



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 154A OF 2014

NICHOLAS MUTISO NZIOKAAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the conviction and sentence of Hon. Japhet Bii RM delivered on 18th August 2014 in Criminal Sexual Offences Case No. 6 of 2014 in the Senior Principal Magistrate's Court at Kangundo)

JUDGMENT

The Appellant was convicted and sentenced to serve 10 years imprisonment for the offence of attempted defilement, contrary to section 9(1) of the Sexual Offences Act. The particulars of the offence were that on the 26th April 2014 in Matungulu District within Makueni County, the Appellant intentionally attempted to cause his penis to penetrate the vagina of G M a girl aged eight (8) years.

In the alternative the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of the offence were that on the 26th April 2014 in Matungulu District within Makueni County, the appellant intentionally touched the buttocks, breasts, arms and vagina of G M a child aged eight (8) years with his penis.

The Appellant was first arraigned in the trial court on 28th April 2014 when he pleaded not guilty to the charges. He was tried, convicted of the offence and sentenced to ten (10) years imprisonment for the main offence.

The Appellant being aggrieved has appealed the conviction and sentence meted by the trial magistrate. The Appellant's grounds of appeal are stated in his Petition of Appeal dated and filed in Court on 1st September 2014. In summary, the Appellant alleges that there was no age assessment conducted on the victim; the Appellant was not subjected to DNA testing to prove his involvement; there were crucial witnesses who did not testify contrary to section 144 and 150 of the Criminal Procedure Code; the Appellant's defence was rejected; the charge sheet was defective and the case was not proven beyond reasonable doubt.

The Appellant's learned counsel, J.N Kimeu & Co Advocates filed written submissions on the appeal dated 14th March 2016, wherein it was urged that the Appellant was charged with the offence of attempted defilement contrary to section 9(1)(2) of the Sexual Offences Act which is non-existent, and should have been charged under sections 9(1), 9(2) or 9(3) of the Sexual Offences Act. That the charged sheet was therefore defective since the offence the accused was charged with was not known in law, and the accused was prejudiced since he was not represented by counsel in the lower court. Reliance was

placed on the decision in **Hilda Atieno vs Republic, (2015) eKLR** in this regard.

It was further submitted that there were inconsistencies in the testimony of PW2 and PW4 on how the accused person was arrested, thus the prosecution case was incompetent. Finally, that the absence of the original birth certificate meant that the prosecution relied on a copy which is a secondary document, and did not prove its case to the required standards in the absence of an age assessment report.

Ms. Mogoi Lillian, the learned prosecution counsel, opposed the appeal in written submissions dated 2nd June 2016 filed in Court on 6th June 2016. It was urged therein that that the Appellant was charged under section 9(1)(2) of the Sexual Offences Act, and the offence and penalty are provided for under the same section. Further, that if there was an omission of the words “as read with” between the section describing the offence and the section of the sentence, the same would amount to a mere omission that does not occasion an injustice to the accused and can be cured by section 382 of the Criminal Procedure Code.

In addition, it was submitted that the charges against the Appellant were proved beyond reasonable doubt through the evidence of the four witnesses and the P3 form which confirmed there was attempted defilement. It was stated that the contradiction on the mode of arrest of the accused did not go to the root of the offence. On the issue of age assessment it was submitted that the age was proven by the presence of the birth certificate produced as Exhibit 1, which was a copy produced after the court had seen the original. That the Appellant had also not contested to its production at trial.

As this is a first appeal, I am required to re-evaluate the evidence tendered in the trial Court, and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

Five witnesses testified for the prosecution at the trial in the lower court. The key aspects of the evidence by the complainant who was PW1, and who testified after a *voire dire* examination, was that she knew the Appellant as their farm hand, and that she had been sent to him to tell him to remove the cattle when he took her by the hand and removed her underpants and trouser, and did “*tabia mbaya*” (bad manners) to her. She stated that her mother found her and PW1 told her what had happened. PW2 was F M, the mother of PW1, who stated that PW1 was born in 2005 and was 8 years old. She produced a copy of PW1’s birth certificate in court as an exhibit, and testified on the events of 26th April 2014 when the alleged offence occurred.

PW3 was Dominic Mbidyo a clinical officer at Kangundo District Hospital who examined PW1 and produced a filled P3 form, and PW4 was PC Suleiman Nzovia who was stationed KBC police station, and testified as to the report of the attempted defilement and arrest of the Appellant.

After the close of the prosecution case, the Appellant was put on his defence and made a sworn statement. He did not call any witnesses. He stated that on 28th April 2014, PW1 was sent to him but that he did not see her. Further, that at 4.00 pm as he took the cattle home, PW2 had asked whether he had seen PW1 of which he said he had not. He was then arrested and taken to Malaa police post. He denied touching the girl.

From the foregoing submissions and evidence, I find that the issues raised in this appeal are firstly, whether the Appellant was convicted under a defective charge; and if not, secondly, whether the age of the complainant was proved, and lastly, whether the Appellant’s conviction for the offence of attempted defilement was based on sufficient and satisfactory evidence.

However, after perusing the trial court’s proceedings I have noted certain irregularities which I need to first address before proceeding with a determination of the said issues. In the first instance, during the *voire dire* examination of the minor PW1 who was the alleged victim and complainant, and also during her evidence-in-chief, there was no question asked or answer given as to the name of the complainant. There is therefore nothing on record to show the identity of PW1, and if PW1 was indeed the child named in the charge sheet as having been defiled.

Secondly, there is no record of any cross-examination of PW1 or record that the Appellant was given the opportunity to cross-examine PW1. It is shown on the record that the minor was found by the trial Court to be fit to testify and that PW1 then proceeded to give an unsworn statement. PW2 then gave her sworn testimony immediately after the unsworn statement by PW1.

The right to cross examine a witness is one of the rights of a fair trial as set out in Article 50(2) (k) of the Constitution which provides that an accused person has the right to adduce and challenge evidence. Section 302 of the Criminal Procedure Code also provides that the witnesses called for the prosecution shall be subject to cross-examination by the accused person or his advocate, and to re-examination by the advocate for the prosecution.

It was therefore incumbent upon the trial court to inform the Appellant of the right of cross-examination, especially as he was not represented by a legal counsel, and if the Appellant did not have any question to put to the witness, it should have recorded that fact. Thus, the failure by the trial court to do so was an error. It is also my finding that this error prejudiced the Appellant as the evidence of PW1 who was also the complainant was central in the Appellant's conviction.

In addition, the issue of cross-examination of children of tender years who give unsworn testimony was settled by the Court of Appeal in **Nicholas Mutula Wambua v Republic**, MSA CRA No. 373 of 2006 where it quoted with approval the decision of the Supreme Court of Uganda in **Sula v Uganda** [2001] 2 EA 556 that:

“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 oblivious 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”.

I am of the view that the failure to afford the Appellant an opportunity to cross-examine PW1 is on its own is sufficient to dispose of the appeal.

It is therefore not prudent for this Court to proceed with a determination of the identified issues in this appeal, as the same will entail an evaluation of the evidence adduced in the trial Court, which would be prejudicial in the event that a retrial is ordered.

The only outstanding issue then is whether I should acquit the Appellant or order a retrial. The principles governing whether or not a retrial should be ordered were enunciated in **Fatehali Manji v Republic** [1966] EA 343 by the East Africa Court of Appeal as follows:

“In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person.”

In **Mwangi v Republic** [1983] KLR 522 the Court of Appeal held that:

“We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the

conviction of the appellant.”

I have reviewed the evidence before the trial Court and it is my view that it raises the possibility of a conviction. In addition, it is my view that taking into account the time that has lapsed, the witnesses will not be difficult to secure and a retrial will therefore not be difficult.

I accordingly allow the appeal, and quash the conviction and sentence of the Appellant by the trial Court for the offence of attempted defilement , contrary to section 9(1) of the Sexual Offences Act. I direct that the Appellant shall be retried by any magistrate other than Hon. Japhet Bii RM at the Kangundo Law Courts, and for that purpose he shall remain in custody and shall be taken before the Resident Magistrate at Kangundo Law Courts on **25th July 2016** to plead to fresh charges.

Orders accordingly.

It is so ordered.

DATED AT MACHAKOS THIS 19TH DAY OF JULY 2016.

P. NYAMWEYA

JUDGE