



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 04 OF 2017

BETWEEN

KELVIN MUCHITI INDAI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in Criminal Case Number 1549 of 2013 in the Senior Resident Magistrate's Court at Kimilili by Hon. D.Onyango (SPM) on 10.1.17)

JUDGMENT

The Trial

1. The Appellant herein **KELVIN MUCHITI INDAI** has filed this appeal against sentence and conviction on a charge of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006 (hereinafter referred to as **the Act**). The appellant was also charged with an alternative count of indecent act with a child contrary to section 11 (1) of **the Act**. The particulars of the main count are that

On 13th November, 2013 at [particulars withheld] village in Bungoma North sub-county within Bungoma County unlawfully and intentionally caused your genital organ namely penis to penetrate the genital organ namely vagina of L.N a girl aged 10 years

Prosecution case

2. The prosecution called a total of four (4) witnesses in support of its case. PW1, the complainant stated on the material date, at night while she was sleeping with Y and L, appellant woke her up allegedly to wash utensils and when she went to the living room found him naked from where he took her to a bed and defiled her. She stated she reported the matter to L and M. PW2 M S, sister to complainant's grandmother told court that the appellant was employed by her sister who also lived with the complainant and an aunt that was blind. She recalled that on 13.11.13, she went to check on her sister's home since she was away and the appellant told her that they were faring well. It was her evidence that later the same day, L informed her that the appellant had defiled the complainant and she escorted the complainant to hospital and later reported the matter to the police. PW4 Michael Okumarut, a clinical officer examined complainant on 15.11.13 and found she had a recently torn hymen and an inflamed the labia minora. He produced complainant's P3 form and treatment book as **PEXH. 1** and **PEXH. 2** respectively.

PW3, PC Anne Wangui, the investigating officer upon receiving complainant's report arrested the appellant and had him charged.

3. At the close of the prosecution case, the appellant was ruled to have a case to answer and was placed on his defence. The Appellant gave an unsworn defence in which he denied the charges.

4. *In a judgment* delivered on 10.1.17, appellant was convicted and sentenced to life imprisonment.

The appeal

5. Aggrieved by this decision, the appellant lodged the instant appeal on 20th January, 2017. From the 5 grounds of appeal and written submissions filed on 16th October, 2018, I have deduced three grounds of appeal as follows:-

1. ***That the names of complainant and the investigating officer on the charge sheet is different from their names in the proceedings.***

2. ***The appellant was denied an opportunity to cross-examine the complainant***

3. ***The prosecution case was not proved beyond any reasonable doubt***

4. ***Appellant's defence was not considered***

6. When the appeal came up for hearing on 5.11.18, appellant chose to wholly rely on the grounds of appeal and also on his written submission in which he reiterated the grounds of appeal.

7. Mr. Oimbo, Learned Counsel for the state opposed the appeal and submitted that misspelling of names of witnesses was not fatal to the prosecution case.

Analysis and Determination

8. In a more recent case of **Collins Akoyo Okemba & 2 Others vs Republic [2014] eKLR**, the Court of Appeal stated as follows on the duty of the first appellate court:

“It is a duty to re-evaluate, re-analyze and re-consider the whole evidence in a fresh and exhaustive way before arriving at its own independent decision.”

9. I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions by the appellant and by the state.

10. In dealing with this appeal, I will separately address the 4 grounds summarized above as follows:-

1. Misspelling of names

11. The charge sheet lists the complainant as L N and the investigating officer as Anee Waigwa. The proceedings show the complainant was L N and the investigating officer Anne Wangui. It has not been demonstrated that the complainant and investigating officer that testified were different from the complainant and investigating officer in this case. It has also not been demonstrated that misspelling of the complainant's and investigating officer's name misled the appellant or caused him any prejudice.

12. I have considered the case of **Nelson Kiteso Maweu & 2 others v Republic [2008] eKLR** cited on behalf of the appellant and it is distinguishable from this case for the reason that the complainant named in the charge sheet in that case was **Paul Mwangangi Mwanzia** whereas the one that testified as the complainant was **Peter Mungai Chengecha**.

2. Cross-examination of the complainant

13. It is on record that when the complainant minor testified, she was not cross-examined. No doubt the trial court adopted a wrong procedure. Every witness, whether minor or adult is supposed to be cross-examined by the accused person. It is a right accorded to the accused and it is upon the accused to decide either to cross-examine or not. There is a difference between an unsworn witness and the unsworn evidence of an accused person. (See **Lawrence Iria v Republic [2017] eKLR**)

14. In the case of **Sula V. Uganda (2001) 2: E.A.**, the **Supreme Court Of Uganda** held as follows:-

“Although an accused person is not liable to cross-examination if he chooses to give unsworn testimony, the law does not prohibit the cross-examination of a child witness who has not given sworn testimony because she did not understand the nature of oath. A child witness who gives evidence not on oath is liable to cross-examination to test the veracity of his/her evidence.

15. Similarly, In the case of **Nicholas Mutula Wambua V. Republic, Mombasa Criminal Appeal No. 373 of 2006 (C.A.)**, It was held:-

“The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross-examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined.....It would appear that misconception arises from a view that because accused persons are not cross-examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is obvious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined.” That thinking is expressed in Section 208 of the CPC which govern hearing of Criminal proceedings in the Magistrate's courts. It provides that during the hearing, the accused persons or his advocate may put questions to each witness produced against him. Accordingly, all prosecution witnesses are liable to be cross-examined in order to test the credibility and the veracity of the witness. The Trial Courts should always observe that requirement of the law in criminal trials to obviate an otherwise stable case from being lost on that omission.”

16. The first issue which arises is whether the prosecution case should collapse as a result of failure by the Trial Court to allow a minor

witness who gives unsworn evidence to be cross examined. It is true there is violation of the appellant's constitutional right under Article 50 (k) of the Constitution to challenge the evidence of the minor witness. The evidence of PW1 implicates the appellant. My view is that the court has to evaluate the other evidence independently without that of the minor who was not cross examined and make its own finding. Failure to subject a minor witness to cross examination should not be an automatic licence to acquittal of the accused.

17. The second issue is whether the court can still convict the accused without the evidence of the witness who was not cross examined.

18. In this case, a P3 form **PEXH.1** filled on 15.11.13 which was 2 days after the alleged offence was committed produced by PW4 Michael Okumarut, a clinical officer confirmed that complainant had a recently torn hymen and an inflamed the labia minora. This independent evidence points to the conclusion that complainant was indeed defiled.

19. On the issue as to whether it is the appellant who defiled complainant, the only evidence is that of the complainant which I find prejudiced the appellant for failure by the trial court to subject it to cross-examination to test its veracity.

20. Further to the foregoing, the trial court record shows that other than that the complainant was not cross-examined; Hon. D.Onyango without complying with Section 200(3) of the Criminal Procedure Code which is couched in mandatory terms took over the matter from Hon. M. Nanzushi on 15.8.16, heard the evidence of one witness and wrote the judgment. Section 200(3) of the Criminal Procedure Code is indeed critical considering that the succeeding magistrate who wrote the judgment did not himself see and hear three of the prosecution witnesses who included the complainant. He therefore was not in a position to assess the personal credibility and demeanour of the three witnesses in this case and the trial was therefore unsatisfactory.

21. I have considered whether the court should order a retrial in line with the provisions of Section 200 (4) of the CPC which provides that:-

"Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial"

22. In the case of ***John Njeru v Republic [1980] eKLR***, the Court of Appeal held:-

"In general, a retrial should be ordered only when the original trial was illegal or defective, as otherwise an order for retrial would give the prosecution an opportunity of filling gaps in its case; see Aloys v Uganda [1972] EA 469, which followed the earlier decision Fatehali Manji v The Republic [1966] EA 343. This is particularly so where the first trial has resulted in an acquittal"

23. It is the duty of the court to ensure that fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and under no circumstances can a person's right to fair trial be jeopardized.

24. Appellant was charged on 18.11.13 and was convicted on 10.1.17. To date, appellant has been in custody for a cumulative period of 5 years. This period does not surpass the interests of justice in trying a serious offence as defilement. Furthermore, it only serves justice to order a retrial so that even the complainant can see to it that justice has been served. Defilement is also a serious offence that in the public interest ought to be disposed of in a trial conducted in an objective and fair manner.

25. Having so said, I will not belabor on the two remaining grounds of whether the prosecution case was proved beyond any reasonable doubt and whether the appellant's defence was considered for the reason that it might prejudice the retrial.

Disposition

26. *Having considered the evidence in its totality, the appeal succeeds.* Accordingly, it is hereby ordered that:

1. The conviction is quashed and the sentence is set aside

2. The Appellant shall be released from Prison custody forthwith and shall, instead, be placed on remand pending his presentation before the Magistrates' Court for a retrial.

3. The Appellant shall be presented before the Senior Principal Magistrate, Kimilili Law Courts NOT LATER THAN 19th November, 2018 for taking plea afresh before any other magistrate other than Learned Honourable *D.O.Onyango (SPM)* who initially heard the case.

27. It is so ordered.

DELIVERED AND SIGNED AT BUNGOMA THIS 9th DAY OF November 2018

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Ribba & Diannah

Appellant -

For the State - Mr Oimbo