



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 216 OF 2014

T K W.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the conviction and sentence of Hon. L. Simiyu in Machakos CMCR No. 1407 of 2013 delivered on 29th October, 2014)

JUDGEMENT

1. The Appellant was convicted of the offence of incest contrary to section 20 (1) of the Sexual Offences Act No. 3 of 2006 and sentenced to life imprisonment. The particulars were that, he on 19th November, 2013 at [particulars withheld] sub location, [particulars withheld] location in Machakos District within Machakos County intentionally and unlawfully caused his penis to penetrate the vagina of J.K. a child aged 7 years who was to his knowledge his daughter. The Appellant also faced an alternative charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006 particulars being that; the Appellant on 19th November, 2013 at [particulars withheld] sub location, [particulars withheld] location in Machakos District within Machakos County, intentionally and unlawfully touched the vagina of J.K. a child aged 7 years with his penis.

2. Facts are as follows. J.K. (PW1) was on the material day called into the house by the Appellant leaving her siblings N B and N outside. He asked her to fetch him water then told her to climb onto her parents' bed. He inserted his penis into her vagina and when he noticed J.K. was bleeding, he told her that if anyone inquired about it she should say that she was pricked by a stick. He then dressed her with pampers diapers. When her mother E N N (PW2) returned home and found her bleeding, she informed her that she had been pricked by a stick. The Appellant who is her husband informed her that J.K. had been hit by a tree and that he had washed the wound and tied it up. PW2 took J.K. to Machakos Level Five Hospital where upon check up, she was informed that J.K. had had penile penetration. All the while, J.K. maintained that she had been pricked by a stick until when she asked for sandals, PW2 told her to first tell her the truth and J.K. revealed that it was the Appellant who caused the injury using his penis. Dr. Abonga Josephine (PW3) produced a p3 form dated 5th December, 2013 and filled by Dr. Obare whose handwriting she was familiar with. Examination revealed that J.K.'s hymen was not normal, there was a tear on vagina extending to perineum, bleeding from tear. An opinion was formed that there was forceful entry to the vagina. J.K. was said to have been seen within four (4) hours from the incident. Sergeant Lorna Kimuma (PW4) interviewed PW1 who informed her that she was home playing when his father called her in, put her on bed undressed her and inserted his penis into her vagina. She felt acute pain and when she attempted to cry, the Appellant threatened her. She started bleeding profusely and the Appellant had her wear pampers diaper. He then told her to go to bed and that if anyone inquired what had happened, she should say that she had been pricked by a stick. That upon being taken to hospital, the doctor found that she had been defiled. PW4 received blood stained jeans trouser (P. Exhibit 5) and recorded J.K.'s statement. PW 4 was also given J.K.'s birth card (P. Exhibit 6) which revealed that she was born on 4th November, 2006. On cross examination, PW4 stated that the tree the Appellant showed her had no blood stains and that J.K. freely narrated to her what had transpired.

3. Put on his defence, the Appellant testified that he was at work on the material day when his two children went and informed him that J.K. had been injured. He went home where she found J.K. outside the house. She showed him her private parts and took her to the house and dressed her in a diaper because she was bleeding. He then went back to look for money to take her to hospital. On the way he met PW2 whom he informed of what had happened. They went back home and interrogated J.K. who informed them that she had been pricked by a stick. PW2 changed J.K.'s clothes and took her to hospital where she was admitted. On cross examination he stated that two of his children went to his work place to inform him that J.K. had been injured. That J.K. showed him the tree that pricked him and that it was possible that only her hymen was pricked by a stick.

4. The Appellant filed this appeal challenging the conviction and sentence. The grounds upon which this appeal is brought can be summarized as follows:

- a) That the Appellant's right to representation under Article 50 (2) (g) (h) of the Constitution was not communicated.***
- b) That trial was conducted in a manner that exposed the court was biased.***

c) *That the trial court failed to find that the evidence by PW1 exonerates the Appellant.*

d) *That the trial magistrate failed by rejecting his evidence which was plausible.*

5. This being a first appeal, this court is under duty to re-evaluate and reconsider the evidence afresh with a view to arriving at its own independent conclusion. This is done bearing in mind that it did not have the benefit of seeing the witnesses' demeanor. I shall address the issues simultaneously. On the first ground, the appellant submitted that the trial magistrate failed to inform him of his right to representation under Article 23 (1) of the Constitution. The Prosecution on the other hand cited Article 50 (2) of the Constitution and submitted that the trial magistrate was not obliged to inform the Appellant of his right to legal representation and that the said failure does not violate his Constitutional right or prejudice his right to fair trial. It was further stated that the State shall consider such representation where an accused is faced with a capital offence and on other instances where there are complex issues of law or fact where an accused is unable to conduct his own defence. It was further argued that there is no evidence that the Appellant suffered any substantial injustice due to lack of legal representation as he ably conducted his trial from start to finish.

6. The substantive law on legal representation is Article 50 (2) (h) of the Constitution which is in the following terms:

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

(h) to have an advocate assigned to the accused person by the State at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;” (Emphasis mine)

My understanding of this article is that legal representation is not only available to persons charged with capital offences but also to persons likely to suffer substantial injustice if not represented and I am guided by the Court of Appeal's reasoning in the case of **David Njoroge Macharia v. Republic [2011] eKLR** where the Court had this to say:

“Article 50 sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence... We are of the considered view that in addition to situations where “substantial injustice would otherwise result”, persons accused of capital offences where penalty is loss of life have the right to legal representation at State expense.”

The Court in discussing the essence of legal representation to such persons stated:

“The counsel's role at the trial stage is most vital. This is because of his knowledge of the applicable laws and rules of procedure in the matter before the court, and his ability to relate them to the fact, sieve relevant, admissible, and sometimes complex evidences from what is irrelevant and inadmissible. A lay person may not have the ability to effectively do so and hence the need to hire the service of a legal representative. The importance of a counsel's participation was succinctly articulated by Lord Denning in his decision in Pett v. Greyhound Racing Association (1968) 2 All E.R 545, at 549. He had this to say:

“It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: ‘you can ask any questions you like;’ whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task?”

7. Applying the test, it must be established that the Appellant must have suffered injustice by lack of representation. From my analysis of the record, I am unable to identify any complex issues that arose. The Appellant was able to take plea, request for statements, cross examine the witnesses and also offer testimony in his defence. In the circumstances, I find that he had an understanding of the case and cannot be said to have been exposed to any injustice or rather suffered any. This limb therefore fails.

8. Second and third ground shall be discussed together. The Appellant argued that the trial commenced on 5th May, 2014 when J.K. denied that the Appellant defiled her but the court compelled her to give evidence that implicated the Appellant. He argued that the trial magistrate ought to have acted on J.K.'s evidence as it was and not interfere. In support of the said argument, the Appellant relied on **Gachangio Nganga v. Republic CA Criminal Appeal No. 98 of 1995**. It was argued that if a court has to strain itself to arrive at a finding of guilt, doubts must be resolved in favour of the accused person. The Appellant also submitted that there was no way he could have interfered with J.K. since he was in custody the entire time. The Prosecution did not submit on this ground. The record shows that J.K. was first subjected to voire dire examination where the court formed an opinion that she did not understand the meaning or rather essence of an oath. Her unsworn statement was taken. It emerges from the record that as she testified, she broke down and had to be stood down. When she resumed, it was noticed that she was testifying while looking at someone outside the court. The court interviewed her and she stated that she knew the lady she was looking at but did not know her name. The trial magistrate noted that she was apprehensive and afraid and that she had changed the flow of her testimony. He ordered that she be stood down, DCIO to take custody of her for the next ten days and the District Child Officer to take the child for counselling and PW2's testimony was taken followed by J.K.'s.

9. As observed earlier in this judgment, it must be noted that this court in reconsidering this case must bear in mind the fact that it did not have the chance to observe the witnesses' demeanor. The trial court having noted J.K.'s nervousness, it was only prudent to make orders as necessary bearing in mind she was a child. It is noteworthy that evidence given after counselling was flowing compared to that given at the time she was said to be nervous and it is that evidence coupled with those of other witnesses that the trial court relied on in making its

decision. In my view, I find that bias has not been established but rather the court followed the proper procedure. Having said so, I find the Appellant's argument that J.K.'s evidence exonerates him not plausible. This is due to the fact that evidence given after counselling was not doctored but given by the minor after the court environment had been made conducive for her to present her testimony. In any event the Appellant cross-examined her at length regarding her testimony until he was satisfied.

10. Lastly, the Appellant argued that the evidence of injury were not proved to have been caused by him while on the other hand, the Prosecution submitted that J.K.'s evidence was corroborated by PW3. I have carefully analyzed the record, J.K.'s evidence after counselling was very consistent. The same was corroborated by PW2, 3 and 4's evidence which were not contradictory. PW4 confirmed the injuries sustained and the possible cause. The Appellant on the other hand strained to explain how exactly and which stick pricked J.K. making his evidence shaky. His explanation that he left the child who was seriously injured to go and look for money did not also hold water. The prosecution evidence on the other hand left no loophole. In the circumstances, I find that the prosecution's case was proved beyond reasonable doubt and I do not see the need to interfere with the trial court's finding at all. In the end, the appeal herein lacks merit and is dismissed. The trial court's conviction and sentence are hereby upheld.

It is so ordered.

Dated and delivered in Machakos this 17th day of September 2018.

D. K. KEMEI

JUDGE

In the presence of:-

Thomas Kioko Wambua - for the Appellant

Machogu - for the Respondent

Josephine - Court Assistant