



**GMN v Republic (Criminal Appeal 11 of 2021)
[2023] KECA 288 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KECA 288 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 11 OF 2021
MSA MAKHANDIA, S OLE KANTAI & GWN MACHARIA, JJA
MARCH 17, 2023**

BETWEEN

GMN APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Nairobi
(Mbogholi Msagha, J.) dated 29th June, 2014 in HC. CR.A. No. 40 of 201)*

JUDGMENT

1. The appellant in this appeal was charged before the Magistrates Court at Limuru with the offence of Incest contrary to Section 20 (1) as read with Section 22 (1) of the *Sexual Offences Act*. He faced an alternative count of committing an indecent act with a child contrary to Section 11(1) of the said Act. The particulars were that on January 20, 2011, he caused his penis to penetrate the vagina of a girl, 'CW', aged 12 years. The prosecution called 7 witnesses while the appellant tendered an unsworn statement and did not call any witness. He was convicted and sentenced to life imprisonment and his appeal to the High Court of Kenya at Nairobi was dismissed by Msagha, J (as he then was) in a Judgment delivered on July 29, 2014. This is therefore a second appeal and our mandate is limited to a consideration of matters of law only as is provided by Section 361 (1) (a) *Criminal Procedure Code*. It was held by this Court in the case of *Michael Paul v Republic [2014] eKLR* on the mandate of the court in a second appeal:

' Being a second appeal our jurisdiction is limited by Section 361(1) (a) Criminal Procedure Code where we are to consider only issues of law if any are raised in the appeal but must not go into a consideration of facts which have been tried by the trial court and re-evaluated on first appeal unless we reach the conclusion that the findings were not backed by evidence or are based on a misapprehension of the evidence or it is shown that the two courts



demonstrably acted on wrong principles in making those findings or the conclusions are perverse – Chemagong v Republic [1984] KLR 611.'

2. We shall visit the facts of the case to find out whether the two courts carried out their mandate as required in law.
3. PW1 was the victim who told the court that on the material day she was asleep in a bed which she shared with her brother (who was not called as a witness by the prosecution), when her father (the appellant), came to the bed, removed her pants and lay on her. She told the court that he poked her with something like a stick and covered her mouth when she tried to call out for her mother. The child did not reveal the incident until the following day at school when the teacher (EWN – PW3) inquired as to why she was not walking properly. The child was taken to the hospital the same day. The girl told the court that she was 10 years old while Dr Kamanga Caroline (PW6) told the court that she was 12 years old. Notably, no other witness testified as to her age or produced any documentary evidence to ascertain her age. The charge sheet did not state the relationship between the appellant and the child.
4. PW2 (FNK) was the grandfather to the child. He described her as being mentally challenged but able to communicate. He was summoned to the child's school where he heard the child tell of the events and of pain in her private parts.
5. PW3 and PW4 (JKK) were teachers at a special school which the child attended. They noticed the child was walking with difficulty, and the child told them what had happened following which they searched for her grandparents as they had never engaged with her parents.
6. PW5 was the area Assistant Chief who was informed of the incident and went to the home where the child told him that her father hit her with a stick in her private parts. The Assistant Chief escorted the child to the police station and helped to apprehend the appellant. The doctor from Tigoni District Hospital produced the P3 form on behalf of a former colleague. The P3 form indicated that the form was filled after 1 week and noted red cells indicative of injury with a blunt weapon and an infection, leading the doctor to conclude that there was sexual assault. Notably, the indication of red cells in the P3 form differs from the initial hospital examination records which showed no bleeding. Nonetheless, the initial examination also concluded that there was sexual assault.
7. PW7 was the Investigating Officer, who proffered the charges after recording statements from witnesses.
8. When the appellant was placed on his defence he told the court that on the material day he went to work as usual and the child went to school. He denied committing the offence.
9. As we have seen the appellant was convicted and duly sentenced.
10. The appellant contends in this second appeal that he did not receive a fair trial as he was not given an opportunity to cross-examine PW1, that the court shifted burden of proof to him; that there was insufficient identification, that the charge sheet was defective, that crucial witnesses such as the victim's brother did not testify; that his defence was wrongly rejected and that the sentence was too harsh.
11. The appellant submits in written submissions that the prosecution did not prove their case beyond reasonable doubt as the age of the complainant was not established and that evidence of penetration was not conclusive because there was a perforated hymen with no injury, indicating sexual activity, if any, was not recent. On this point, he also argues that the child never mentioned any body part of the appellant touching her and told all witnesses about a stick, which issue should have been interrogated further. The appellant also submits that the child shared a bed with her brother, whose age was not established, and this raises reasonable doubt as to who may have abused the child. He submits that the



particulars of the charge sheet did not establish any relationship between him and the complainant. The charge sheet is also said to be defective due to contradictions with evidence as to the date and time of the offence. The appellant also submits that the P3 form is blank at the most relevant section 'C' and thus is of no probative value.

12. The respondent in written submissions submits that the case was proved beyond reasonable doubt and that there was no defect in the charge sheet that compromised the appellant's understanding of the charge he faced. Notably, the DPP, in the virtual hearing of the appeal, conceded that the court should determine the effect of failure by the trial court to let the appellant cross-examine the victim at trial; but in its written submissions, it says that this ought not to lead to an acquittal as it is not in the best interest of the child who the court noted appeared to be mentally challenged and attends a special school.
13. We have considered the record of appeal and the submissions by the parties.
14. The first, and in our view, the most-weighty ground of appeal is the failure by the trial court to inform the appellant that he could cross-examine PW1. The record shows that PW1 gave an unsworn statement and the appellant does not appear to have been given an opportunity to cross-examine her.
15. In the case of *Gailord Yambwesa Landi v Republic [2019] eKLR*, this Court dealt with a matter where the witness was deemed vulnerable and testified through an intermediary and no cross-examination was ever posed to the child. The Court considered the issue by stating inter alia:

' "Indeed Article 50 (2) of the Constitution provides that every accused has a right to a fair trial. Article 50 (k) stipulates that every accused has the right to adduce and challenge evidence.

Furthermore, section 302 of the Criminal Procedure Code stipulates that

'The witnesses called for the prosecution shall be subject to cross examination by the accused person or his advocate and to reexamination by the advocate for the prosecution.'

16. Our reading of the above provisions is that the accused person is entitled to cross-examine all prosecution witnesses. It is worth noting that the provisions are couched in mandatory terms.
17. In the case of *Nicholas Mutula Wambua vs Republic, MSA CRA No 373 of 2006*, this Court cited with approval the decision of the Supreme Court of Uganda in *Sula vs Uganda [2001] 2 EA 556* thus:

' The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross-examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined. It would appear that misconception arises from a view that because accused persons are not cross-examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined'.

18. And recently, in the case of *Paul Kinyanjui Kimauku vs Republic [2016] eKLR*, this Court whilst addressing a similar issue further observed thus:

' The record reveals that following the evidence of G that was unsworn, the appellant was not given the opportunity to cross-examine the witness. This was a clear violation of the appellant's right to a fair trial. Under Article 50(2) of the *Constitution*, every accused person



has a right to a fair trial. This includes the right of an accused person to challenge the prosecution evidence through cross-examination. Therefore, an accused person is entitled to cross-examine any person who testifies as a prosecution witness. This is so even in the case of a minor witness giving unsworn evidence. A witness including a minor witness, unlike an accused person has no right to refuse to answer questions or not to be subjected to cross-examination. Thus, there is a clear distinction between an accused person who opts under Section 211 of the Criminal Procedure Code to give unsworn evidence in his defence, and a minor witness who gives unsworn evidence as the latter must be cross-examined.'

19. The court in the case of *Gailord Yambwesa Landi (supra)*, proceeded to consider the remedies available in the situation, and held that the impugned judgment was just 2-years old which was a favourable circumstance towards a fresh trial. The court stated;

' Given the foregoing, the question for us to determine is whether as a consequence of the omission, we should acquit the appellant, or disregard the complainant's evidence and determine the appeal on the basis of other witness evidence, or whether to declare a mistrial and remit the case back to the trial court for rehearing.

As to whether we should order an acquittal, it does not follow that a lapse in the trial process would result in an acquittal. The appellant is facing serious charges of defilement of a child who was of tender age at the time. Having regard to the circumstances of the case, our view is that an acquittal would not be in the best interest of the child.

In the alternative, should we disregard DK's evidence and proceed to determine the appeal on the basis of the other witness evidence? What this would mean is that there would be uncorroborated evidence that might prejudice the prosecution's case. For the reasons outlined above, we do not think that proceeding in this manner would be in the interest of justice. The complainant too is entitled to have her day in court, and to seek vindication through the justice process.

This would leave the option of a retrial. To determine whether to order a retrial, would depend on the circumstances of each case.

In the case of *Muiruri vs Republic [2003] KLR 552* the court outlined the factors to be taken into account when faced with a question of whether or not to order a retrial. The court stated thus;

'Generally whether a retrial should be ordered or not must depend on the circumstances of the case. It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not.'

- 20 In the case of *Nabashon Otiemo Odhiambo v Republic [2019] eKLR*, this Court, when faced with a similar issue, set free the appellant who had already served more than 7 years' imprisonment. This Court was clear in stating that:

' Of more importance, the right to cross examine a witness is part of the constitutional right to a fair trial given to an accused person under Article 50 (2)(k), that gives an accused the right to adduce and challenge evidence. In light of the above, we find that the 1st appellate



court fell into error when it failed to fault the trial court's failure to allow the appellant to cross examine the minor.'

- 21 In view of the law and in line with the cases referred above, we are of the view that the appellant indeed was not afforded a fair hearing in by the trial court and this was not considered by the 1st appellate court. We are also of the view that a re-trial would be an unsuitable order in the circumstances as the offence took place in 2011, the appellant was convicted on November 14, 2011 and the High Court rendered its Judgment in 2014. A considerable length of time has passed; the appellant has served over 11 years of the jail term and we have serious doubts that the prosecution would be able to mount a successful prosecution so much time having passed from the time when the prosecution began.
22. Having come to this conclusion we do not find it necessary to delve into the other issues of law which the appellant has raised in this appeal.
- 23 We therefore quash the conviction of the appellant and set aside the sentence and we direct that he be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 17th day of March, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

