REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 15 OF 2017

S M N.....APPELLANT

VERSUS

REPUBLIC…..……..... RESPONDENT

*(Being an appeal from the original conviction and sentence in **Githunguri Senior Principal Magistrate's Court Criminal Case No. 618 of 2014** by **W. Ngumi S R M on 03/02/15**)*

J U D G M E N T

1. S M N, the Appellant herein was arraigned before the **Principal Magistrate's Court, Githunguri** having been charged with the offence of **Defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on the **21st** day of **October, 2010** at **[particulars withheld] Village** in **Kiambu County** unlawfully committed an act which caused penetration with his genital organ (penis) into the genital organ (vagina) of **C N N** aged **3½ years.**

2. In the alternative, he was charged with the offence of **Indecent Act with a Female Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006.** Particulars of the offence were that on the **21st** day of **October, 2010** at **[particulars withheld] Village** in **Kiambu County,** committed an act with a female child namely **C. N. N** aged **3½ years** by intentionally causing contact between his genital organ (penis) and genital organ (vagina) of the said female child.

3. Having denied the charge, he was tried, convicted and sentenced to **life imprisonment.**

4. Being dissatisfied with the conviction and sentence, he now appeals on grounds that:

- The learned Magistrate did not comply with **Article (7)** of the **Constitution** and **Section 33** of the **Evidence Act.**
- Evidence adduced was contradictory.
- The charge was not proved to the required standard.
- The Appellant canvassed the Appeal by way of written submissions.

6. The State through learned State Counsel **Ms Maundu** opposed the Appeal. She submitted orally that when the offence was committed the Complainant was **3½ years.** But following an order for a retrial she testified when she was **eight (8) years old.** She stated that the Complainant was the Appellant's cousin. PW2 her mother left her at home for 2 – 3 hours. On her return the Complainant complained of stomachache. The following morning while washing her she noticed that the Complainant had been defiled. She argued further that it was not a case of mistaken identity. That a perusal of proceedings does not suggest that **Section 33** of the **Evidence Act** was overlooked. And when the Complainant testified at

the retrial it was not prejudicial to the Appellant.

7. Briefly the facts of the case were that on the **21st November, 2010, P N N** the mother of the minor Complainant **(C N)** was away from home for approximately 2 – 3 hours looking for fodder. On her return she continued with her usual chores. That night the minor slept with PW1, her sister **A W N.** In the day as she washed the child she noticed a swelling on the genitalia, therefore, she suspected she had been defiled. She enquired what happened and the child purportedly said the person responsible was P. PW4, **Regina Kimeu,** a Clinical Officer examined the child and concluded that she was defiled. PW5 **No. 60315 P C Robert Ochora** investigated the case and caused the Appellant to be arrested and charged.

8. When put on his defence the Appellant who gave sworn evidence denied having committed the offence in issue. He stated that this case came up again as a result of an order for a retrial by the High Court. In the instant case the Complainant stated what she did not state in the earlier trial. She alleged that she had been threatened. On cross-examination he stated that he was with his family on the material date. Regarding her relationship with the Complainant's family he said that it was not cordial as they owed him **Kshs. 10,000/=.**

9. This being the first appeal, this court is duty bound to subject evidence adduced at trial to a fresh and exhaustive examination and come to its own conclusion bearing in mind that it did not see nor hear witnesses who testified at the hearing. **(See Okeno vs. Republic (1972) EA 32).**

10. It is submitted by the Appellant that the trial Court did not comply with **Article 50(7)** of the **Constitution.** And in particular he contended that failure to provide an intermediary was prejudicial to his rights at trial. **Article 50(7)** of the **Constitution, 2010** provides thus:

> ***"In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court."***

Every Accused person has a right to a fair trial as stipulated in **Article 50** of the **Constitution, 2010.** Where justice demands, the Court has the power of allowing a Complainant to be assisted by an intermediary. The **Sexual Offences Act (Act)** defines intermediary as:

> ***"…. a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counsellor, guardian, children's officer or social worker;"***

Under the Act the Court is seized of jurisdiction to declare a witness a vulnerable one and cause her to give evidence through an intermediary. This all depends on the circumstances of the case and interest of justice.

11. This particular case was heard following a retrial ordered by the High Court. As pointed out by the Appellant the Lower Court made a grave omission by not conducting a *voire dire* examination to establish whether or not the minor aged **3½ years** had sufficient intelligence to understand the duty of telling the truth.

12. The proceedings in the initial trial were produced in the trial Court as part of evidence. In the initial trial the Complainant was allowed to testify. The Court did not declare her a vulnerable witness requiring representation by an intermediary. Similarly in the instant case the Complainant was not acknowledged as a vulnerable witness. The question to be answered is whether the Appellant was prejudiced as a result. Declaring a witness as vulnerable and directing an intermediary to give evidence on behalf of such a witness is discretionary **(see Section 31 of the Act).** Failure to do so in the circumstances was not prejudicial to the Appellant.

13. It is argued that the case was not proved to the required standard. In the case of **Miller vs. Ministry of Pensions (1942) 2 All ER 372, Lord Denning** stated thus:

"The decree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to pocket the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of what will suffice."

14. In this case the Prosecution was duty bound to prove:

- The age of the Complainant.
- The fact of the act of penetration of the Complainant's genitalia.
- That the Appellant was the perpetrator of the act in issue.

15. PW2 testified and produced in evidence a birth notification in respect of the Complainant. She was born on **26th May, 2006.** She was three years and five months old at the time of the incident hence a child of tender years.

16. The offence is stated to have been committed on the **21st** day of **October, 2010.** She was examined on the **23rd** day of **October, 2010.** She had an inflamed and lacerated vulva. The hymen was perforated. Many pus cells were noted. The Clinical Officer formed the opinion that the child was defiled and infected with a Sexually Transmitted Disease. Vaginal laceration noted and the infection the child had must have been as a result of penetration.

17. There was no eye-witness to what happened to the child. PW2 left the Complainant at home going to look for fodder. There was no indication if there was any other person at home. Nothing attracted her attention when she returned home. On the material night when the Complainant went to sleep with PW1 she complained of stomachache. PW2 gave her medicine.

The following day PW2 removed the Complainant's pants and noted a swelling on the vagina. She interrogated her and she said that it had been done by P.

18. The first time the Complainant testified she was approximately five (5) years old. The 2nd time she testified she was about eight (8) years old. In both instances she was a child of tender years. Ordinarily evidence of such a child would call for corroboration not that she was offended but that the perpetrator of the offence was the Accused. However, this being a Sexual Offence it is an exception. The proviso to **Section 124** of the **Evidence Act** provides thus:

"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."

The child herein having been infected with a Sexually Transmitted Deceased it would have been expected that the person who sexually assaulted her was infected by a similar bacteria. The investigation carried out did not explore such a possibility.

19. The Complainant was subjected to *voire dire* examination prior to testifying. In the case of **Peter Kariga Kiune vs. Republic Criminal Appeal No. 77 of 1982 (Unreported)** the Court stated:

"Where, in any proceedings 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 even his sworn evidence may be received. If the court is not so satisfied her unsworn evidence may be received if in the opinion of the court she is possessed of sufficient intelligence and understands the duty of speaking the truth. In the

latter event an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him……" (Emphasis mine).

20. The learned trial Magistrate having taken the child through *voire dire* examination formed the opinion that the child was intelligent and directed that she makes an unsworn statement because she did not understand the meaning of taking an oath. The learned trial Magistrate did not form an opinion whether the child understood the duty of telling the truth.

21. When the Complainant testified at the outset she referred to the Appellant as **S.** She said he was not their family member and she was silent on whether or not she had seen him before. During the retrial she added that **S** threatened to kill her with a knife. She gave his three names **S M N** and added that he was also called P and that he knew him before, though he never used to go to their home.

22. The question to be posed is whether this was deliberate untruthfulness or if the child failed to recollect what actually transpired and was assisted to remember and include information that she was aware of?

23. The trial Court had the opportunity of hearing her and observing her demeanor. In reaching the decision to convict the Appellant, the learned Magistrate stated that:

"The Complainant pointed to the accused person as being the person who committed the offence and violated her. She gave the name Per as the name of her violator which name the accused confirmed to be his alias name. It was also in evidence that the accused and complainant were cousins and knew each other well."

24. Other than making the statement the learned Magistrate failed to interrogate if indeed the Complainant knew the Appellant at the outset. The initial proceedings produced in evidence by the Prosecution formed part of the evidence. It is evident that the Complainant mentioned the name P during the retrial. Failure on the part of the learned trial Magistrate to find the Complainant a person who appreciated speaking the truth called upon him to outrightly give reasons why he believed her and that she was a truthful witness per the requirement of **Section 124** of the **Evidence Act.** This glaring omission cannot be overlooked.

25. From the foregoing it was unsafe to convict the Appellant. Consequently, I allow the Appeal, quash the conviction and set aside the sentence imposed. The Appellant shall be released forthwith unless otherwise lawfully held.

26. It is so ordered.

Dated, Signed at **Kitui** this **19th** day of **April,** 20**17.**

L. N. MUTENDE

JUDGE

Dated, Signed and **Delivered** at **Kiambu** this 12th day of **June,** 20**17.**

PROF. J. NGUGI

JUDGE