



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: P. KIHARA KARIUKI, (PCA), OUKO & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 41 OF 2013

BETWEEN

M M APPELLANT

VERSUS

REPUBLICRESPONDENT

(An appeal against the conviction and sentence of the High Court of Kenya at Machakos (Asike-Makhandia, J.) dated 5th October, 2012

in

HC.CR.A NO. 120 OF 2011)

JUDGMENT OF THE COURT

In convicting the appellant for the offence of defilement contrary to **section 8 (1)** as read with **section 8 (2)** of the Sexual Offences Act, the learned trial magistrate relied on the evidence of the complainant's mother who explained that on the fateful morning at 5.30 am, she went to fetch water leaving behind her two children, the complainant aged 4 years and her sibling aged 2 years, sleeping in her house. When she returned after 30 minutes, she heard the complainant crying.

Upon entering the house, she found the appellant, a nephew to her husband, in bed with the complainant. His long trousers were below his knees. The witness called her husband (the complainant's father) from his second wife's house. He confirmed that when he got to his first wife's house he found the appellant in the house and the complainant was crying.

The complainant's grandmother was called and upon examining her found that she had injuries in her private part. Although the complainant's grandmother was not called to testify, the medical examination conducted by a clinical officer at Kyuso District Hospital on the same day (precisely 7 hours later) confirmed, from her broken hymen and live sperms that she had been penetrated. The appellant was arrested and charged as explained above.

After conducting a *voir dire* examination, the learned trial magistrate recorded as follows regarding the ability of the complainant to testify; **“too tender and does not comprehend what she is being asked.....She cannot adduce any evidence.”** At the prompting of the prosecutor, the trial court declared the complainant a vulnerable witness and treated her mother as her intermediary, and accordingly treating her evidence as such.

In his defence, the appellant denied the allegations against him and maintained that the evidence was fabricated against him due to his refusal to accede to the complainant’s mother’s persistent sexual advances and demands. He also alleged that she owed him Kshs. 500/- which she refused to pay him. On the fateful day, after the complainant’s mother took away the appellant’s beddings, she inquired whether the latter had reported her advances to her husband and upon confirming having done so she went away only to return shortly with the complainant, her father and grandmother claiming that he (the appellant) had defiled the complainant.

The learned trial magistrate was persuaded by the prosecution witnesses’ evidence but dismissed the appellant’s defence as unbelievable amounting to a mere denial. In convicting the appellant the learned magistrate found that the appellant committed the offence for four (4) reasons; that he left where he ordinarily slept in the granary and went into the house where the complainant was sleeping with the intention of committing defilement; that live spermatozoa was found in the private part of the complainant; that medical examination found that there was penetration; and that the complainant’s mother found the appellant in the act. Upon conviction, the appellant was sentenced to life imprisonment.

Aggrieved, he challenged that decision in the High Court, where Makhandia, J (as he then was) in dismissing the appeal concluded that there was overwhelming evidence in support of the charge; that the appellant was found in the act of committing the offence; that between the time of the offence up to the time the complainant was examined by the clinical officer, she was in the company of her parents and the police; that failure of the complainant to testify was not fatal as **section 31** of the Sexual Offences Act was complied with while at the same time the complainant’s mother was treated as an intermediary; that her evidence was corroborated by the complainant’s father and medical evidence. The learned Judge, just like the trial magistrate found no substance in the appellant’s claim that there was a grudge between him and the complainant’s mother, holding that if such a grudge existed, he ought to have raised it in the course of cross-examination but did not. The appellant who has been unrepresented through his trial and in the two appeals now brings this second appeal on four grounds which we have condensed into three as follows:-

- i) That the language used in the trial is not indicated on record of the trial court.
- ii) That without subjecting him to medical examination, the evidence upon which he was convicted was not conclusive.
- iii) That there was contradiction on the date the appellant was examined. That according to the clinical officer, the complainant was examined on 2nd February, 2009 and not on 7th February, 2009 as recorded in the medical examination form, some 5 days before the date of the alleged offence.

Relying on the English case of **Woolminton V. the D.P.P.** [1935] A.C. 462 the appellant urged us to find that the prosecution failed to prove its case against him and to acquit him as he had no obligation to prove his innocence.

As required of us by **section 361 (1)** of the Criminal Procedure Code on second appeal, we are only concerned with matters of law. From the grounds of appeal, summarized above, we are satisfied that, save for the question whether the complainant was examined by the clinical officer on 2nd or 7th February, 2009, which is a question of fact, the rest of the grounds raise matters of law.

Was the charge against the appellant proved to the required standard?

The victim of defilement, a girl aged 4 years did not testify after the learned trial magistrate stood her down due to her inability to comprehend the proceedings, leaving the parents' and the medical evidence as the only links incriminating the appellant. The learned trial magistrate was of the view that the complainant's mother's evidence could serve as that of an intermediary in terms of **section 31 (3)** of the Sexual Offences Act, a view shared by the learned Judge of the High Court.

While questioning the propriety of the procedure adopted by the trial court in the treatment of the complainant's mother's evidence Mr. Orinda, learned counsel for the respondent, wondered whether it was not prejudicial to the appellant for the trial court to merely ratify evidence already presented without giving the appellant notice or opportunity to cross-examine the complainant's mother in her new capacity as an intermediary. That view notwithstanding, Mr. Orinda maintained that even without the evidence of an intermediary the prosecution evidence was overwhelming.

In order to answer the above question, it is necessary to examine the role and use of an intermediary in a trial.

The use of an intermediary in evidence is a unique and novel phenomenon in our jurisprudence, introduced upon the enactment of the Sexual Offences Act, 2006 and few years later reproduced in **Article 50 (7)** of Constitution of Kenya, 2010.

There is no unanimity in the few local decisions we have sampled regarding the procedure for appointment and the role of an intermediary, perhaps explaining the difficulty Mr. Orinda had in taking a position that could have assisted the Court. For instance, in **Kennedy Chimwani Mulokoto V. Republic** Eldoret High Court Criminal Appeal No. 51 of 2011, Ochieng, J. found that the trial magistrate properly appointed as an intermediary the mother of a 3 year old girl, a victim of defilement who was unable to testify, due to her tender years. The learned Judge said:-

“When the mother of the little girl gave her evidence, she was deemed to be giving evidence on behalf of that little girl....Therefore, for all intents and purposes, when the mother of the little girl gave evidence, she did so as a legally recognized intermediary, for and on behalf of the little girl. Such evidence was admissible.” (Emphasis ours).

We do not have the record of the trial court to see how the victim's mother was appointed an intermediary. But from the above passage it would appear the victim's mother's testimony which was given earlier was simply adopted as that of an intermediary. See also **T.C.K V. R** Milimani HC. Criminal Appeal No. 453 of

2010, **Francis Ogoti Otundo V. Republic** Nkr. H. C. CR. Revision Case No. 397 of 2012, **Joseph Kamau Kirubi V. Republic** Criminal Appeal No. 303 of 2010 and **Marcus Muriuki V. Republic** Meru H. C. CR. Appeal No. 215 of 2009. These cases demonstrate that both the trial courts and the first appellate court have not given sufficient consideration to the question of procedure of appointment and role of an intermediary in a trial.

The provision of the services of an intermediary in a criminal trial today constitutes a right to a fair trial guaranteed in **Article 50 (7)** of the Constitution. It stipulates as follows:-

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

Unlike **section 31** the above Article does not draw a distinction between the complainant and the accused person. Both can enjoy the services of an intermediary. **Section 31 (2)** on the other hand provides that:-

(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 to the proceedings;**
- (j) the nature of the subject matter of the evidence; or**
- (k) any other factor the court considers relevant.”**

(Emphasis supplied)

This suggests that the accused person under the Sexual Offences Act is not regarded as a vulnerable person to benefit from the services of an intermediary service. **Section 2** of the Sexual offences Act, defines an intermediary to mean:

“.....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.”

A person is said to be vulnerable under **section 2** aforesaid when the person is a child, a person with mental disabilities or elderly person. By dint of **section 31**, a court in a case involving alleged commission of a sexual offence may, on its own motion or on request, 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, as shown above, by the age, intellectual, psychological or physical impairment of the witness, trauma, cultural differences, the possibility of intimidation, race, religion, language, the relationship to any party, the nature of the subject matter of the evidence and any other factor that the court may consider relevant. Appointment of an intermediary is therefore one of the measures of witness protection.

The role of an intermediary is provided for in **subsection 7 of section 31** namely, to convey the substance of any question to the vulnerable witness, inform the court at any time that the witness is fatigued or stressed; and to request the court for a recess.

It is difficult for a child or indeed a victim of a sexual attack to publicly relive the most traumatic and humiliating experience of their lives in order to get justice, more so, if they have to be subjected to the rigors of daunting and intimidating cross-examination. The thinking behind the enactment of **section 31** was, in our view, to moderate these traumatic effects in criminal proceedings.

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 *voir 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 preceeds the testimony of the intended vulnerable witness even where the court does so *suo moto*. 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.

Is an intermediary the mouth piece of the vulnerable witness or is he or she the witness? According to **section 2** of the Sexual Offences Act, an intermediary is defined to mean among other things, a person who gives evidence on behalf of a vulnerable witness.

Section 31 (1) provides *inter alia* that:-

“A court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary.”

We have seen that in **Article 50 (7)** of the Constitution an intermediary is a medium through which the accused person or complainant communicates with the court. In our understanding, the evidence to be presented is not that of the intermediary himself or herself but that of the witness relayed to court through the intermediary. 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.

The key word in **sub section 7** is emphasized as shown below to demonstrate the place of the intermediary's evidence.

“If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may;

- a) **convey the general purport of any question to the relevant witness.**
- b) **inform the court at any time that the witness is fatigued or stressed; and**
- c) **request the court for a recess.”** (Emphasis supplied)

The word through is used also in **subsection 4 (b)** in describing the protection of the witness by providing an intermediary through whom his evidence is relayed. It is the witness who gives the evidence which is explained and communicated to the court and the reverse through an intermediary in the manner and style developed between the two.

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

“125. (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.”

Because of the reality that a child of tender years, or an extremely old person, or a person affected by disease of the body or mind or even a lunatic may have difficulties relating to the trial court events in a crime, the role of an intermediary in such situations is imperative. Indeed in jurisdictions such as South Africa, England and Wales, intermediaries are professionals whose services are sourced by the court when the need arises. Perhaps that is what the framers of **section 2** of our Sexual Offences Act had in mind when they included experts, psychologists, counselors and social workers in the definition of “intermediaries”.

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.

Turning to the appeal before us, we reiterate that the victim did not herself testify due to her tender years. In cases like this where the victim is too young to give evidence, **section 33** of the Sexual Offences Act allows the trial Court to rely on either the evidence of the surrounding circumstances, or under **section 31 (4)**, to give evidence through an intermediary or both.

In the absence of the complainant’s testimony, there was independent evidence of the complainant’s mother, that of the father and the clinical officer that linked the appellant to the defilement of the complainant. 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.** HC. 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.

In the circumstances of the present appeal and contrary to the demands of the appellant, it was unnecessary to conduct forensic examination in order to link the appellant with the complainant’s defilement. He was found lying on the

complainant with his trousers down. On examination, a few hours later, the complainant was found to have been defiled. That was sufficient evidence linking the appellant with the offence. His defence was properly dismissed and we agree with the finding of the High Court that it was an afterthought.

We also find no merit on the appellant’s claim that he did not understand the proceedings on account of the language used at the trial. It is plain to us from the record that the charges were read in Kiswahili language. Throughout the trial, the record shows an active accused person, cross-examining witnesses, making various applications and giving a long unsworn defence. That ground must similarly fail.

In the result, this appeal is without merit and accordingly dismissed.

Dated and delivered at Nairobi this 18th day of July 2014.

P. KIHARA KARIUKI, (PCA)

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR