REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 41 OF 2012

Appeal from the original conviction and sentence in Criminal Case Number 42 of 2012 at Senior Resident Magistrate's Court at Wajir (Mr. Linus Kassan, SRM)

MOHAMUD ADAN ALI……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGEMENT

Background

Mahamud Adan Ali, the appellant, was charged with defilement contrary to section 8(1)(2) of the Sexual Offences Act and in the alternative with committing an indecent act with a child contrary to section 11(1) of the same Act. The particulars of the main charge read that 2nd February 2012 at Jogbaro in Wajir East District, within Wajir County, intentionally caused his penis to penetrate the vagina of I.M a child aged six years. In the alternative it is alleged that on the same date and place he intentionally rubbed his penis on the vagina of I.M a child aged six years.

The appellant was tried and convicted on the main charge. He was sentenced to life imprisonment. He has appealed against the conviction and sentence.

Petition of appeal

The appellant, through his counsel Mr. Ingutya, has listed six grounds of appeal, namely:

i. That the learned trial magistrate erred in law and fact in failing to afford the appellant an opportunity to cross-examine the complainant.
ii. That the learned trial magistrate erred in law and fact in shifting the burden of proof.
iii. That the learned trial magistrate erred in law and fact in failing to consider the glaring contradictions in the testimonies of the prosecution witnesses.
iv. That the learned trial magistrate erred in law and fact in convicting on the basis of uncorroborated evidence of a minor when it was clear that she was not telling the truth.
v. That the learned trial magistrate erred in law and fact in failing to afford the appellant an opportunity to mitigate.
vi. That the learned trial magistrate erred in law and fact in imposing a maximum sentence without any justification.

Both counsels for the appellant and the respondent agreed to dispose of the appeal by way of written submissions.

Appellant's submissions

Counsel for the appellant submitted that the age of the complainant was not proved beyond reasonable doubt. The issue of complainant's age is not one of the grounds of appeal. Nevertheless, counsel submitted on it. It was further submitted that the trial magistrate failed to follow the laid down procedure in taking down evidence of minors. Counsel cited **John Muiruri vs. Republic (1983) KLR 445** in support of this issue on the procedure to be followed in conducting a *voire dire* examination of minor witnesses and this, it is submitted, is fatal to prosecution case.

It is submitted that the complainant did not testify because the record of the lower court does not show that the complainant testified. It was submitted that failure to allow the appellant to cross examine the complainant was an infringement of his rights under Article 50 of the Constitution 2010.

It was submitted that the evidence by the prosecution witnesses is full of contradictions. Examples were given on the evidence of the complainant that she had been defiled on several occasions by the appellant and after telling her mother, nothing was done. The mother denied that she had been informed of the previous defilements. Counsel further contrasted the evidence by the complainant that her screams attracted her mother and other people but on the contrary her mother testified that it is the complainant's brother who went for her; that the complainant said the garage where she was defiled is far from their home when her mother said that it is behind their house. As a result of these contradictions, it is submitted, the witnesses were not credible and their evidence cannot be relied on.

It was submitted that the trial magistrate shifted the burden of proof to the appellant when he found that the appellant did not explain how he got bruises on his penis or why he was found holding the complainant. It was submitted that the burden of proof never shifts to an accused person and the trial court was in error in doing so. Counsel asked the court to reverse the lower courts findings, quash the conviction, set the sentence aside and free the appellant.

Respondent's submissions

The respondent opposed the appeal and submitted that the age of the complainant has been proved beyond reasonable doubt. Learned state counsel submitted that the mother was best placed to know the age of her child as was held in **Faustine Mghanga vs. Republic in Criminal Appeal No. 348 of 2010** and that a P3 form showing age assessment by a doctor who had examined the complainant was adequate evidence establishing age as was stated in **Republic vs. Mohamed Abdi Bille in Criminal Appeal No. 42 of 2013**.

On the issue of failure to conduct a *voire dire* examination, counsel submitted that the trial court conducted this examination on all the three minor witnesses and that failure to conduct a *voire dire* examination on a child of tender years may not of itself lead to the quashing of a conviction if there is in existence other evidence on record sufficient enough to base a conviction on as was held in **Omar Mohamed Ibrahim vs. Republic in Criminal Appeal No. 136 of 2013.**

As to whether the complainant testified it was submitted that after the court noted that the child was intelligent but too young to take oath, what follows is the unsworn evidence of the complainant; that the fact that the trial court did not number the complainant as a prosecution witness does not in any way make the lower court proceedings fatal and that the appellant has not demonstrated that he was prejudiced in any way. It was submitted that in any event, this omission is curable under section 382 of the Criminal Procedure Code and that since the complainant did not give a sworn testimony, cross examination could not be done.

On contradictory evidence is was submitted that corroboration is no longer a requirement in sexual offences where the victim child is the witness and that in **Mukungu vs. Republic in Criminal**

Appeal No. 277 of 2002 the requirement for corroboration of evidence of girls and women was held to be discriminatory and unconstitutional; that courts can rely on sole evidence of a minor to convict where it finds this evidence truthful.

On the issue of shifting the burden of proof, it was submitted that the trial court did not shift the burden to the appellant and that an accused person is supposed to rebut prosecution evidence.

On the issue of mitigation, it is submitted that non-observance of the principle of sentencing (mitigation) does not result in failure of justice and that this is curable under section 382 of the Criminal Procedure Code.

Learned state counsel submitted on the issue of defective charge sheet. This issue was not raised on appeal by the appellant but even if it had been raised, this court finds the charge properly drawn as it contains a statement of the offence and particulars that inform on the offence committed. The only mistake is the manner the section of the law creating the offence is cited. This is an error that is repeated often in many cases and the police ought to be sensitized on the proper way to frame the charges. This error in my view and from decided cases including **Fappyton Mutuku Ngui vs. Republic (2012) eKLR** is curable under section 382 Criminal Procedure Code.

Learned state counsel submitted that the authorities cited by the appellant are not relevant to his case and ought to be disregarded. He asked the court to dismiss the appeal for lack of merit.

Evidence

It is required of this court to examine, analyze and evaluate all the evidence tendered in the lower court afresh with a view to arriving at its own independent conclusion. I have critically read the evidence tendered in the lower court.

The prosecution case was supported by the evidence of six witnesses. The first to testify is I.M the complainant. She was aged six years at the time. She testified without taking oath. Her evidence in summary is that she was coming from school with her older sister S.S. Before they reached home, the appellant who was at what the witnesses referred to as a garage situated near the home of the complainant, called the complainant. Her sister S.S went home alone. The girls' mother F.N, PW3, asked S.S where her sister was. S.S told her mother that the complainant had been called by a man in the garage. PW3 sent her son and complainant's brother F.A (PW2) to go and look for the complainant at the garage. PW2 went to the place and through a window he saw the complainant and the appellant inside with the appellant holding the complainant who was crying. The appellant was telling the complainant to keep quiet. PW2 entered the house and told the complainant to accompany him home. According to PW2's evidence, the complainant was holding her trousers in her hand.

On getting home, PW3 noticed that the complainant was holding her trousers in her hand. On enquiring on what had happened, the complainant, who was crying, narrated to her mother that she had been defiled by the appellant. PW3 went to ask the appellant. According to her evidence, the appellant apologized and told her that they settle the matter. PW3 locked the appellant inside the garage and went to report the matter at the police station.

PC Benjamin Kimeli of Wajir Police Station (PW6) confirmed receiving the report of defilement on 2nd February 2012 around 14hours. He testified that in company of PC Woman Kawina (not a witness) he joined PW3 to go to what he called a hide and skin store where he found the appellant locked inside with members of public ready to beat him. The police arrested him and took him to the Police Station.

The complainant was issued with a P3 Form and referred to hospital. Doctor Noor Mohamed, PW5, attended to the complainant on the same date. He noted a tear and laceration on the labia minora and vaginal orifice, bloody discharge from her vagina and absence of hymen. PW5 also examined the appellant and found laceration on the corona of the penis (ridge of skin separating the penis head from

the shaft). He placed the age of the injuries as hours and concluded that defilement had taken place.

In his defence, the appellant testified that on the day he is alleged to have defiled the complainant, he had been working in the store with other people and listening to the radio; that complainant's mother went to the place and claimed that the appellant had defiled her daughter which he denied and asked her not to embarrass him; that he was taken to hospital and found with bruises on the penis which had been there before the alleged defilement.

Determination

The age of the complainant was not raised as a ground of appeal but counsel for the appellant has submitted on it and the respondent's counsel has replied on the same. The complainant in her evidence did not state her age to the trial court but she told the court that she attended nursery school. Her mother PW3 said the complainant was six years old. She did not however state the year when the complainant was born. The P3 Form shows her age as six years. I have read **Charles Karuga Kinyua vs. Republic (2009) eKLR**, the case relied on by counsel for the appellant. I find that the case does not assist the appellant at all. The issues in that case are not specifically on age of the complainant.

I agree with counsel that it is crucial for the prosecutor to prove the age of the complainant in sexual offences for obvious reasons: the sentence is based on the age of the victim. Following the case of **Fappyton Mutuku Ngui**, above, which has persuasive value to this court, I agree with the judge in that case when he said that 'conclusive' proof of age does not necessarily mean that there has to be a formal age assessment report of the production of a birth certificate. I have considered the evidence of PW3 the mother of the complainant who told the court that her daughter was six years at the time; the P3 Form that put her age at six years and the fact that she was in nursery school. Section 8(2) of the Sexual Offences Act under which the appellant was charged refers to the age of the victim as eleven years and below. I am convinced that given this evidence, the complainant could not have been over eleven years and therefore this available evidence proves beyond reasonable doubt that the complainant was within the age bracket stipulated under section 8(2) of the Sexual Offences Act. This ground has no merit.

On the issue of *voire dire* examination, I have noted what transpired in the lower court. The record shows as follows:

Examination of a minor

"I am I.M. I have attended duxi. My duxi teacher is A. I have friends in the duxi".

Court: Child is intelligent but too young to take oath.

It is submitted that procedure of conducting a *voire dire* examination on a minor child was not followed in this case. The trial court did not record the questions he asked the complainant before she gave the answers. However, I have no doubt that the court must have posed some questions to elicit the answers given. In his discretion, the trial magistrate formed the opinion that even though the child was intelligent, she could not give evidence under oath.

In **Nyasani s/o Bichana vs. Republic (1958) E.A 190**, the court had this to say on the issue of conducting voire dire examination:

> **"It is clearly the duty of the court under that section (19 (1) 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 recognition 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 the instant case we did not consider it necessary to call for a report from the learned judge as to whether or not there had, in fact, been a compliance with the requirements of s. 19, since we were of opinion that there was ample evidence of the commission of the offence apart from the evidence given by the complainant herself".

The court in the **Nyasani case,** above, held, *inter alia*, that omission to comply with the requirements of section 19 of the Oaths and Statutory Declarations Act may result in the quashing of a conviction when the other evidence is insufficient by itself to sustain the conviction. As is evidence in this judgement, there is adequate other evidence to conclusively prove beyond reasonable doubt that the complainant was defiled by the appellant and therefore failure by the trial magistrate to strictly adhere to the provisions of section 19 above does not result in quashing of the conviction.

In respect of the other two child witnesses, I note that the trial magistrate conducted *voire dire* examination on them and found PW2 fit to testify under oath but S.S, who testified as PW4, unfit to give a sworn testimony.

Having given unsworn evidence, it was not possible to allow the appellant to cross examine the complainant and S.S. To my mind, the most crucial thing is whether the appellant was prejudiced in any way in this trial. I will comment on this before concluding this judgement.

On the issue of contradictions and uncorroborated evidence, I have critically analyzed all the evidence, especially that of the complainant, her brother PW2, her sister S.S and her mother PW4. There are contradictions on time of the offence. The complainant and her sister S.S did not state the time when the appellant called the complainant. PW2 said it was 7.00pm and her mother put the time as 12.30pm. The evidence of PW6 the Police Officer puts the time as 14-15 hours. The P3 Form puts the time 13.30 hours. It is obvious that PW2 was wrong. In my view this seems to be a genuine mistake and this court has not doubt that the time must have been in the afternoon and not in the evening.

Another contradiction is the distance of the garage to the home of the complainant. She told the trial court that the garage was very far from their home but her mother said it was behind their home without stating how far apart that was. Another contradiction is who went to rescue the complainant. She testified that her screams attracted her mother and brother who went to rescue her. PW2 her brother and her mother said it is the brother who was sent by the mother to go look for her.

While I appreciate these contradictions, I find the evidence of PW2 corroborated by that of their mother PW4. These contradictions, in my view do not go to the root of this case which is whether there is evidence to support defilement.

The Complainant and her sister S.S said they were coming from school when the appellant who was known to them called the complainant. She went to his house and S.S proceeded home where she told their mother where she had left the complainant. Their mother sent PW2 to look for the complainant. PW2 found the complainant inside the garage referred to as the hides and skins store. The complainant was crying and holding her trousers in her hand. On learning what had happened the complainant's mother went and confronted the appellant and locked him in the same store. This is where the police found him and arrested him. I find this evidence well corroborated. The proviso to section 124 of the Evidence Act does not come into play here since the complainant's evidence is not the only evidence in this case.

The medical evidence is conclusive that defilement took place. The complainant was examined hours after the offence and was found with lacerations on the labia minora and the vaginal canal. The hymen was broken and she had bloody discharge from her genitalia. Her trousers were torn between the legs and her hijab and skirt had some whitish discharge. The appellant has laceration on the corona of his penis which the doctor concluded was due to forceful penetration.

This evidence taken together proves without doubt that the complainant had been defiled by the appellant.

He explained that the laceration on his genitalia was older than the alleged defilement. This court cannot belief this to be true. He is not required to prove his innocence but good defence casts doubt in prosecution case. I have no reason whatsoever to doubt the evidence of defilement which is conclusively supported by medical evidence.

I have noted that the appellant is claiming that the trial court shifted the burden of proof to him. I do not agree with him. I am aware the trial magistrate commented that the appellant did not explain why he was found holding the complainant or how he got the laceration on his penis. In my view the trial magistrate relied on the evidence of the prosecution witnesses which he found credible and the offence of defilement proved beyond reasonable doubt. Although he noted that the appellant did not explain why he was holding the complainant or why his penis was injured, I do not think this is what formed the opinion of the magistrate to convict the appellant and in any case one of the purposes of a defence is to rebut the prosecution case.

On the issue of mitigation, it is true the trial magistrate did not allow the appellant to mitigate before sentencing. The appellant through his counsel did not submit on this ground. It is crucial, as observed in various decisions, that an accused person be allowed to mitigate before sentencing. Mitigation is part of sentencing and forms part of the requirement for fair trial. However, failure to mitigate does not, ipso facto, vitiate a conviction. See **Isaack Kimanthi Kanuachobi vs. Republic (2013) eKLR** and **Amos Changalwa Juma vs. Republic (2009) eKLR.**

I find the submission that the complainant did not testify without merit. I am aware that the trial court did not keep good record by naming the complainant and her sister S.S as PW. However, the record of the sequence in which the prosecution witnesses testified clearly flows. After the court made its comments that the complainant was scared when looking at the appellant, the record shows that what follows is continuation of her evidence.

The trial court sentenced the appellant to life imprisonment. It is submitted that this is harsh. Of course it is a harsh sentence but a legal one. It is properly provided in law. Sentencing is left to the discretion of the trial court. Unless it is shown that the sentence imposed is illegal, then the appellate court has no reason to interfere with it. Section 8(2) Sexual Offences Act provides life imprisonment for defilement of a child aged eleven years and below.

Finally I wish to comment that the evidence of the complainant to the effect that the appellant had been defiling her on various occasions is not supported by evidence and the trial court confined itself, as has this court, to the defilement committed on 2nd February 2012 to which there is ample evidence to prove the same occurred.

My careful evaluation of the evidence of all the witnesses and the defence of the appellant lead me to the conclusion that there is ample evidence conclusively proving that the appellant defiled the complainant on 2nd February 2012. His defence cannot therefore be true. The trial before the trial court did not prejudice the appellant in any way. This court therefore rejects his appeal and upholds the conviction and sentence. It is so ordered.

Dated, signed and delivered this 5th day of June 2014.

S.N.MUTUKU

JUDGE