



REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO. 4 OF 2014

JOEL SIO MWASI.....APPELLANT

-VERSUS-

REPUBLIC..... RESPONDENT

JUDGMENT

INTRODUCTION

1. The Appellant was convicted for the offence of defilement of a child aged ten years contrary to section 8 (1) as read with Section 8 (2) of the Sexual Offences Act, 2006. He was sentenced to imprisonment for life.
2. The particulars of the offence were as follows:

“JOEL SIO MWASI: On the 1st day of January 2010 at (particulars withheld) Village, (particulars withheld) Location in Taita Taveta District within Coast Province, had unlawful carnal knowledge of M.W (name withheld), a girl aged ten years.”

3. The Appellant has appealed against his conviction and sentence. He raised 6 grounds of appeal as follows:
4. The Appellant, who was unrepresented, filed written submissions on which he relied during the hearing to urge his grounds of appeal.

THE APPELLANT'S CASE

5. Ground 1 of the Petition of Appeal is a mere narrative of the offence the Appellant was charged with and nothing further needs to be said on that ground.

ASSESSMENT OF THE CHILD'S AGE

6. On ground 2 of the Petition of Appeal, the Appellant's case is that the trial magistrate erred in fact and in law by imposing the conviction and sentence without having assessed the age of PW1 (hereinafter “**the child**”) by an independent authorized person. The Appellant stated that the child was his immediate neighbour and he knows that she was born in January 1997 since she was two weeks older than the Appellant's sister, who was born on 31st January 1997. That as at the date of

the offence, the child was aged 13 years and not ten years as indicated in the charge sheet and stated by the prosecution witnesses. The Appellant contended that no birth certificate or age assessment report was produced to prove the right age of the child. That the failure by the trial magistrate to assess the correct age of the child led to unlawful sentence being passed against the Appellant.

EXAMINATION OF THE APPELLANT (DNA)

7. On ground 3 of the Petition of Appeal, the Appellant's case is that contrary to the provisions of section 36 (1) and (2) of the Sexual Offences Act, 2006, he (the Appellant) was not subjected to a DNA test. Section 36 (1) and (2) of the Sexual Offences Act 2006 provide as follows:

“ (1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample

or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.

(2) The sample or samples taken from an accused person in terms of subsection (1) shall be stored at an appropriate place until finalization

of the trial.”

8. It was the Appellant's contention that a DNA test would have assisted the trial court to confirm whether there was penetration which is a key ingredient in a charge such as this one.

Non-Compliance with Section 109 of the Evidence Act

9. On ground 4 of the Petition of Appeal, the Appellant argued that the trial magistrate failed to comply with Section 109 of the Evidence Act, Cap. 80 of the Laws of Kenya. That section provides that:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

10. The Appellant did not particularly address this ground of appeal. He did not submit on why the trial magistrate did not comply with the said Section 109. Instead, he cited all his other grounds of appeal as reasons why the Section was not complied with. He also added that “**prime**” witnesses in this case were either close relatives or his immediate neighbours and the trial magistrate should have borne in mind the possibility of the witnesses ganging up against him to victimize him “**over some domestic issues**”. The Appellant further contended that the trial magistrate ought to have heard his side of the story regarding the case.

11. The Appellant, however did not elaborate on how and why the witnesses might have had intention to punish him. He also did not clarify what the domestic issues he alleged to have had with the witnesses were. In fact, the issue of possible victimization of the Appellant by the witnesses was not raised at all at the trial and has been raised for the first time in this appeal. It was incumbent upon the Appellant to demonstrate bad faith on the part of the prosecution and its witnesses. He did not allege, let alone prove, that there was a grudge between him and the witnesses to warrant the fabrication of the case against him. In my view, that argument is baseless.

12. I also find the argument that the trial Magistrate should have heard the Appellant's side of the

story to be without basis because the record clearly shows that he chose not to cross-examine any of the witnesses and did not adduce any evidence or even say anything in his defence. The Appellant's ground of appeal that the trial magistrate did not comply with Section 109 of the Evidence Act must therefore be rejected at this preliminary stage of this legal opinion.

Fragile Physical and Mental Status of the Appellant

13. On ground 5 of the Petition of Appeal, the Appellant submitted that the trial Magistrate erred in law and fact by failing to consider his fragile physical and mental status during the trial. He submitted that at his arrest, he was beaten up by members of the public and was subsequently hospitalized for one month. That as a result, his “**physical and mental stability were out of place to make any worthy participation during the whole period of hearing of the case**”. The record does not show that the Appellant at any given moment either before, during or after the trial, raised with the trial Magistrate any issue regarding his mental or physical state. The record clearly shows that the Appellant was always ready to proceed with the hearing on all days when the case came up for hearing. In fact, it is the prosecution that was not ready and sought adjournment on certain days. Further, the case was mentioned on many occasions but the Appellant did not raise any issue regarding his mental or physical health with the trial court. When the trial court, on 18th August 2010, delivered a ruling that the prosecution had established a *prima facie* case against the Appellant sufficient to require him to defend himself, the Appellant stated that: “I shall wait for the court's judgment.” He therefore had all the opportunity to raise the condition as to his health with the trial court but failed to do so. I find that the issue of the Appellant's fragile mental and physical health raised in this appeal is an afterthought and must also be rejected at this preliminary stage of this opinion.

Relation of the Witnesses with the Complainant

14. On ground 6 of the Petition of Appeal, the Appellant contended that the trial Magistrate erred in law and in fact by failing to notice that most of the prosecution witnesses were from the complainant's family. I am not aware of any requirement whether in law or otherwise that a trial magistrate takes notice of the relationship between the complainant and the prosecution witnesses. It was upon the Appellant to bring to the attention of the magistrate the relationship between the complainant and the prosecution witnesses and demonstrate to the court how such relationship was likely to prejudice his trial. He did not do so. In any event, I do not think that the mere fact that the prosecution witnesses are related to the complainant is a cause of prejudice to the accused person. It is upon the person alleging that such relationship is likely to compromise the trial process to prove so. If anything, the only prosecution witness who was from the complainant's family was PW 2 who is the child's grandmother. The rest of the prosecution witnesses were not from the child's family. This ground of appeal is similarly rejected without hesitation.

RESPONSE BY THE STATE

15. The appeal was contested by Mr. Gioche, State Counsel. On the child's age assessment, the learned State Counsel submitted that the child and her grandmother (PW2) were consistent that she (the child) was ten years old. Further, that the age of the child was stated in the P3 Form as ten years. That since there was consistency in the child's age, the issue was not contentious to warrant an age assessment by the court.

16. On the failure to order DNA test on the Appellant, the learned State Counsel submitted that there was no dispute that the child was defiled. That the Appellant was caught in the act by the child's grandmother (PW2) who knew the Appellant prior to the incident, and all the other witnesses who testified linked the Appellant to the offence. The State Counsel submitted that there was therefore no need for a DNA test.

THE ISSUES FOR DETERMINATION

17. In my view, the following are the issues for the court's determination in this appeal:

- i. Whether the trial Magistrate erred in fact and in law by failing to assess the age of the child; and
- ii. Whether the trial Magistrate erred in fact and in law by failing to order that the Appellant be subjected to medical examination.

ANALYSIS

18. This being a first appeal to the High Court, this court has a legal duty to re-evaluate evidence tendered and come to its own conclusion and findings, bearing in mind that the court neither heard nor saw the witnesses. This was stated in the case of **Okeno vs Republic (1972) EA 32** thus:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs Republic [1957] EA 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal Rulwala Vs. Republic [1957] EA 570). It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

AGE OF THE CHILD

19. In a defilement case such as this one, the age of the victim child is very

material because under **Section 8** of the Sexual Offences Act, 2006, the extent of the sentence to be meted out to the accused person upon conviction is determined by the age of the child. In the case of **Gilbert Miriti Kanampiu v Republic, Embu High Court Criminal Appeal No. 97 of 2009, [2013] eKLR**, Gikonyo, J. stated that:

“Proof of age is critically important in proving offences of defilement or attempted defilement as it is the age of the victim that determines the amount of sentence to be imposed on conviction.”

20. The Appellant contends that the child was aged 13 years at the time the offence was committed. His contention is based on the fact that he knew the child well as a neighbour and that the child was born two weeks after his sister who was born on 31st January 1997. The Appellant did not state these allegations at the trial. He chose to remain quiet and leave it to court. He has raised the issue in this appeal.

21. Although no birth certificate or age assessment report was produced to prove the child's age, I do not think that the Appellant's argument that the age of the child was not assessed has any basis. Proof of the age of a child is not necessarily by production of a birth certificate or an age assessment report. Other form of evidence may be acceptable to prove the age of the child. It is upon the trial court to satisfy itself that the age of the child has been sufficiently proved. This position is supported by the holding of Ngugi, J. in the case of **Fappyton Mutuku Ngui V Republic, Machakos High Court Criminal Appeal No. 296 of 2010, [2012] eKLR** thus:

“I am aware that our case law requires that the age of a child to be conclusively proved before any conviction can arise from an offence under the Sexual Offences Act. The Courts are strict about this requirement because the penalty once found guilty is dependent on the age of the victim. For this strict approach, see, for example, *Hillary Nyongesa v Republic* (Eldoret HC Crim. App. No. 129 of 2009 (Mwilu J.)). I

would be prepared to clarify that “conclusive” proof of age in cases under Sexual Offences Act does not necessarily mean that there has to be a formal age assessment report or the production of a birth certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases. (Emphasis added)

22. In my view, it would have been necessary for the trial court to call for an independent age assessment of the child or for the production of a birth certificate if there was glaring inconsistency in the age of the child as stated by the prosecution witnesses to the extent that the court was not in a position to pass appropriate sentence under Section 8 of the Sexual Offences Act, 2006.

23. In this case, the child herself stated that she was ten years old. The trial court conducted a *voir dire* assessment and satisfied itself that the child was of sufficient intelligence to be able to give evidence and to tell the truth. PW2, the child's grandmother, testified that the child was aged ten years. The P3 Form produced by PW 4, a clinical officer, indicated the age of the child as ten years. None of the witnesses contradicted the other on the age of the child. In my view, and as was rightly held in the case of **Fappyton Mutuku Ngui** (supra), there was no need for the production of a formal age assessment report or birth certificate because there was no doubt as to the child's age since the witnesses were consistent on her age. In light of such consistency, I do not think that there was any error either in fact or law that was committed by the learned trial magistrate by proceeding with the trial without calling for the production of a birth certificate or for an age assessment report.

Medical Examination of the Appellant

24. The Appellant's case is that contrary to the provisions of section 36 (1) and (2) of the Sexual Offences Act, 2006, he was not subjected to a DNA test. It is true that the court did not call for the medical examination of the Appellant. Was he prejudiced by that failure?

25. Precedence shows that medical examination of an accused person under Section 36 (1) of the Sexual Offences Act, 2006 is not mandatory but discretionary on the trial court. In the case of **Ahmed Ibrahim Adan v Republic, Garissa High Court Criminal Appeal No. 36 of 2013, [2013] eKLR**, Mutuku, J. stated that:

“On failure by the court to order for DNA test in respect to the appellant the law Section 36 Sexual Offences Act gives courts discretion to or not to order for this depending on the relevance of this test and the nature of the case.”

26. The learned Judge adopted the same position in the case of **Abdinsir Guhad Bore v Republic, Garissa High Court Criminal Appeal No. 74 of 2012, [2014] eKLR** where he stated as follows:

“My understanding of Section 36(1) of the Sexual Offences Act is that it gives the court discretion to order for the medical examination of an accused person in order to gather evidence and to ascertain whether or not the accused person committed an offence.”

27. A similar holding was made by Meoli, J. in the case of **Charles Karanja Somba V Republic, Malindi High Court Criminal Appeal No. 141 of 2010, [2012] eKLR** where the learned Judge stated that:

“And contrary to the appellant’s assertions in the appeal, there existed no legal burden on the part of the [court] to order forensic tests as anticipated under Section 36 of the Sexual Offences Act. Moreover, no application was made to the court in the course of the trial.”

28. There are three main ingredients that have to be established in a case of defilement under section 8 of the Sexual Offences Act, 2006. These are: whether the complainant is a child; whether there was penetration of the complainant's genitalia; and finally whether the penetration was by the accused [See the case of **Fappyton Mutuku Ngui** (supra)].

29. The question of whether the complainant was a child is answered in the affirmative by the above finding that she was aged ten years and therefore the first requirement is satisfied. The evidence of PW 4 and the P3 Form produced at trial clearly show that there was penetration of the child's genitalia. PW 4 testified as follows:

“She (the child) had laceration at the vulva with evidence of inflammation. The hymen was not intact and the vagina was gapping. This was evidence of penetration... There were pus cells and red blood cells in the discharge which was obtained in the vagina.”

30. PW4 produced the P3 Form which backed his testimony as above.

There is no doubt that there was penetration of the child's genitalia. The only question is whether the penetration was caused by the Appellant. The Appellant submitted that because no DNA test was conducted on him, the act of penetration on the child could not be linked to him and therefore the trial court erred by concluding that it is him (the Appellant) who committed the offence.

31. I have already found that medical examination of an accused person

in cases such as this one is not necessarily mandatory. The court has the discretion to consider the evidence and the circumstances of the case in order to decide whether to order the accused person to be medically examined or not. Medical examination may be necessary where there is a possibility of misidentification of the accused person because the accused person is not known to the victim child or to any of the prosecution witnesses. In this case, there is no dispute that the Appellant was a neighbour to the child and was well known to the child, her grandmother (PW2) and PW 3.

32. The child testified that the Appellant dragged her to his house and after placing her on the bed, removed her clothes, then removed his pair of trousers and started doing “bad things” to her. The child clarified that by “bad manners” or “bad things” she meant that the Appellant had raped her. In the case of **Charles Karanja Somba** (supra) the court stated that *“It is not unusual, and indeed the court takes judicial notice of the fact that “bad manners or tabia mbaya” among local children has gained notoriety as a polite term referring to sexual or sexually related activity”*. The child therefore properly identified the Appellant as the person who had raped her.

33. The child's testimony was corroborated by the consistent testimony of PW 2 and PW 3 both of whom knew the Appellant well before the incident. PW 2 testified that she heard the child screaming from the Appellant's house. She stormed in and found the Appellant was in the process of putting on his pair of trousers while the child was on the Appellant's bed, holding her pants in the hand. PW3 testified that he arrived at the Appellant's house shortly after PW 2 had arrived. He also found the child on the Appellant's bed with her pants removed. The Appellant was inside the house when PW 3 arrived.

34. In my view, the child and the two witnesses clearly linked the Appellant to the offence. The Appellant was well known to the child and the two witnesses (PW 2 and PW 3) prior to the incident. He was caught in the act by PW 2 and there is no doubt that he is the one who caused the penetration of the child's genitalia. I do not think that in the face of such clear evidence linking the Appellant to the offence, there was need to order for his medical examination. The Appellant was not prejudiced by the trial court's failure to order for his DNA examination. The ground of appeal on account of medical examination must therefore be rejected.

Conclusion

35. In light of the foregoing, the Appellant has not laid a basis upon which the learned trial magistrate's finding on both conviction and sentence should be faulted and I find no reason to interfere with the same. The Appeal should be dismissed. For the avoidance of doubt, the Appellant's conviction and sentence as passed by the trial court in **Wundanyi SRM Criminal Case No. 19 of 2010** is hereby upheld. The Appellant's appeal is dismissed.

Judgment by:-

MARY KASANGO

JUDGE

In the presence of:-

..... for Appellant

..... for Respondent

DATED and DELIVERED at VOI this 8TH day of OCTOBER, 2014.

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JUDGE