person being accorded his right to legal representation whereby substantial injustice was occasioned and there arose a contravention of the provisions of **Article 50(2) (g) & (h) of the Constitution.***

5. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. In doing so, I am to be guided by two principles. First, I must recall that I

must make appropriate allowance for the fact that I did not have a chance to see or hear the witnesses. This means that I must give due deference to the findings of the Trial Court on certain aspects of the case. Second, in re-evaluating and re-considering all the evidence, I must consider the evidence on any issue in its totality and not any piece in isolation. This principle constrains me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings as a foil to endorse or reject its findings. See *Okeno v Republic* [1973] E.A. 32; *Pandya vs. R* (1957) EA 336, *Ruwala vs. R* (1957) EA 570.

6. The Complainant in this case, MN, was four years old at the time the offence was allegedly committed as well as the time of trial. When she was first put on the witness stand on 24/05/2013, she had difficulties comprehending the questions put to her by the Prosecution. The Court moved suo motto to declare her a vulnerable witness under section 31(1) and 31(4) of the Sexual Offences Act and directed, as a protective measure, that the Complainant's mother be her intermediary. The Court records indicate that the mother, M W, was sworn before acting as the intermediary.

7. On appeal, arguing his first ground of appeal, Mr. Kanyi, Counsel for the Appellant, argued that the trial was a nullity because the procedures outlined in sections 31 and 32 as well as the Sexual Offences Rules were not followed. In particular, Mr. Kanyi argued that the Court did not note on the record the factors it considered before declaring the witness vulnerable. Secondly, Mr. Kanyi complained that the Court did not note on the record that it had duly informed the vulnerable witness of the protective measures it had ordered. Thirdly, Mr. Kanyi submitted that the intermediary was not affirmed as required under Rule 7 of the Sexual Offences Rules, 2014. Lastly, Mr. Kanyi pointed out that the Sexual Offences Rules provides that the Accused Person should be informed of the appointment of the intermediary in writing. Mr. Kanyi relied on *Phineas Irungu Ngunjiri v R* (*Muranga High Court Crim. App. No. 191 of 2013; [2014] eKLR*)

8. I should begin by noting, as Mr. Motende, the Prosecution Counsel pointed out, that the Sexual Offences Rules were not in application when the case was heard and determined in the Lower Court. The Sexual Offences Rules of Court, 2014 were gazette on 11/07/2014. This trial was conducted in 2013 long before then. To this extent, the complaints based on non-adherence to the Sexual Offences Rules are unavailing to the Appellant.

9. After carefully looking at the Trial Court record, I am also not persuaded that there was any fatal failure to follow the procedures for appointing an intermediary provided in sections 31 and 32 of the Sexual Offences Act. In this case, the Court acted suo motto as it is permitted to do under section 31(4) of the Act. The Court recorded that it was acting because it had "*note[d] that the child cannot comprehend the question asked by the Court, due to her tender age...I find the minor vulnerable and shall speak through her mother, M W.*"

10. I think this record is enough to pass muster under sections 31 and 32 of the Sexual Offences Act. The Complainant was 4 years old and unable to comprehend many things. It would have been futile to try to explain to her more than the Court did that it was taking protective steps on her behalf. The Court record gives clear reasons for the Court's move.

11. In any event, I note that section 32 of the Sexual Offences Act is meant for the protection of the vulnerable witness. It would be otiose to make a finding that technical failure to follow it should be utilized for the benefit of the Accused Person. However, I would point out that in cases where an appointed intermediary is herself an independent witness in a case, good practice demands that the intermediary should give her testimony first before acting as an intermediary. See *M v R (Court of Appeal at Nairobi Criminal Appeal No. 41 of 2013)*. However, though here the intermediary did not testify first, I find that there was no substantial prejudice to the Appellant.

12. Having done away with the Appellant's first ground of appeal, I will now rehash the evidence adduced at trial so that I can perform my duty to re-evaluate it before turning to the other two grounds of appeal.

13. The Complainant, MN, testified first. In her examination-in-chief given through the intermediary, her testimony was quite short: it was that her mother took her to the toilet when they visited her aunt in Molo and while there, her mother discovered that she had difficulties standing after using the toilet. Her mother, then, examined her "susu" (vagina) and took her to hospital. She testified that when her mother asked her what the problem was, she told the mother that the Appellant had come on a motor bike and taken her to his home.

14. MN's mother, M W, corroborated MN's narrative about when she discovered that MN had been defiled. She testified that she had gone to visit her sister in Molo with her children on 23/12/2012 when MN asked her to take her to the toilet in the evening. While there, MN complained about pain after urinating. This prompted M to ask her what had happened. MN, then, told her that one day while M was at work, the Appellant had gone and taken MN on his motor bike, took her to his house and defiled her.

15. M took MN to a Molo dispensary where she was referred to the Police.

16. The medical personnel who examined MN at Rare Health Centre was Tabitha Ngugi, a Clinical Officer. She testified that MN was taken for examination and treatment on 24/12/2012 with complaints that she had stomach pains and pain while urinating; and that she had been defiled. Upon examination, Ms. Ngugi found that her hymen had been ruptured. There were no infections or physical injuries. She noted that she examined the Complainant about three weeks after the alleged defilement. She prescribed medication for pain and antibiotics since all other tests were negative.

17. The Area Chief, Peter Kamau, testified about receiving information from a Mr. Mbaluka about the case with instructions to arrest the Appellant and take him to Naishi Police Station on allegations of defilement. He complied. He took the Appellant in a matatu to Naishi Police Station and handed him over to PC Masese.

18. Lastly, the Investigating Officer, PC Joseph Masese, testified about the report made at Naishi Police Station by Miriam, the Complainant's mother and the efforts he made to record the report on the Occurrence Book, issue P3 Form, take the Complainant for medical examination and the Appellant's arrest.

19. When put on his defence, the Appellant denied ever defiling the Complainant. Instead, he testified that the Complainant's mother had

fabricated the story to get back at him. This is because, he testified, that the Complainant's mother had tried to get him to sleep with him but he declined since they were cousins. He told the Court that this was the Complainant's mother's way of getting back at him.

20. The Learned Trial Magistrate was not impressed by the Defence's narrative. She analyzed the evidence thus in material part:

On whether it was the Accused Person who defiled PW1, PW1 was categorical that it was one Waweru whom she identified and pointed at as the Accused Person herein, the Accused Person has clearly in his evidence stated that this is a case of grudge against him by PW3 and that PW3 had influenced PW1 to frame him because he refuses to have sex with him. This could be a possibility, however, I find that a child of this age cannot be coached, the child was very candid and categorical, in fact in court, she cried when she looked at the Accused Person. I find that her evidence was very believable although I have to warn myself against believing the sole evidence of a child. From her demeanour, she did not look like a person who was coached or influenced. I choose to go by her evidence. I therefore find that the Accused's defence does not hold any water though it does not water down the defence's evidence. [Reproduced verbatim]

21. On appeal, Mr. Kanyi protests that the Learned Trial Magistrate erred in her finding of fact that there was penetration. This is because, Mr. Kanyi argues, there was no evidence before the Court to suggest any penetration; that the entire testimony of the Complainant does not speak about penetration at all. Mr. Kanyi submitted that it was, in fact, the mother who spoke of defilement and penetration and not the Complainant. As such, section 124 of the Evidence Act was not applicable since it was not the victim who testified about the defilement. To buttress his point, Mr. Kanyi pointed out that the Investigating Officer testified that he took a statement from the mother and not the victim. Further, Mr. Kanyi argued that the medical evidence did not corroborate a narrative of defilement: torn hymen does not necessarily mean there was defilement. Lastly, Mr. Kanyi expressed incredulity that a victim of defilement as young as the Complainant would endure the pain for three weeks before reporting to anyone about it. Mr. Kanyi cited **Ben Maina Mwangi v R [2006] eKLR** and **Michael Odhiambo v R [2005] eKLR**.

22. Mr. Motende, in response to this line of submissions by the Appellant, submitted that the evidence of PW3 was clear that the child was defiled by the Appellant; that PW3 testified that she examined the child and took her to the hospital; that the doctor found the hymen missing. Mr. Motende argued that failure to report within three weeks does not at all mean there was no defilement since it is likely that the child was suffering in silence.

23. I have now independently reviewed the full trial record and evidence adduced at trial as I am required to do.

24. In order to return a guilty verdict, the Court was required to ascertain that the Prosecution proved the three ingredients of the offence of defilement:

- a. That the victim was below eleven years old;
- b. That there was penetration; and
- c. That it was the Appellant who caused the penetration.

25. The age of the Complainant is not an issue at all in the case: both oral and documentary evidence (P3 Form and Medical Card of the Complainant) establish that the Complainant was four years old.

26. Was there penetration? The Appellant argues that there is no evidence that proves beyond reasonable doubt that there was penetration since no such evidence came directly from the victim. I disagree. While, of course, the Complainant, who is four years old, did not use the word "penetration" or "defilement", the context of her testimony is dripping with meaning that the Appellant defiled her. In her Examination-in-chief, she is clear that the Appellant came and took her in his motor bike. She relates this to the pain she was having in her stomach and while urinating. Then, in cross-examination by the Appellant, the Complainant says this:

She answer[s] that she did not tell anyone immediately because you threatened her. She say[s] that nobody witnessed the incident. She say[s] that you were alone in your house. She states that it is me who washes her when I come back from work. She says nobody told her to say what she has said before Court and that she is telling the truth to the Court.

27. From this account, I conclude that the Complainant is, in fact, testifying about being defiled given her earlier testimony during examination-in-chief. It is, therefore, not correct to say that the only evidence of penetration came from the Complainant's mother hence making section 124 of the Evidence Act inapplicable. It is important to recall that the Complainant was merely four years old. Her testimony must be read with this in mind. If one does so, any fleeting doubts that she was, in fact, speaking about penetration vanishes.

28. Further, the evidence given by the Complainant tallies with that of her mother who testified how she discovered about the defilement. The medical evidence about the missing hymen, therefore, further reinforces the evidence that there was penetration.

29. The Learned Trial Magistrate who heard and saw the witnesses was categorical in her analysis about the demeanour of the Complainant. She found the Complainant candid and forthcoming in her evidence. She also recorded the impact seeing the Appellant had on the Complainant. This is a relevant factor to consider under section 33 of the Sexual Offences Act. Coupling this her actual evidence and the evidence of the surrounding circumstances, I have no doubt that the Complainant was penetrated and defiled.

30. Turning to the last ingredient of the offence, I would also agree with the Learned Trial Magistrate that there was ample evidence linking the Appellant with the penetration. The Complainant told the mother at the first instance that it was the Appellant who had defiled her. She gave details of how he had picked her up in his motor cycle and taken her to his home. These are too pettifogging details for a child of four years old to make up. There is also no question that the Appellant is a relative (being a brother to the Complainant's father) and that the

Complainant knew him well. The incident happened during the day as well. There was, therefore, no possibility of mistaken identity.

31. The last thing I would like to comment on regarding the credibility of the Prosecution narrative is Mr. Kanyi's submission that if the narrative was true, the Complainant would have said something earlier than three weeks after the incident. This submission misunderstands the impact that sexual violence has on victims and especially children. It is now well understood in the relevant literature that victims of sexual violence may be hesitant to report the sexual assault on them due to fear, stigma, guilt or social norms. The hesitation to report is heightened among children who may not have the intellectual and emotional wherewithal to process the assault. To this extent, the failure by the Complainant to report the assault for three weeks does not, to my mind, detract from the credibility of her account.

32. I will finally turn to Mr. Kanyi's final submission. It is that the trial violated the Appellant's right to fair trial because, first, he was not informed of his right to have a lawyer represent him, and, second, he was not assigned a lawyer to represent him. Mr. Kanyi relied on *Joseph Ndungu Kagiri v R [2016] eKLR* to argue this point.

33. The Constitution at Article 50(2)(g) and (h) provides that:

Every Accused Person has the right to a fair trial, which includes the right:

(g) to choose, and be represented by an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at the State's expense if substantial injustice would otherwise result and to be informed of this right promptly.

34. On the right to be informed of the right to be represented by Counsel, a perusal of the Court record is clear that the Appellant not only knew of the right but also exercised it: when the matter came up on 11/03/2013, a Mr. Waiganjo, Advocate, asked to be placed on the record for the Accused Person. He requested, and was supplied with witness statements and charge sheet to prepare for the defence. Mr. Waiganjo was also in Court on 23/03/2013 when he requested for an adjournment. He was also present on 15/04/2013 when he requested for a new date. He suggested 19/04/2013. However, Mr. Waiganjo did not show up on 19/04/2013 or at any of the other appearances. So the case proceeded without him and with the Appellant acting pro se. In these circumstances, it is simply absurd to argue that the Appellant was not informed of his right to have an attorney of his choice represent him.

35. Should the State have provided the Appellant with legal representation? Various Courts have defined what "substantial justice" means for purposes of Article 50(2)(h) of the Constitution. Two clear principles seem to have arisen from case law. First, that the constitutional provision does not mean all persons accused of crimes are entitled to legal representation at the State's expense; and that each case has to be determined on its own merits. See *Dominic Kamau Macharia v R (Crim. App. No. 72 of 2012; [2014] eKLR*. Second, Courts have definitionally determined that there would be "substantial injustice" if a person charged with an offence whose maximum sentence is death is not supplied with legal representation if he cannot afford one. See *David Macharia Njoroge v R [2011] eKLR*.

36. Mr. Kanyi did not argue why he thought that in the present case "substantial injustice" was caused by the Appellant not being represented by Counsel. Be that as it may, in interpreting and applying that phrase, the Court must have a firm view of our context and circumstances as a nation. Doing so, and considering comparable cases, I am not persuaded that in this particular case the Appellant suffered any "substantial injustice" by not having a lawyer assigned to him. Among other factors I have considered is that the Appellant did, in fact, have a lawyer of his own although it is not clear why that lawyer chose not to participate further in the proceedings.

37. In the end, therefore, I find the appeal wholly without merit and I proceed to dismiss it. In doing so, I note that the Appellant was sentenced to the only penalty allowable under the statute given the age of the victim: life imprisonment.

38. Orders accordingly.

Delivered at Nakuru this 20th Day of September, 2018.

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JOEL NGUGI

JUDGE