



IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE, J.J.A)

CRIMINAL APPEAL NO. 52 OF 2015

BETWEEN

JOHN KINYUA NATHAN APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Embu (F. Muchemi, J) dated 23rd June, 2015 in H. C. Cr. A. No. 175 of 2012)

JUDGMENT OF THE COURT

1. The appellant is serving a life sentence after his conviction by Runyenjes Ag. Senior Resident Magistrate (**J. P. Nandi**) for the offence of defilement contrary to **Section 8 (1)** of the **Sexual Offences Act** (SOA), in that he intentionally and unlawfully caused his penis to penetrate the vagina of BW, a girl aged 3 years and six months. The conviction was endorsed by the High Court (**Muchemi J.**) on first appeal and supported by learned Senior Assistant Director of Public Prosecutions (SADPP), **Mr Kaigai**, before us. The two courts were thus satisfied, and the SADPP concurred, that the three basic elements of the offence were proved beyond reasonable doubt, to wit: the complainant was a child, there was penetration and it was the appellant who was responsible.

2. The concurrent findings of fact made by the two courts are simple enough: BW, the girl who was defiled, was aged 3½ years. Her mother, PW2 was living in the same house with the appellant as husband and wife but he was not the natural father of her children. On 3rd August, 2012 at 6 a.m, PW2 left the appellant at home with the children as she went to Karurumo Market. When she returned in the evening, she did not find the appellant but BW told her she was feeling pain in her private parts and that it was the appellant who had caused it. PW2 called a neighbor, one Lydia, and they examined the vagina of BW and confirmed she had a tear. On the same day, PW2 took her to Karurumo health centre where PW4, a clinical officer, applied a vaginal swab on BW's vagina and found a few pus cells. He also conducted HIV tests which were negative and then referred the child for further treatment at Runyenjes District Hospital. The following day, PW2 obtained a P3 form from PW3, the investigating officer, at Runyenjes police station which was completed by PW1, a clinical officer, at Runyenjes District Hospital on 6th August, 2012. PW1 examined BW and confirmed that she had 'a tear on introitus at 6 o'clock' and that there was whitish discharge from the genitals, thus confirming penetration. The child was crying in pain as the lower limb was moved during the examination. The appellant was arrested on 13th August, 2012

but denied the offence stating that it was a ruse by PW2 to leave him and run away with his property as she was resisting his offer to marry her as the second wife.

3. The appellant raised six grounds of appeal and submitted written submissions before us for consideration. Most of those grounds challenge the findings of fact made by the two courts below. Such are the grounds relating to lack of spermatozoa, and lack of blood stains. All these matters were considered and findings made which at this stage we are not at liberty to interfere with unless there was no evidence to support them or the evidence on record was misapprehended. On our own consideration of the record, there was sufficient basis for making the findings of fact on those issues. In terms of **Section 361** of the **Criminal Procedure Code (CPC)**, only matters of law fall for consideration on a second appeal. As we see it, there is only one main issue of law relating to fair trial which the appellant raised in Ground 1 as follows:

“The learned Judge erred in law when she uphold(sic) the appellant’s conviction without considering that the case was not proved beyond any reasonable doubts as stipulated under section 150 of C.P.C. that no eye witnesses was(sic) involved in this case and the victim did not testify before the court”.

A supplementary issue of law raised was the non-consideration of the defence which we shall also examine.

4. The main ground of appeal arises from the fact that the prosecution did not call the child to testify or indeed call any eye witness to confirm that it was the appellant who was responsible for the alleged offence, despite the finding that he was. The prosecution too did not call the neighbor, Lydia, who is supposed to have confirmed the alleged defilement. Only the mother of the child who is alleged to have had a grudge with the appellant, two clinical officers and the arresting officer were called to testify. The issue then arises as to whether the appellant was deprived of an opportunity to interrogate the evidence of his accusers and whether in the absence of the complainant the charge was provable.

5. In his written submissions, the appellant observed that the child was able to give information to her mother that she had been defiled and that it was the appellant who did it using his penis. He wondered why the child could not have given the same story to the court and face cross examination. He also observed that, on the recorded evidence, there appears to have been another unnamed child who gave a similar story to their mother but was not called to testify. To make matters worse, he contended, a neighbor named Lydia who was supposed to corroborate the mother’s story was not called to the stand. In his view, therefore, all those omissions rendered the charge unproved as there was no eye witness account to prove that he was involved.

6. The trial court in its judgment made no mention of the issue and simply proceeded to analyse the evidence on record before convicting the appellant. On its part, the High Court had this to say:

“The appellant complained that the complainant did not testify. Considering the tender age of the complainant and the lack of capacity to testify, it is not a requirement that her evidence be on record in order to sustain a conviction. It was held in the Court of Appeal case of M. M. vs Republic [2014] eKLR that a child of tender years need not testify and that the evidence of her parents coupled with the medical evidence is sufficient to link the appellant to the offence. The court observed that:-

“any requirement that insists on a child victim of defilement, irrespective of his or her age to testify in order to found a conviction would occasion serious miscarriage of justice.”

7. As a general rule of evidence, no person is precluded from giving evidence, except to the extent the court may determine. This is clear from **Section 125** of the **Evidence Act** which provides that:-

“ (1) All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those

questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause.

(2) A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them.”

8. This, of course, applies to those witnesses who are produced before, or are called by the court. For there is no compulsion for the prosecution to produce a superfluity or any number of witnesses to prove a fact. This court has said so severally following **Section 143** of the **Evidence Act**:

“No particular number of witnesses shall, in the absence of any provisions of law to the contrary be required for the proof of any fact.”

This Court has also applied the decision of **Bukenya & Others v. Uganda [1972] EA 549** that:

i)....the [prosecution] must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.

ii).....the court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.

iii)....where the evidence called is barely adequate the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

As the prosecution is not expected to call a superfluity of witnesses, the adverse inference will only be made by the court if the evidence called is not adequate or is barely adequate. Conversely, there will be no adverse inference where the evidence tendered is sufficient to prove the particular facts in issue or the entire case.

9. In this case, the High Court appears to propound the legal position that a child of tender years lacks capacity to testify and is thus not required to give evidence at all. With respect, this is erroneous. The error, in our view, arises from a misapplication of the decision of this Court (differently constituted) in **M. M. v. Republic [2014] eKLR** which we must re-examine *in extenso*. In that case, the child was aged 4 years and was, unlike this case, called to testify. However, the trial court stood her down after conducting the *voire dire* and making a finding that she was “*too tender and does not comprehend what she is being asked.....She cannot adduce any evidence.*” There was, nevertheless, direct and independent evidence from the mother of the child who found the defiler lying on top of the child with his trousers down to his knees. There was also medical examination of the child a few hours later which confirmed she was defiled. That was sufficient evidence linking the appellant with the offence, even without the evidence of the infant.

10. In the **MM case (supra)**, the Court, examined at length the existing provisions of the law relating to the testimony of children and other vulnerable groups through intermediaries and stated:

“The whole object of the proceedings through an intermediary is to achieve fairness in the determination of the rights of all the people involved in a trial and to promote the welfare of a child or vulnerable witness.”

An intermediary is defined in **Section 2** of **SOA** as:

“.....a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counselor, guardian, children’s officer or social worker.”

11. The legal provisions examined by the Court included **Article 50** of the Constitution which protects fair

trial and provides in **Sub-Article (7)** thus:

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

In addition there is **Section 31** of **SOA** which empowers a court in a case involving alleged commission of a sexual offence, on its own motion or on request, to declare a witness (but not the accused person) in the proceedings, a vulnerable witness if that witness is himself or herself the alleged victim of a sexual offence, a child or a person with mental disability. In making the declaration the court will be guided by several factors listed in **sub section (2)**, including age.

12. In the end the Court stated the law on intermediaries as follows:-

“It is clear from sections 31 (2) and 32 that, first and foremost it is the duty of the prosecution to ascertain the vulnerability of the witness and to apply to the court to make that declaration before appointing an intermediary. In addition, the court, as we have earlier observed, can on its own motion, through voire dire examination, declare a witness vulnerable and proceed to appoint an intermediary. Any witness (other than the one to be declared vulnerable) can likewise apply to the court for the declaration. The application must not be granted merely because the victim is young or too old or appears to be suffering from mental disorder. The court itself must be satisfied that the victim or the witness would be exposed to undue mental stress and suffering before an intermediary can be appointed. It is clear from what we have said so far that the procedure of appointing an intermediary precedes the testimony of the intended vulnerable witness even where the court does so suo motu. It is also clear that an intermediary can be an expert in a specified field or a person, who through experience, possesses special knowledge in an area or a social worker, or a relative, a parent or a guardian of the witness.

The expertise, possession of special knowledge or relationship with the witness must be ascertained by the trial court through examination of the prospective intermediary before the court appoints him or her. It goes without saying, in view of that role, that an intermediary must subscribe to an appropriate oath ahead of the witness’ testimony, undertaking to convey correctly and to the best of his/her ability the general purport of the evidence. The trial court must then give directions to delineate the extent of the intermediary’s participation in the proceedings”.

13 It was clear in the mind of the Court that the evidence presented by the intermediary to the court is that of the witness and not the intermediary’s.

“The intermediary’s role is to communicate to the witness the questions put to the witness and to communicate to the court the answers from the victim to the person asking the questions, and to explain such questions or answers, so far as necessary for them to be understood by the witness or person asking questions in a manner understandable to the victim, while at the same time according the victim protection from unfamiliar environment and hostile cross-examination; to monitor the witness’ emotional and psychological state and concentration, and to alert the trial court of any difficulties”.

14. For the above reasons, the Court concluded with the passage cited out of context by the High Court in this matter, thus:-

“From what we have said, we conclude that it was in error for the two courts below to treat the evidence of the complainant’s mother as that of an intermediary, the steps leading to such appointment having not been followed. It was sufficient to rely on her direct evidence as an independent eye witness.

Any requirement that insists on a child victim of defilement, irrespective of his or her age to testify in order to found a conviction would occasion serious miscarriage of justice. What fair hearing

would a child victim aged six (6) months, like that in the case of Robinson Tole Mwakuyanda V. R. H. C. Cr. Appeal No. 227 of 2007, get if the courts were to insist on the evidence of such a child, who on account of his/her tender age cannot speak.” (Portion cited by the High Court emphasized)

15. We respectfully agree with the exposition of the law as stated in the **MM case**. There can be no argument about the stress child complainants in sexual offences suffer when they testify in courts where they are required to relive the horror of the crime in open court. At times they are subjected to the most brutal and humiliating treatment by being asked to relate the sordid details of the traumatic experiences that they had gone through. In many countries of the world including South Africa, this apparent treachery on the child has been mitigated by Constitutional, statutory, judicial and administrative reforms. See for example the South African Constitutional Court case of **Director of Public Prosecutions, Transvaal versus Minister For Justice and Constitutional Development & Others. Case CCT 36/08 [2009] ZACC 8**. Kenya is also progressively making efforts of her own through the Constitution, statutes and administrative reforms to project the paramountcy of the rights and interests of the child which are universal. Various legal enactments including the **CPC**, the **Children Act**, the **Witness Protection Act**, the **Victim Protection Act**, the **SOA** and the **Constitution** itself, attest to that effort. Nevertheless, the Kenyan child is still obligated to undergo the *voire dire* under **Section 19** of the **Oaths and Statutory Declarations Act** when called to testify to determine *whether the child understands the nature of an oath; or if the child, in the opinion of the court does not understand the nature of an oath, whether the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth*. In either case the child is liable to cross examination. They must also appear before the court for determination of any issue on the appointment of an intermediary.

16. In the case before us, the child was a necessary witness both in determining the third element of the offence as to whether the appellant was responsible, and also in determining whether she was a vulnerable witness and therefore needed an intermediary to speak on her behalf. No reason was given for the failure to call the complainant in this case and the trial court made no finding on that crucial aspect of the case. The High Court on its part, as already stated, misdirected itself. If PW2 was to be believed, the child was able to inform her about her injury and the person responsible and so, as argued by the appellant, she was capable of stating so to the court directly or through an intermediary. In the circumstances, the evidence of PW2 was at best hearsay as she was not the appointed intermediary. Only, part of her evidence was corroborated by medical evidence and findings thereon correctly made.

17. In view of the above, we find the following findings by the High Court of doubtful conformity with the evidence on record:

“The evidence of the prosecution established that the complainant was defiled by the appellant. The evidence of PW2 was sufficiently corroborated by the medical evidence which prove that penetration had taken place. The evidence points at no other person but the appellant under whose custody PW 2 had left the child. At no time did the appellant deny that the victim was in his custody or claim that she had been left to be under the care of another person.”

18. The evidence of surrounding circumstances which may be admissible under **Section 33** of **SOA** was in our view, tenuous. There was no credible evidence that the appellant ran away after the alleged offence as PW2 asserted. When cross-examined by the appellant, who was not represented by counsel, she admitted: ***“On that night we slept together but we did not make love.”*** The investigating officer also made no reference to any disappearance until the appellant was arrested and charged 10 days later. There was no evidence he was not arrested from the same home. The cross examination of PW2 also centered on their marital differences and it is no wonder that in his defence the appellant stated that she wanted to leave him. One may indeed wonder why, if the two were married, the appellant was not charged with the offence of incest under **Section 20** of **SOA** since the relationship with the child fell under **Section 22** of **SOA**. Be that as it may, we think the peremptory dismissal of the defence was improper.

19. The upshot of the foregoing is that the appeal has exceptional circumstances which enure in favour of the appellant. He is entitled to the benefit of the doubt and we allow it. We quash the conviction of the

appellant and set aside the sentence imposed on him. He shall be set at liberty forthwith unless he is otherwise lawfully held.

Orders accordingly.

Dated and delivered at Nyeri this 25th day of January, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR