



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CRIMINAL APPEAL NO.36 OF 2013

ISAAC OKUKU ALIAS ZAKAYOAPPELLANT

VERSUS

REPUBLICRESPONDENT

(An Appeal arising out of the judgment of I.T. Maisiba P.M. delivered on 7th May 2013 in Busia criminal case no.232 of 2013)

J U D G M E N T

1) This Appeal raises, amongst other issues, the important question as to when and how a Trial Court can allow the use of Intermediary Evidence under the provisions of Section 31 of The Sexual Offences Act (Act No.3 of 2006).

2) Isaac Okuku alias Zakayo (**the Appellant**) was convicted of the offence Gang Defilement contrary to Section 10 of The Sexual Offences Act (Act No.3 of 2006). It had been alleged that on 30th January 2013 within Busia County, in association with others not before Court intentionally and unlawfully caused his penis to penetrate the vagina of G W a child aged 15 years old.

3) The victim gave evidence through a step mother, E N N, after the Court had remarked,

“The complainant is an imbecile. The Court appoints her mother to give evidence on her behalf.”

Whilst the use of the word imbecile may be said to be derogatory and therefore inappropriate, I understand the Learned Magistrate to be saying that the complainant was suffering from mental retardation. That is, the complainant was suffering from mental or intellectual disorder or impairment.

4) During the hearing of the Appeal, the Appellant challenged the probative value of the Evidence of the Prosecution witnesses. On its own initiative, this Court pointed out that the Appeal raised a fundamental question as to whether the Court properly allowed the use of Intermediary Evidence.

5) The procedure for allowing Intermediary Evidence under Section 31 of The Sexual Offences Act has a Constitutional underpinning in Article 50 (7) of The Constitution which provides:-

“In the interest of Justice, a Court may allow an intermediary to assist a complainant or an accused person to communicate with the Court.”

A Court must scrupulously satisfy itself that use of an intermediary is in the interest of Justice and

therefore Justified. This is because once Intermediary Evidence is allowed, there is always the danger that the evidence will not be effectively tested by the accused person because he/she will not be confronting the complainant in person during cross-examination.

6) So what is the procedure for allowing Intermediary Evidence in a trial of a Sexual Offence? Section 31 of The Act is fairly detailed on this. The starting point would be subsections (1), (2) and (3) which provide:-

“(1) 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 witness is-

- a) The alleged victim in the proceedings pending before the court;**
- b) A child; or**
- c) A person with mental disabilities.**

(2) The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1) declare any such witness, other than the accused, a vulnerable witness if in the court’s opinion he or she is likely to be vulnerable on account of –

- a) age;**
- b) intellectual, psychological or physical impairment;**
- c) trauma;**
- d) cultural differences;**
- e) the possibility of intimidation;**
- f) race;**
- g) religion;**
- h) language;**
- i) the relationship of the witness to any party of the proceedings;**
- j) the nature of the subject matter of the evidence; or**
- k) any other factor the court considered relevant.**

(3) The court may, if it is doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2) summon an intermediary to appear before the court and advise the court on the vulnerability of such witness.”

7) Where the reason for vulnerability is on account of mental impairment or disability, The Court should, it is proposed, first carry out an inquiry as to whether the witness is likely to be vulnerable. That inquiry should be carried out in a manner that protects and upholds the dignity of the witness. Regard must be made that labelling someone mentally disordered or impaired may carry a stigma. As a rule the inquiry should be carried out in camera.

8) The purpose of the inquiry is for the Court to satisfy itself that the witness is likely to be

suffering from mental impairment. The Court itself may not be properly tooled or trained to assess the mental condition of the witness. Should the Court be satisfied that the witness is likely to be suffering from a mental disorder or impairment then it should direct that he/she undergoes a Psychiatrist assessment or Review. A professional opinion by a Psychiatrist should then settle the matter.

9) In the case before me, the Learned Magistrate does not give reasons for drawing the conclusion that the complainant suffered from mental retardation. This has an implication as to whether the Appellant was properly convicted because some of the evidence taken into account in returning that verdict was that given by the appointed intermediary. For that reason alone this Court does hereby quash the conviction and set aside the sentence.

10) What then is the proper order to make? This Court has re-evaluated the entire Prosecution evidence and come to the decision that, if properly received, a conviction may have been likely. This Court also considers that the offence facing the Appellant attracts a minimum sentence of 15 years. The Appellant was in fact sentenced to that minimum. As the sentence was imposed on 7th May 2013, he has served a short portion of that term. For those reasons this Court orders a retrial before a Magistrate other than the Magistrate who convicted him.

11) As always the retrial needs to be heard and concluded expeditiously. The Appellant will, right away be escorted to the Subordinate Court for Directions of the Retrial.

F. TUIYOTT

J U D G E

DATED, DELIVERED AND SIGNED AT BUSIA THIS 13TH DAY OF OCTOBER 2014.

IN THE PRESENCE OF:

KADENYICOURT CLERK

PRESENT IN PERSON.....FOR APPELLANT

OWITI.....FOR STATE