REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

HCRA NO. 65 OF 2012

Originally Eldoret Chief Magistrate's criminal case no. 2415 of 2011

HEBERT MUHAMMED MIDIKA.....APPELLANT

VS

REPUBLIC ….....RESPONDENT

(Being an appeal against the decision of Honorable A. Alego delivered on 16 April 2012 in respect of Eldoret CMCCr Case No. 65 of 2012)

JUDGMENT ON APPEAL

The appellant was charged and convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act, Act No. 3 of 2006. Upon conviction, he was sentenced to 20 years imprisonment. He has now appealed against the conviction. Twelve grounds were set out in the Petition of Appeal. These cover the reasons that the appellant was denied access to prosecution statements; that his rights under Article 31 (b) of the Constitution were infringed; that the trial magistrate proceeded with the case despite existence of High Court Miscellaneous Application No. 96 of 2011; that the plea was taken when he was ill; that he was detained beyond the prescribed statutory period; that he was convicted despite contradictory, inconsistent and incredible prosecution statements; that the case was fabricated; that the mode of his arrest was questionable as he was arrested without warrant; and that there is new and compelling evidence.

This being a first appellate court, its duty is to re-evaluate the evidence and determine whether the trial court arrived at a correct finding.

The record shows that the appellant was charged with the offence of defilement contrary to Section 8(1) as read with section 8(3) of the Sexual Offences Act. The particulars provided that the offence was committed on 7th July 2011. There was an alternative charge of Indecent Act with a Child contrary to Section 11(1) of the Sexual Offences Act. The appellant was first arraigned in court on 11th July 2011. He requested that plea be deferred as he was unwell. This request was granted and the matter was adjourned to 24th July 2011. On that day plea was taken and the appellant pleaded not guilty to both the main charge and the alternative count. On that day, he did not complain of any illness. He was then released on bond. The matter was fixed for hearing on 3rd August 2011. On that day, it was said that the complainant was incapacitated and could not attend court. The appellant, who remained unrepresented throughout the trial, then made an application to be supplied with witness statements. The court made an order that these be supplied. It seems as if the statements were not supplied as ordered, as on 12th September 2011, the appellant made another application to be supplied with the witness statements. The court again ordered that these be supplied and adjourned the matter to the following day. That is the last time the issue of witness statements came up, as on the following day, the matter proceeded with the first

four witnesses testifying. No complaint was raised that witness statements had not been supplied.

A total of six witnesses testified in support of the prosecution's case. Interestingly, the appellant chose not to cross-examine any of them.

PW-1 was the complainant herself. The record shows as follows :-

Voir dire examination 12 years. PW-1 Minor sworn Evidence Kiswahili."

The witness then proceeded to give evidence. She testified that she was born on 7. 10. 1998 and that she is in class 5. She stated that she stays with her uncle who testified as PW-2. She continued that on 7.7.2011, she was sleeping with a baby M. She heard someone knocking the window. She woke up and opened the door. She stated that she wanted to go to the toilet. She then met the appellant outside. The appellant then told her to escort him to his house. They went to his house and had sexual intercourse. She stated that she remained there till morning and then left. Her uncle saw her coming home and asked her where she was from. She told him what happened. She was then taken to hospital and later the matter was reported to the police. She was issued with a P3 form which was filled.

PW-2 was uncle to the complainant. They live together. He testified that on 7.7.2011, at around 3.30 am he was asleep, although he stated that he usually prays around 3 pm (probably 3am). He testified that he got distracted by a shadow and woke up his wife. She woke up and called out the complainant, S. S said that she was going to the toilet. PW-2 continued and finished praying. He got concerned because he was sure that S, had not returned. They looked for S all over. Later S, emerged through a maize plantation. On being asked where she was from, S, stated that she was from the maize plantation to relieve herself. It did not make sense to PW-2 because they have a toilet. On being confronted, She, disclosed that the appellant had been luring her out of the house for sex. PW-2 latter waylaid the appellant and arrested him.

PW-3 was the wife to PW-2 and aunt to S. She stated that on the material day, she was sleeping when she heard the door being opened. She asked who it was, and S responded. They got concerned when S seemed to have taken too long and they started looking for her. She later emerged and disclosed the incident.

PW-4 testified that he is an agent in the house that the appellant lives in. He stated that on 6.7.2011, he saw the appellant with S at around 7pm but never thought much of it.

PW-5 was one Dr. Chebet. She examined S, and filled in the P3 form. According to the history given to her by S, S stated that she was on her way to school when she was attacked by the appellant who then defiled her. The good doctor noted that her hymen was torn and she had two tears in her private parts. All other tests were negative.

PW-6 was the investigating officer. She received the appellant and booked him. She produced a dress that was said to have been worn by S, on the material day, and the vaccination card of S, most likely to prove the age.

With that evidence, the trial magistrate made the following ruling :-

The court finds that the prosecution have proved their case on a balance of probability and this court finds that accused person has a case to answer and to comply with S.211 of CPC.

When called upon to provide his defence, the appellant stated as follows :-

"I am not ready to proceed with my defence case. I have another matter at the High Court."

For full effect I will set out the response of the court.

Since the accused was put on his defence on 21.10.2011 and today was his defence case but accused has refused and says ' I have nothing to say in defence, since I have lodged a case at the high court.' Be as it

may, nothing bars accused to give his defence case and since he has opted not to give his defence on the ground that he has a case 'at the high court' which in this court's view has nothing to do with this matter, this court terms that accused has nothing to say in defence and terms his defence closed. Judgment on 6.4.2012.

The judgment was delivered on 16.4.2012 and as I stated earlier, the appellant was convicted of the offence of defilement, and sentenced to 20 years in jail.

Mr. Okara for the appellant, argued that no witness statements were provided to the appellant contrary to the provisions of Article 50 (2) (b) (c) and (j) of the Constitution. He submitted that when the statements were not supplied the appellant filed an application in the High Court. I however pointed out to Mr. Okara that I have no record of such application and Mr. Okara chose to abandon the ground that the trial proceeded despite the presence of a High Court application seeking to stop it. Mr. Okara further contended that there were several contradictions in the prosecution evidence. He further argued that the appellant needed to be examined as he was not caught in the act. In his view, there was no proof beyond reasonable doubt and he asked that the appellant be acquitted.

Mr. Omwega for the State did not support the conviction. In his view, the case was a mistrial. He pointed out that the victim was 12 years old, but no voire dire examination was done. He also averred that there was no record of compliance with the provisions of Section 211 of the CPC. Mr. Omwega asked that there be an order for a retrial since there was ample evidence of defilement.

I have considered the record, the evidence tendered and the submissions of counsel. In many respects, there are serious flaws in the manner in which the proceedings were conducted. As conceded by Mr. Omwega, there was no *voire dire* examination of the 12 year old victim. Under Section 19 of the Oaths and Statutory Declarations Act (CAP 15) Laws of Kenya, it is required, before taking the evidence of a child of tender years, for the court first to be satisfied that the child understands the nature of an oath. If such child cannot understand the nature of an oath, he/she can testify but such evidence will be deemed a deposition. The Section is drawn as follows :-

Evidence of children of tender years

19. (1) *Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.*

(2) *If any child whose evidence is received under subsection (1) willfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of an adult with imprisonment.*

Although the above provision as drawn, refers only to a child of tender years, which the Oaths and Statutory Declarations Act does not define, but which the Children's Act, (CAP 141) defines at Section 2 to be a child of less than 10 years, it is a recognized practice for the court to satisfy itself as to whether any witness, who is a child, irrespective of his/her age, is capable of understanding the nature of an oath or is possessed of sufficient intelligence to justify the reception of his/her evidence. This is because, a child witness may be declared incompetent to testify, owing to his/her tender years, pursuant to the provisions of Section 125 (1) of the Evidence Act (CAP 80) Laws of Kenya. It therefore behoves upon the court to determine for itself whether the child is capable of giving evidence, irrespective of his/her age.

The court must be satisfied that the child is capable of giving evidence whether through oath or otherwise, before proceeding to allow such child to testify. This is what is called the *voir dire*. The court can ascertain the capability of a child to testify by asking simple questions and depending on the answers, can have the child declared incompetent, or competent to testify. If competent, the court then has to assess whether the child understands the nature of an oath in which case he/she may be sworn. If not, the court has to satisfy itself that at least the child understands the duty of speaking the truth. The court must record the responses of the child to the questions. It is not enough for the court to simply say, *voire dire* done. The nature of that *voire dire* has to be recorded.

There are numerous authorities that assert that the above process must be done. See for example ***Nyasani s/o Gichana v R (1958) EA 190***, ***Kibangeny arap Kolil v R (1959) EA 92*** and ***Oloo s/o Gai v R (1960)*** . In the case of ***Kinyua v R (2004) 1 KLR 256***, it was stated as follows at p265 :-

There are two steps to be borne in mind. The first step is for the Court to ascertain whether the child understands the nature of an oath. An investigation to this effect must be done by the Court immediately the child-witness appears in court. The investigation need not be a long one but it has to be done and has to be directed to the particular question whether the child understands the nature of an oath. If the answer to this question is in the affirmative, then, the Court proceeds to swear or affirm the child and to take his or her evidence upon oath. On the other hand, if the child-witness does not understand the nature of an oath, he or she is not necessarily disqualified from giving evidence. The second step then follows. The Court may still receive his evidence if the Court is satisfied, upon investigation, that he is possessed of sufficient intelligence and understands the duty of speaking the truth. Again investigation in this respect need not be a long one but it must be done and when done, it must appear on record. Some basic but elementary questions may be asked of the child to assess the level of his intelligence and whether he understands the duty of speaking the truth or otherwise. Where the Court is so satisfied, the Court will proceed to record unsworn evidence from the child-witness.

In the case of ***Gabriel s/o Maholi v R (1960) EA 159***, the court of appeal faulted the manner in which the evidence of a 9 year old was taken. Whilst the judge satisfied himself and recorded that the child was sufficiently intelligent to give evidence, he did not record that the child understood the difference between truth and falsehood. The court stated that such omission could be fatal to a case.

The proceedings herein do not disclose the nature of the *voir dire* and whether, before swearing PW-1, (the stated victim of the offence), the trial court satisfied itself as to whether she understood the nature of an oath, or indeed, whether she understood the duty of speaking the truth. This in my view was an error on the part of the trial magistrate.

Moreover, nowhere in the record did the trial magistrate state that there was compliance with the provisions of Section 211 of the CPC which states as follows :-

S.211 (1) *At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).*

(2) *If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of the witnesses.*

It was necessary for the trial court to avail the various options available to the appellant to make his

defence. I have seen the reference to Section 211 made by the trial magistrate, but no record that there was compliance with the same. My view is that Section 211 was not complied with, because if it had, then the appellant would have stated to court the manner in which he would prefer to present his defence. There is no record whether the appellant stated that he would give an unsworn statement, or a sworn statement; neither is there any record as to whether the appellant stated that he would avail or not avail any witnesses. The only conclusion that I can reach is that there was non-compliance with Section 211 of the CPC. Moreover, the trial magistrate also failed to allow the appellant to present his defence, putting aside for a moment, that it was not stated the manner in which the appellant would present his defence for want of compliance with Section 211 of the CPC.

Further, the trial magistrate was also wrong in stating that the prosecution had proved its case on a balance of probabilities. This was a criminal matter and the correct term in respect to Section 210 of the CPC, is that the prosecution has demonstrated a prima facie case.

When the matter came up for defence hearing, the appellant sought an adjournment because he had another matter before the High Court. There is no record that the trial magistrate made an inquiry as to what matter before the High Court the appellant had. It may very well be the case that the appellant had a matter before the High Court and his mind was directed at dealing with that matter first. It was wrong for the trial magistrate to off-hand dismiss the request for adjournment by the appellant for the appellant may have had a legitimate basis for the application. Although the trial magistrate recorded that the appellant said that 'I have nothing to say in defence…' this is not what the record bears. The record does not bear such words, and there is nowhere in the record that the appellant insinuated that he had nothing to say in defence. The trial magistrate made a fundamental error in denying the appellant an opportunity to present his defence. This contravened the provisions of Articles 50 (2) (c) of which the constitution which provides that an accused must be accorded adequate time and facilities to prepare his defence and Article 50 (2) (k) which vests an accused, the right to adduce and challenge evidence. The learned trial magistrate barred the appellant from adducing any evidence in defence and violated his constitutional rights.

There was the other argument that the appellant was not provided with the prosecution's evidence in advance. This is a right enshrined in Article 50 (2) (j) of the constitution. However, my own assessment is that there was no violation of this provision. The record reflects that the court ordered the appellant to be provided with the prosecution's witness statement. There is nowhere in the record which shows that the appellant complained that he had not been provided with the witness statements before any of the witnesses started testifying. It is however advisable, for the court to make a record that witness statements and all the prosecution's evidence have been availed to an accused person, so as to remove doubt as to whether the statements have been availed or not. It is a practice that I would recommend for every trial court.

There is no doubt that there were fundamental flaws that went to the root of the trial and which made the trial unfair to the appellant. I hold that the appellant was not accorded a fair trial as required by Article 50 of the Constitution. The conviction on that ground alone cannot stand.

The next issue that I need to determine is whether to order a new trial or to forthwith acquit the appellant.

Whether or not to order a retrial depends on the circumstances of each case. As was stated in the case of ***Bishar Abdi v R Court of Appeal at Nairobi, Criminal Appeal No. 7 of 2008, (2010) e KLR*** *approving a dictum* ***in Ekimat v R (Criminal Appeal No. 151 of 2004 (UR))***

"There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it."

I must therefore determine it will be in the interests of justice to order a retrial, bearing in mind, that a court will certainly not order a retrial, if the sole purpose is so that the prosecution may fill in the gaps

in the previous case. If I am convinced that the prosecution's case would have supported a conviction, I will be inclined to order a retrial.

I have looked at the evidence, which in my view has a lot of discrepancies. Although on one hand, the victim stated that she was lured by the appellant to go into his house for sex, she also stated to the clinical officer that the appellant waylaid her when she was on her way to school. This was after she had already revealed to her uncle and aunt, that she had had intercourse with the appellant, and therefore there was no reason to conceal what she had already informed her uncle and aunt, if indeed this were true. There were no other witnesses to the alleged incident. I am aware that a court can convict on the sole evidence of a sexual victim on the basis of Section 124 of the Evidence Act (CAP 80) Laws of Kenya. That section provides as follows :-

S. 124 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.

I am not too convinced that the victim is one prone to always tell the truth, and I would be hesitant to convict on her sole evidence.

The evidence of PW-2 and PW-3 was also not very consistent with that of PW-1. PW-1 stated that she was called at night by the appellant and she spent the whole night at his place. She never stated that when she was going out, she was called by PW-2 and/or PW-3, but ignored and proceeded to accompany the appellant. Her evidence is that PW-2 and PW-3 only saw her coming back home. On the other hand PW-2 and PW-3 testified that they heard and called the complainant when she was going out.

Even in the absence of the fundamental flaws committed by the trial court, I would still have found the appeal, meritorious on the basis of the evidence tendered. In my view, a retrial will not therefore be in the interests of justice. I decline to order a retrial.

The net effect is that the appellant's appeal succeeds. I hereby quash the conviction and sentence and order that the appellant be set free unless otherwise lawfully held.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 6TH DAY OF FEBRUARY 2014

JUSTICE MUNYAO SILA

DUTY JUDGE

HIGH COURT AT ELDORET.

Delivered in the presence of:

Appellant - present

N/A for Mr. Okara for appellant

Mr. Munene present for the state.