



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**CRIMINAL APPEAL NO. 30 OF 2014**

**KENNEDY KINYUA WACHIRA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An appeal from the conviction and sentence of the Principal Magistrate's Court (S. Jalang'o) at Baricho, Criminal Case No. 1316 of 2012 dated 20<sup>th</sup> June, 2014)*

**JUDGMENT**

1. **KENNEDY KINYUA WACHIRA** the appellant herein was charged vide Baricho **Principal Magistrate's Court Criminal Case No. 1316 of 2012** with Sexual Assault contrary to **Section 5 (1) (a)** of the **Sexual Offences Act No. 3 of 2006**. The particulars as contained in the charge sheet were that on the 29<sup>th</sup> day of May, 2012 in Kirinyaga West District within Kirinyaga County, the appellant sodomized **JKC**.

2. The brief facts of the case were that on 29<sup>th</sup> May, 2012 at around 5.00 p.m., the appellant entered the house of **JKC**, a mentally retarded person and locked the house from the inside and sodomized him. Before entering the house, he had apparently been seen by **BK** (P.W.2) who got curious and went to check what was going on and summoned his father in law (P.W.1) **HCK** who came and when they tried to open the door they found it locked. They ordered the appellant to open the door and when he came out with his zip open, they raised an alarm and got the appellant arrested and took him to the Police and subsequently charged with the offence after medical examination established that an offence had been committed against the complainant.

3. **P.W.1 HCK**, testified before the trial court that he was the father to the complainant in the case and that the complainant was mentally retarded. He testified that on the material day his daughter in law – **BWW** (P.W.2) called him and informed him of a presence of a man in the complainant's house. He further told the trial court that on checking out he found out that a man was talking inside his son's house. When the house was opened, the appellant came out with his trousers opened. The witness also testified that he noticed that he had applied some oil on his penis. On checking inside the house, he testified that he found his mentally retarded son (complainant) with his trousers removed and oil applied on his buttocks. His wife screamed and members of the public nabbed him and took him to Administration Police post before being taken to Baricho Police Station. He testified that he took his son to Kerugoya District Hospital where the doctor confirmed that he had been sodomized. He further told the court that they recovered some oil (milking salve) and a bag at his son's house.

4. **P.W.2 BK** gave almost the same account of events in his evidence before the trial court adding that complainant used to stay alone in his house and never used to have friends visiting him due to his medical

condition. According to her, the members of the public wanted to lynch the appellant after finding out what he had done and was saved by P.W.1 who restrained them from taking the law into their hands.

5. **P.W.5, John Mwangi**, the clinical officer from Kerugoya Hospital gave evidence before the trial court on behalf of Mrs. Macharia the clinical officer who had examined the complainant and filled the P3 form. The witness told the court that he was familiar with the hand writing of her colleague and produced the P3 as Exhibit 3 and treatment card as Exhibit 4. The medical evidence produced showed that the complainant had been sodomized.

6. The investigating officer – **Cpl Catherine Migwi** testified before the trial court and told the trial court how the investigation was carried out including taking the complainant for mental examination where the doctor confirmed that he was indeed mentally retarded. A medical report was produced as Exhibit 3a. She also produced items recovered from the house of the complainant after the incident which were a black bag (Exhibit 1) and a milking jelly (exhibit 2).

7. In his sworn defence the appellant denied the offence and told the trial court that he was looking for Macadamia nuts when he met P.W.1 and that P.W.1 promised to sell him the nuts and he paid him KShs.4,200/=. He testified that he did not carry the nuts but went back at 6 p.m. to collect the nuts only to be confronted after an argument and taken to Administration Police camp. He told the trial court that he was surprised when he was accused of sodomy and later charged in court with sexual assault against the complainant.

8. The learned trial court evaluated the evidence tendered before him and found the appellant guilty as charged. He convicted him and sentenced him to 25 years imprisonment. Aggrieved by both conviction and sentence the appellant appealed to this court and raised 8 grounds namely:-

*(i) That the learned trial magistrate erred in both law and fact by failing to consider the failure by the prosecution to avail the doctor who examined the complainant.*

*(ii) That the learned trial magistrate erred in law and fact by failing to consider that the prosecution failed to avail the arresting officer.*

*(iii) That the learned trial magistrate erred in law and fact by relying on the evidence of a single witness and the fact that all witnesses were members of the same family.*

*(iv) That the learned trial magistrate erred in law and fact by failing to note that the P3 did not provide proof of sexual assault.*

*(v) That the learned trial magistrate erred in law and fact by failing to note that the evidence was uncorroborated.*

*(vi) That the sentence imposed on him was too harsh.*

*(vii) That the learned trial magistrate erred in law by using the same court officials in a retrial.*

*(viii) That the learned trial magistrate failed to consider his defence.*

9. The appellant with leave of this court sought to rely on additional grounds of appeal which basically revolved around the fact that the complainant was not produced in court for the trial magistrate to observe his mental state. He further alleged that the failure to produce the complainant had denied him an opportunity to challenge the evidence of mental retardation and that his right to a fair hearing under **Article 50 (1) (k)** of the **Constitution** was breached as a result. He also opined that penetration was not proved at the trial.

10. In his written submissions the appellant reiterated that his constitutional right under **Article 50 (1) (k)** was breached as the trial court in his view declined his request to have the complainant taken for

psychiatric assessment.

11. He faulted the trial court for not being sure whether the complainant was a “she” or a “he” and pointed out the part of the proceedings where the court had described the complainant as a “she.” In the appellant’s contention, the trial court was not sure of the sex of the complainant because he was not produced in court.

12. The appellant further argued in his appeal that the production of mental assessment report by the investigating officer prejudiced him as it exposed him to unfair trial. In his opinion the report formed the basis of the complainant not testifying in court and this denied him the chance to challenge the report and his constitutional right to a fair hearing under **Article 50 (1) (k)** of the **Constitution**.

13. The respondent through the Office of the Director of Public Prosecutions told this Court through **Mr. Sitati**, learned counsel for State, that the State was not opposed to the appeal. His reasons for not opposing the appeal was that the complainant was not produced in Court and that the appellant did not get a chance to challenge the mental assessment report that was tendered in evidence by the investigating officer. Mr. Sitati also conceded that the doctor’s report was not conclusive.

14. This Court has considered the grounds upon which this petition has been made inclusive of additional grounds and submissions made. Although the State conceded the appeal this Court nonetheless is mandated to re-evaluate the evidence adduced during trial and draw its own conclusion.

15. The appellant was as indicated, charged above with sexual assault contrary to **Section 5 (1)** of the **Sexual Offences Act** which provides as follows:

***“Any person who unlawfully –***

***(a) penetrates the genital organs of another person with –***

***(i) any part of the body of another or that person, or,***

***(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;***

***(b) Manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person’s body, is guilty of an offence termed sexual assault.”***

16. The trial court upon evaluating the evidence tendered found that the prosecution had proved beyond reasonable doubt that the appellant had sodomized the complainant. I have considered the evidence of the complainant’s father (P.W.1), P.W.2 and medical evidence (P3 – Exhibit 3) and (treatment chit – Exhibit 4) and have to say that the learned trial magistrate’s finding in that regard is well founded. The evidence of P.W. 1 was consistent with the evidence of P.W.2 and P.W.3. They found the appellant in the house of the complainant alone with the complainant. The appellant came out of the house with his trousers open perhaps due to haste attendant to the screaming and knocking of the door by the witnesses and villagers who were attracted by the commotion. The complainant was found in a compromising position with his trousers removed and his buttocks oiled. The appellant’s penis was also found oiled with a milking jelly that was produced as exhibit 1. This evidence was well corroborated by the doctor’s finding contained in the P3 produced as exhibit 3 and treatment chit produced as exhibit 4. This Court finds that based on the evidence adduced, the learned trial magistrate’s finding that penetration had been proved was correct and well founded contrary to the appellant’s contention.

17. The appellant has contended that the medical officer who examined the complainant was not called and that it was wrong for the trial court to admit the 2 medical documents as evidence. It is true that **John Mwangi** (P.W.5) the medical officer called to testify told the court that he did not physically examine the complainant and was only coming to court in place of one Mrs. Macharia who was the medical officer

responsible for both documents but who was away at the time in school for further studies. He however, told the court that he was aware of Macharia's handwriting as he had worked with her for 7 years. This in my view made the witness competent to tender the evidence. This finding disproves the first ground of appeal as the trial magistrate was correct in the circumstances to admit the medical documents as evidence. I have also noted that at the trial the appellant never objected to the said witness adducing the evidence on behalf of his colleague. In the same vein the contention that the investigating officer called to testify was not the initial investigating officer and should never have been allowed to testify is without merit. Any Police officer can take over investigation of a case in cases of transfer of investigating officers or for any other reason. The evidence of an investigating officer is simply to inform the court about the investigation carried out by Police and the action taken so unless an accused person has good reasons to have a specific officer testify he or she should not feel prejudiced by change of investigating officers.

18. I have also considered the contention by the appellant that his defence was not taken into consideration and I find the same was considered by the trial court in its judgment. It is important to note that considering a defence put forward by an accused person at a trial is not synonymous with finding merit on the same. The trial court duly considered the appellant's defence but found no weight over the same. The trial court found that the appellant was found inside the complainant's house and no good explanation was given on his presence inside the house other than the reason to commit the offence under which he was charged with. The trial court in my considered view was right to draw the same conclusion.

19. The appellant has raised a constitutional issue in his appeal which this court considers important in this appeal. He has contended that the prosecution failed to avail the complainant to court and the trial only relied on a medical report which was produced by the investigating officer to decide that the complainant could not testify in court. This ground of appeal raises the issue of the manner in which a trial court should treat the evidence of a vulnerable witness. This is well covered by **Section 31** of the **Sexual Offences Act** which provides as follows:

***“A court, in criminal proceedings involving the alleged commission of a sexual offence may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such a witness is –***

***(a) The alleged victim in the proceedings before the court***

***(b) A child or***

***(c) A person with mental disabilities.”***

Under **sub section 3** of the same section, the law provides that an intermediary may be summoned to court to explain the vulnerability of such witnesses. The law also provides under **sub section 2** that the court may on its own motion, or on request from prosecution or any witness, declare a person vulnerable witness on account of *inter alia* trauma, mental impairment *etcetera*. Once declared vulnerable the law provides that the witness shall be protected and may give evidence through an intermediary among other measures to be taken.

20. This Court finds that the law provides elaborate procedures and steps to be taken by a trial court and though the same is not mandatory a trial court has a discretion to follow the procedure when such an issue is brought to the attention of the court. The discretion however, must be exercised in a judicious manner based on the circumstances on each case. This Court finds that the trial court in this instance appeared to have misdirected itself on this score in two aspects;

(i) Admitting a medical report from investigating officer improperly without calling the expert witness to testify.

(ii) Failing to declare the complainant a vulnerable witness in order to allow an intermediary to testify on his behalf.

21. The appellant's contention that the trial court erred by relying on psychiatric report without calling the author and using the same report as a basis for not having the complainant testify during the trial is well founded. The production of the mental assessment report by the investigating officer was erroneous. There was no basis laid for its production and I find that the appellant's contention that the production breached his right to a fair trial under **Article 50** of the **Constitution** is valid. The Office of the Director of Public Prosecutions has conceded that there was an error on their part when they failed to produce the complainant in court which I also find valid. The prosecution should have availed the witness to court or make an application in court and give reasons for not being able to produce the witness and the trial court could have, based on the reasons given, made a decision it considered fair and just in the circumstances. I do agree with the appellant that he was denied the right to challenge the prosecution case in that respect as he could not challenge the mental assessment report or the declaration of the complainant as a vulnerable witness since the trial court also erroneously omitted the process which I find injudicious as it exposed the appellant to unfair trial.

22. In the case of **M. M. Vs Republic** the Court of Appeal observed as follows:

***“It is clear from sections 31(2) and 32 (Sexual Offences Act) that, first and foremost it is the duty of the prosecution to ascertain the vulnerability of the witness and to apply to the court to make that declaration before appointing an intermediary. In addition, the court as we have observed, can on its own motion through voirdire examination, declare a witness vulnerable and proceed to appoint an intermediary. Any witness (other than one to be declared vulnerable) can likewise apply to the court for the declaration. The declaration must not be granted merely because the victim is young or too old or appears to be suffering from mental disorder. The court itself must be satisfied that the victim or the witness would be exposed to undue mental stress and suffering before an intermediary can be appointed.”***

The Court of Appeal in that decision went further and decided an intermediary must subscribe to an appropriate oath before testifying undertaking to convey correctly and to the best of his ability the general purport of the evidence.

23. It is also important to note that a court cannot convict an accused person under Sexual Offences Act solely on the uncorroborated evidence of an intermediary. So unlike other instances where a court can find a conviction based on evidence of a single uncorroborated evidence, the evidence of an intermediary must be corroborated for conviction to stand. That said, it is important to note in regard to this appeal that appropriate steps as provided by law as illustrated above, were not adhered to declare the complainant vulnerable to perhaps due to inadvertence or error of judgment on the part of the trial court and indeed the prosecution. This rendered the trial unfair to the appellant and I find that the conviction was unsafe in the circumstances.

24. In light of the above, I find merit in this appeal. The conviction against the appellant is quashed and the sentence is set aside or reversed. I also consider that it is in the best interest of justice to exercise my discretion under **Section 354 (3) (a) (i)** of the **Criminal Procedure Code** and order for a retrial. The appellant shall be produced before another court of competent jurisdiction in Baricho Law Courts for retrial. In that respect he shall be produced before that court on 7<sup>th</sup> April, 2016 for plea to be taken afresh. It is so ordered.

***Dated and delivered at Kerugoya this 6<sup>th</sup> day of April, 2016.***

**R. K. LIMO**

**JUDGE**

6.4.2016

Before Hon. Justice R. Limo J.,

State Counsel Sitati

Court Assistant Willy Mwangi

Appellant present

Interpretation: English-Kiswahili

Sitati for Director of Public Prosecutions present

Kennedy Kinyua Wachira present

**COURT:** Judgment signed, dated and delivered in the open court in the presence of Sitati counsel for Respondent and Kennedy Kinyua Wachira the appellant in person.

**R. K. LIMO**

**JUDGE**

6.4.2016