



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 8 OF 2017

BERNARD KARIUKI WACEKE.....1ST ACCUSED

WILLY MWANIKI WANGARE.....2ND ACCUSED

VERSUS

REPUBLIC.....PROSECUTOR

JUDGEMENT

1. **Bernard Kariuki Waceke** and **Willy Mwaniki Wangare** hereinafter, the 1st and 2nd Appellants respectively were charged with the offence of **Gang Defilement** contrary to **Section 10** of the **Sexual Offences Act**. Particulars of the offence were that **Benard Kariuki Waceke** on the **3rd day of March, 2014** between **0200 hours** and **0500 hours** in [particulars withheld] of **Gatundu North Sub-County** in **Kiambu County**, in association with **Willy Mwaniki Wangare** intentionally and unlawfully caused their penis to penetrate the genital organ namely vagina of **N W N** one after the other who is a child aged **16 years old** within the view of her mother **V N**.

2. Facts of the case were that on **3rd March, 2014** at **2.00 a.m.** PW1, **N W N**, the Complainant, was asleep in their house with her mother, PW2 **V N K** when the Appellants herein persons who were known to them before gained entry therein. Both of them defiled her in turns. They ransacked the house for money which they did not find. They left at about **5.00 a.m.** The Complainant was taken to hospital for treatment. PW3 **Dr. Eunice Mugweru** examined her and filled a P3 form in her regard. The vagina was tender and the hymen was broken. A swap of the vagina revealed a presence of pus cells. She opined that the Complainant had been defiled. The mother was reported to the police. Members of public arrested the Accused who were charged with the offence.

3. When put on their defence, the 1st Appellant who gave unsworn evidence stated that on **5th March, 2014** he got a call from a fellow 'bodaboda' operator who informed him that he was required at **Mukurweini Police Station**. Ultimately he went and was taken to PW2's home where a mob descended upon him and beat him asking if he was at the home on **3rd March, 2014**. He was rescued by the police who arrested him. He denied having committed the offence.

4. The 2nd Appellant also a bodaboda operator in an unsworn statement stated that he was the youth chairperson at his local church and they had raised funds to buy some church instruments. The money was kept by PW2, the church secretary. She spent **Kshs. 27,000/=**, half of the money in her possession. She asked her to tell the church that he would repay the money. He notified the chairperson. His action annoyed her and she held a grudge against him as a result. On the **19th February, 2014** she forgot her purse in church. The chairperson asked him to take it to her and he complied. She came up with an allegation that it had **Kshs. 3,200/=**. The following day she reported to **Nyamangara Police Post** but

church elders rescued him. On **26th February, 2014** she reported that his motor-vehicle was suspected to be stolen. The police investigated and dismissed the allegation. On **1st March, 2014** his colleague used his motorcycle, was involved in an accident and the motorcycle was damaged. In conjunction with a friend they had borrowed the motorcycle with, they notified the seller. On **4th March, 2014** he got a casual job. On **5th March, 2014** he was required to get the motorcycle. At **7.30 p.m.** he got a call from a friend, **Ndungu** telling him that he was required at the Complainant's matter. He went and on arrival they called the police who arrested him. He denied having committed the offence.

5. After full trial they were convicted. Each one of them was sentenced to serve **fifteen (15) years imprisonment.**

6. Aggrieved by the conviction and sentence they appealed on grounds condensed as:

- The conviction and sentence meted out was illegal.
- Conducting *voire dire* examination when the Complainant was aged 16 years was illegal.

Identification in the difficult circumstances that prevailed was unsafe.

- Invoking provisions of **Section 124** of the **Evidence Act** when the evidence of PW1 and PW2 was suspicious was erroneous.
- There was no proof of penile penetration of the Complainant's genitalia.
- The P3 form was adduced in evidence in violation of the Appellants' fundamental rights.
- Essential witnesses were not called to adduce evidence.
- The trial was conducted in a manner that violated the constitutional rights of the Appellants.
- **Section 333(2)** of the **Criminal Procedure Code** was not applied in sentencing of the Appellants.

7. The Appellants canvassed the appeal by way of written submissions. In response thereto, the State through **Ms. Mutheu** learned State Counsel orally opposed the appeal. She submitted orally that recognition evidence adduced by Complainants who know the Appellants was stronger than identification. That **Section 124** of the **Sexual Offences Act** does not apply in the instant case as there was corroboration. The allegation that PW1 and PW2 were untrustworthy should have been brought out in cross examination. The P3 form was instrumental to allowing the 1st Appellant have a fair trial.

8. Further, she submitted that *voire dire* examination being done on a 16 years old was not prejudicial to the Appellant, as the Court sought to establish if the Complainant understood the purpose of an oath. There were torches that enabled the victim and PW2 to identify the Appellants. Injuries sustained were confirmed. According to **Section 143** of the **Evidence Act**, no number of witnesses was required to prove an act and time spent in custody could not be applied to the **Sexual Offences Act**.

9. This being the first Appellate Court, I am duty bound to re-evaluate, re-assess and re-analyze evidence adduced before the trial Court bearing in mind I had no opportunity of seeing and hearing witnesses who testified at trial then come up with my own conclusions. (**See Okeno vs. Republic (1972) EA 32**).

10. The Complainant herein was a minor. She adduced in evidence a birth certificate which was documentary proof of her age. She was born on **16th October, 1997**. At the time of the offence she was **16 years and 7 months old**. The preliminary judicial examinations of a minor is intended to establish if the child of tender years is seized of sufficient intelligence to understand the nature of oath she/he may be subjected to. The child herein was not of tender age. She was not supposed to be subjected to *voire dire* examination. In this case the trial Court had the opportunity of seeing the child. No good reason was

given why the child had to be examined to establish her competency to testify. However, what the trial Court did was not prejudicial to the Appellants.

11. Section 124 of the Evidence Act provides:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the 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.”

It was a misdirection on the part of trial Court to invoke the provision of the law that is applicable to children of tender years. But, as stated it was inconsequential.

12. The Complainant testified that she was defiled repeatedly. She was subjected to medical examination. A medical report (P3 form) was adduced in evidence by PW3 **Dr. Eunice Mugweru**. Per the report she was examined less than **24 hours** after the sexual assault. On examination her vagina was tender and the hymen was broken. No blood was however seen. The fact of her hymen having been broken would be as a result of a sexual activity (penile penetration) or by any other strenuous activity.

13. It is submitted that identification was not correct. In the case of **Wamunga vs. Republic (1989) KLR 424** the Court held that:

“.....It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.....”

The offence was committed at **2.00 a.m.** There were no lights, the Complainant woke up to find two (2) people flashing torches at her mother. She identified the 2nd Appellant as the one who pointed the torch at her mother while the 1st Appellant stood by the door. The 2nd Accused ordered her mother to go under the bed. They searched for money in vain and he proceeded to defile her. The 1st Appellant asked for PW1's sister **J** who was not at home. They went in search of money and on failing to get anything the 1st Appellant returned to her bedroom and defiled her. It was her testimony that she therefore recognized them. On cross examination by the 1st Appellant she stated that she has known him since childhood and she sees him in the local church. With regard to the 2nd Appellant she said she did not recognize him by voice but visually as she had known him before.

14. PW2's blanket was pulled and on waking up she saw the 2nd Appellant her fellow faithful at their local church who had a panga. He demanded money from her which she did not have. The 1st Appellant took the Complainant and defiled her on the bed while she was underneath. The 2nd Appellant defiled the Complainant as 1st Appellant demanded for money from her.

15. These were persons known to both the Complainant and PW2 per their testimony.

16. PW4 **Doctor Teddy Irungu** the Doctor who examined the Complainant and treated her at the outset testified. She stated that the Complainant did not know the person who defiled her. The P3 form, on the part of the general history it is indicated that the patient had a history of being assaulted by a person not known to her on **3rd March, 2014**.

17. Per the report she gave to the police officer who filled part 1 of the P3 form she alleged that she had

been defiled by a person not known to her. The Investigation Officer, PW5, **No. 73247 P C Vincent Mischo Oluoch** the custodian of the P3 form denied having knowledge that the Complainant told the Doctor that he did not know the person who committed the offence.

18. However, there was PW2 who knew the Appellants very well who stated that she identified them both by voice and visually. She added that communicating with the police officer, **P C Oluoch** was a challenge as she was speaking in Kikuyu a language that the officer did not understand.

19. The trial Magistrate has been faulted for convicting the Appellants under **Section 7** of the **Sexual Offences Act** when the charge was amended by hand to read **Section 10** of the **Sexual Offences Act**. I have duly noted the error.

20. It is argued that the Prosecution failed to call essential witnesses and in particular PW2's uncle whom she alleged that she notified of the event that transpired. In the case of **Julius Kalewa Mutunga vs. Republic Criminal Appeal No. 31 of 2005** it was stated that:

“As a general principle in law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example it is shown that the prosecution was influenced by some oblique motive. (See Oloro s/o Daitayi and Others vs. Republic (1950) EA CA 493).”

The alleged witness having not been present during the commission of the heinous act was not vital. Therefore the prosecution had the discretion to call him or not.

21. Both the Doctor who examined and treated the Complainant at the outset and the one who eventually filled the P3 form using treatment notes that were issued testified. Each one of them produced documents that they authored. The law was not flouted.

22. Regarding **Section 333(2)** of the **Criminal Procedure Code** which provides thus:

“(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

23. The statute in respect of the offence the Appellants faced sets out the minimum sentence to be meted out. Therefore the time spent in custody could not have been considered.

24. The Appellants have argued that their rights were violated.

They were not accorded a fair hearing. **Article 50(2)(c)(j)** of the **Constitution** cited states thus:

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

(c) to have adequate time and facilities to prepare a defence;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;”

25. The 1st Appellant sought to be furnished with witness statements on the **20th March, 2014**. The trial Court directed that both Accused be supplied with witness statements. However, the order was not complied with. As at the **23rd day of July, 2014** the Accused had not been supplied with witness statements. The trial Court made a further order to that effect. On **3rd September, 2014** the Court was prompted to make the order as no statements had been supplied as ordered earlier on. The case proceeded

on **17th September, 2014**, the Court record is silent on whether or not the statements were supplied per the order of the Court.

26. In his submissions the 2nd Appellant has stated that they got tired of requesting the Prosecution for the statements. Therefore they opted to proceed with the case. He called upon the Court to find the irregularity being sufficient to render the entire trial a nullity. They based their argument on the case of **Simon Ndichu Kahoro vs. Republic (2016) eKLR** where the Court of Appeal stated that:

“.....therefore, the entire prosecution case was completed before the appellant was furnished with witness statements and when he was indisposed. There was, therefore, clear breach of the provisions of Article 50(2)(c) and (j) of the Constitution, 2010. All constitutional provisions are important. Article 50 enshrines right to fair trial under the Bill of Rights. It is our duty as Judges to whom the people of Kenya rely to protect their rights and fundamental freedom to live up to their expectations..... We do not think for a moment that the fact that the appellant cross examined the witnesses cured the breach of his said rights.....”

27. Guided by that decision, it is obvious that the rights of the Appellants were breached following failure to furnish them with the Prosecution witness statements to enable them prepare for their case.

28. However, in the **Kahoro Case (Supra)**, it was stated thus:

“.....Before penning off, we feel impelled to clarify a likely misapprehension of our finding regarding infringement of the appellant’s right to fair trial under Article 50(2)(c) and (j) of the Constitution, 2010. We should not be understood to be setting up a general principle or precedent that every breach of Article 50 of the Constitution, 2010 should automatically result in an acquittal of an accused person. Each case should be considered in the light of its own special circumstances as consequences of breach of fair rights to fair trial depend on all the surrounding circumstances of the case.”

29. It is apparent that on this ground of Appeal, it is apparent that the trial was vitiated by the mistake of the trial Court following its failure to ensure that the Appellants rights as stipulated in the Constitution were upheld. The question begging is whether a retrial should be ordered.

30. In the case of **Muiruri vs. Republic (2000) KLR 552** the

Court ordered a retrial in the Subordinate Court after observing that:

“Generally whether a retrial should be conducted or not must depend on the circumstances of the case. It will only be made where the interest of justice requires it and it is unlikely to cause injustice to the appellant. Other facts 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 quashing of the conviction were entirely the prosecution making or not.”

31. The Appellants were sentenced to **15 years imprisonment**. They have been in custody for one and a half years. It will be in the interest of justice that a retrial be ordered. In the premises the Appeal is allowed. The conviction is quashed and sentence set aside.

32. However, I order that both the Appellants shall be retried. They will be remanded at **Gatundu Police Station** and be produced in Court on the **15th June 2017** for a retrial.

33. It is so ordered.

Dated, Signed and Delivered at Kiambu this 13th day of June, 2017.

L. N. MUTENDE

JUDGE