



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 52 OF 2013

JEREMIAH CHEGE KIHARA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Kangema Senior Resident Magistrates Court Criminal Case No. 435 of 2008)

JUDGMENT

The appellant was charged with the offence of defilement contrary to **section 8 (1)** of the **Sexual Offences Act No. 3 of 2006**. According to the particulars of the charge, on diverse dates between 9th and 17th day of November, 2008 in Murang'a District within central province, the appellant intentionally and unlawfully committed an act which causes penetration with his genital organ to JNC, a girl aged 9. In the alternative, the appellant was charged with the offence of indecent assault to a child contrary to **section 11(1)** of the **Sexual Offences Act No. 3 of 2006**; the particulars in the alternative count were similar to those in the principal count except that the appellant is said to have committed an indecent Act with a child aged 9 by touching her private part.

At the conclusion of his trial, the learned magistrate held that the principal count had been proved beyond reasonable doubt and convicted the appellant accordingly; the appellant was sentenced to life imprisonment.

Being dissatisfied with the conviction and sentence the appellant appealed to this court. The grounds upon which his appeal was based can be summarised into what he described as errors of law and fact which the learned magistrate allegedly fell into by relying on contradictory evidence by the prosecution; improper admission of the evidence of a minor; dismissal of the appellant's defence; failure to call the principal witness; disregard of the appellant's defence; and reliance on a defective charge sheet.

Of all the grounds of appeal, the one which stood out and on which, in my humble view, the appellant's appeal turns is the manner the learned magistrate took and admitted the evidence of the complainant. Because of the importance which both the prosecution and the learned magistrate attached to her evidence it is important to lay it out together with the evidence of the rest of the prosecution witnesses. In her evidence, before evaluating its value. In any event the appellant is entitled to a fresh examination and analysis of evidence by this court before it can come to its own conclusions on whether the decision of the trial court should be upheld but always remembering that it is the trial court that had the occasion and the benefit of seeing and hearing the witnesses. **(See Okeno versus Republic (1972) E.A. 32)**.

The complainant testified that she was aged 10 and in class four. She recalled that sometimes in

November, 2008, she had gone to church with her mother and her brother E; however, together with her brother, they came back home leaving their mother behind.

The complainant alleged that upon arrival at home, her father who is the appellant herein, forcefully defiled her and that though she cried out nobody came to her rescue. She told the court that the appellant warned her against telling anybody what had happened; however, she opened up on the following day and informed her mother what her father had done to her. According to her, she had been defiled by the appellant on two previous occasions before this particular incident.

Since nobody else witnessed the alleged sexual attack on the complainant the evidence of the rest of the prosecution witnesses was tied to what the complainant told them except for the **clinical officer (PW2)** whose evidence mainly constituted observations arising from his medical examination of the complainant. This witness was of the opinion that that there must have been penetration of the complainant's genital organs because there were bruises on the complainant's external genitalia and her labia minora was also inflamed. Though there was no discharge and no evidence of spermatozoa, the complainant's genitalia still emitted a foul smell.

The head teacher of the complainant's school testified that on 18th November, 2008, he got information from complainant's teacher that the complainant had abnormal pain; he asked this teacher to take her to a nearby dispensary where upon examination, it was revealed that she had been defiled. The complainant is said to have told them that she had been defiled on several occasions by the appellant. When the headmaster summoned the complainant's mother the following day, she confirmed to him that indeed she had also been told that the appellant had defiled their daughter but could not do anything about it for fear of being either divorced or assaulted by the appellant. Indeed it was the head teacher and not the mother of the complainant who took it upon himself to report the case to the police.

For some unexplained reason the complainant was recalled to testify and on this second occasion she is recorded to have been affirmed before testifying. Contrary to what she told the court when she first testified, she said that when she was defiled by the appellant her mother had gone to work and that she told her grandmother about it; it was her grandmother who informed her mother. She said that this was the second time the appellant had defiled her.

The grandmother who is alleged to have been told about the defilement did not testify but the complainant's mother told the court that sometimes in November, 2008 the complainant had informed her that while she was away working, the appellant defiled the complainant who apparently had been sent away from school on the material occasion. She claimed to be the one who took the complainant to hospital.

It was apparent from the evidence of the police officer who is supposed to have investigated the complaint against the appellant that he did nothing more than re-arrest and charge the appellant who was said to have been brought to the police station by some police officers who are alleged to have arrested the appellant; none of these officers testified.

It is thus clear from the prosecution witnesses' evidence that their testimony revolved around what the complainant is alleged to have told them. The learned magistrate's judgment also suggests that he was largely influenced by the complainant's evidence in convicting the appellant. At page 5 of his judgment the learned magistrate said:

“ I have carefully considered the evidence on record. I have also taken into account the relationship between the accused and the complainant. the complainant alleged defilement no(sic) by her own father. The complainant was examined and the clinical officer formed the opinion that indeed the complainant had been defiled...I may wish to state that after considering the evidence, I am satisfied that the accused committed the offence.”

Since it was that vital, it is necessary to scrutinise the complainant's evidence and consider whether it should have been admitted in the first place.

Being only ten years of age, the complainant was legally speaking a child of tender years and the admission of her testimony was subject to **Section 19** of the **Oaths and Statutory Declarations Act, Chapter 15**, Laws of Kenya; this provision of the law says:

“19. (1) Where in any proceedings before any court or person having by law or consent of the 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 as aforesaid, 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 other person as aforesaid, 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, shall be deemed to be a deposition within the meaning of that section.”

For purposes of this section, a child of tender years is defined to mean, *“in the absence of special circumstances, any child of an age, or apparent age, of under fourteen years.”*(See **Kibangeny Arap Kolil versus Republic (1959) E.A 94**).

According to the foregoing provision, the scenarios under which the evidence of a child of tender years may be admitted are two-fold; the evidence may either be received on oath if the child understands the nature of an oath or if he or she does not so understand, the evidence may be received unsworn as long as the child is intelligent enough to justify admission of his or her evidence and that he or she understands the duty of speaking the truth. The decision to admit the evidence in one form or the another can only be arrived at after a preliminary examination of the child; the trial court is bound to ask the child questions which, though elementary in nature, must seek to ascertain whether the child understands the nature of an oath and not merely to test his general intelligence. It is the answers to these questions that will certainly inform the court whether the evidence should be taken sworn or unsworn. The questions, their answers and the conclusion that the court comes to must be recorded. This inquiry is what is sometimes referred to as *voire dire* examination.

In **R versus Surgenor (1940) 2 ALL ER 249** which was cited with approval in **Kibangeny versus Republic (supra)**, the court while referring to **section 38 (1)** of the **Children and Young Persons Act, 1933** which is similar to **section 19** of our **Oaths and Statutory Declarations Act** that;

“That section clearly states-and this court has on more than one occasion intimated-that it is the duty of the presiding judge to satisfy himself whether or not a child of tender years is in position to be sworn...Those who preside over criminal trials ought to remember that it is the duty of the presiding judge to make an investigation for himself.”

Despite the importance attached to the complainant’s evidence and, no doubt the appellant would not have been convicted without this evidence, the learned magistrate did not make any efforts to inquire whether the complainant was capable of giving evidence on oath on the two occasions that she testified; it is curious that on the first occasion when she testified the complainant gave unsworn evidence but she was affirmed when, for some unexplained reason she was recalled to testify against the appellant for the second time. In neither of the two occasions was a *voire dire* examination conducted. In the absence of this mandatory investigation, the reception of the complainant’s evidence appears to be contrary to the provisions of **section 19 of the Oaths and Statutory Declarations Act** and for this reason the complainant’s evidence was of no value.

In the case of **Sakila versus Republic (1967) E.A**, the court (Platt, J as he then was) referring to the decisions in the cases of **Kibangeny Arap Kolil versus Republic (supra)**, **Nyasani s/o Bichana versus Republic (1958) E.A 190**, **Fransio Matovu versus Republic (1961) E.A 260** and **Oloo Gai versus Republic (1960) E.A 86** said at page 406 that:-

“It is well established that before evidence of a person of tender years is admitted, a voire dire examination should be carried out in order that the court may satisfy itself that the witness is

possessed of sufficient intelligence and that he understands the duty of speaking the truth in order to justify the reception of his evidence. And further that where it is clear that he understands the nature of the oath, his evidence may then be received on oath or affirmation. Where this procedure is not carried out and the evidence of a person of tender years is of a vital nature, it may be that the omission may occasion a miscarriage of justice.”

In the case of **Nyasani s/o Bichana versus Republic (supra)**, which is one of the decisions that the court in **Sakila versus Republic (supra)** relied on, the court of appeal said at page 191 that:-

“It is the duty of the court under that section (that is section 19 of the Oaths and Statutory Declarations Act) to ascertain, first, whether a child tendered as a witness understands the nature of an oath, and if the finding on this question is in the negative, to satisfy itself that the child “is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth”. This is a condition precedent to the proper reception of unsworn evidence from a child, and it should appear upon the face of the record that there has been a due compliance with the section.”

In **Kibangeny versus Republic (supra)** the court of appeal allowed the appellant’s appeal solely on the ground that the evidence of the two boys in that case was of so vital a nature that the learned trial judge’s failure to comply with **section 19** of the **Oaths and Statutory Declarations Act** was held to have occasioned a miscarriage of justice.

While admitting that the learned magistrate omitted to undertake a *voire dire* examination counsel for the state, Ms Akhaabi, urged this court to find that that omission was not fatal to the appellant’s conviction because besides the complainant’s evidence, there was other evidence that linked the appellant with the offence with which he was convicted. In support of this proposition, counsel cited the **High Court Criminal Appeal No. 34 of 2013 Kivelelo Mboloi versus Republic (S.N. Mutuku, J)** in which the court disregarded the complainant’s evidence on the ground that a *voire dire* examination had not been carried out but still held the appellant was guilty of the offence of an indecent act with a child contrary to **section 11 (1) of the Sexual Offences Act** because there was other evidence that pointed to the appellant’s culpability.

I would not hesitate to take the same path which the court in **Kivelelo Mboloi versus Republic (supra)** took if, in the absence of the complainant’s evidence, there was alternative but sufficient evidence to prove beyond doubt that the appellant committed the offence for which he was convicted; however, in the absence of the complainant’s evidence, it is quite apparent that the rest of the prosecution witnesses’ evidence amounted to no more than hearsay evidence. Of course the evidence of the clinical officer, no doubt, proved that there was penetration and could rightly be said to be independent but it only went as far as proving that fact of penetration and no more; from the evidence available there was no link, of whatever nature, between the penetration and the appellant in the opinion of the clinical officer.

For the foregoing reason I am persuaded to follow the court of appeal decision in **Kibangeny versus Republic (supra)** and conclude that the evidence of the complainant was of so vital a nature that the learned trial magistrate’s failure to comply with **section 19** of the **Oaths and Statutory Declarations Act** occasioned a miscarriage of justice against the appellant. His conviction cannot be allowed to stand; I would therefore allow the appeal, quash the conviction and set aside the sentence. The appellant is accordingly set at liberty unless he is lawfully held under a separate warrant.

Dated, signed and delivered in open court this 13th June, 2014

Ngaah Jairus

JUDGE

