REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 152 OF 2013

Appeal from the original conviction and sentence in Mwingi Criminal Case No. 822 of 2011 (Mr. V.A. Otieno Acting SRM)

JOSEPH MUSYOKA MUTEMI……APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

JUDGEMENT

Introduction

Joseph Musyoka Mutemi, the appellant in this judgment, was tried, convicted and sentenced to twenty (20) years imprisonment for the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act.

The particulars of the offence read that between the month of February 2011 and March 2011 at (particulars withheld) in Mwingi East District within Kitui County did an act which caused the penetration of his male organ namely penis into the female genital organ namely vagina of N.K. a girl aged 15 years. After taking evidence of four prosecution witnesses and the defence of the appellant the trial magistrate found the offence proved beyond reasonable doubt, convicted and sentenced the appellant. He has raised this appeal contesting the conviction and the sentence.

Facts

Briefly, evidence shows that the complainant, J.N.K, PW1 who is also referred to as N.K in the charge sheet was attacked by the appellant when she went to fetch water from a river sometimes in March 2011. She told the court that it was around 6.00pm. Evidence shows that the appellant greeted her and told her that he had wanted her for a long time and that “she would see”. He grabbed her hand, picked her and carried her on his back to a nearby thicket where he removed her clothes and defiled her. She did not scream because he had warned her not to. PW1 did not tell anyone. It is stated that at the time she was living with an elderly grandfather when her mother was away. She kept this a secret until sometime in August 2011, five months later, when her mother noticed that she was pregnant. Her mother D.K.M, PW2 says she discovered this in June 2011.

PW2 found out from her daughter that the appellant, a neighbour, was responsible for the pregnancy. PW2 reported the matter to George Wambua, PW3, the Chief of the area who reported the matter to the Police at Ukasi Police Station leading to the arrest and charge of the appellant.

Petition of appeal

In the process of reading the record of the lower court file, it came to my notice that there is in existence Garissa High Court Criminal Appeal No 170 of 2013 containing a petition of appeal filed by the Appellant in person on 19th December 2013. This petition lists five self-made grounds of appeal. This appeal was obviously filed out of time and there is no leave sought from the court.

The court record further shows another petition of appeal filed on 16rh October 2013 by Mr. Nzili, Advocate, on behalf of the appellant. This is the appeal that was argued and subject of this judgement. Counsels for the appellant and the respondent agreed to dispose of the appeal by way of written submissions.

Counsel for the appellant did not alert the court that there was another appeal filed later by the appellant. To set the record of the court correct and given that the latter appeal was filed out of time I do hereby dismiss it and proceed to consider the petition of appeal filed on 16th October 2013.

The petition lists seven grounds of appeal challenging the following:

i. Whether age of the complainant was established.
ii. Whether the DNA report was based on samples belonging to the appellant.
iii. Irregular admission of expert report on paternity.
iv. Failure to consider appellants defence.
v. Reliance of hearsay evidence.
vi. Failure to consider appellant's mitigation and imposing harsh sentence.
vii. Failure to record crucial parts of proceedings.

Appellant's submissions

The appellant through his counsel made brief submissions that the age of the complainant was not ascertained; that the age of the complainant is crucial in a sexual offences act and failure to ascertain her age affect the substance of the charge; that there were no medical reports to show that the complainant was sexually assaulted; that evidence does not show how the DNA samples were taken because the baby died shortly after death; that there was delay in reporting the alleged assault and these issues were material to ascertain whether the appellant committed the crime and therefore it was unsafe to convict the appellant.

Learned counsel for the appellant asked the court to allow the appeal, quash the conviction, set aside the sentence and set the appellant free.

Submissions by respondent

The appeal was opposed. Learned State Counsel for the respondent submitted that the age of the complainant was conclusively proved by production of her birth certificate; that while conceding that the DNA report was not properly produced in evidence, counsel submitted that the court ought to look at the evidence in totality to determine if an offence was committed and that this court ought to order a retrial in order to have the DNA report produced to cure the error in not producing the report despite the report being mentioned in evidence.

Learned state counsel further submitted that failure to conduct *voir dire* examination should not be deemed fatal to prosecution case because there is other evidence pointing to the guilt of the appellant. Learned State Counsel asked the court to order a retrial.

Determination

It seems that perhaps due to lack of awareness by the complainant, she did not tell anyone that the alleged defilement had taken place. Had she not become pregnant the issue would have been forgotten. It also

seems that PW2 her mother was more concerned with the pregnancy than the defilement. She reported that the appellant had impregnated her daughter. It is no wonder then that she was told to wait until she delivered before any action could be taken. I can understand the challenges facing the police where five months down the line a complainant comes up with a story that out of defilement she was pregnant. By this time the only evidence that could easily connect the appellant with the alleged defilement was the paternity of the child.

The police must have caused samples taken for DNA profiling. The manner in which these samples were taken is not shown due to lack of evidence to that fact. There is on record a report dated 4th October 2012. It is marked Exhibit 3. There is also an exhibit memo showing that it was issued at Ukasi Police Station. It is marked exhibit 2. The only witness from the police is PC Hilary Rono, PW4. His evidence shows that he took over the Police File from PC Nathan Wasilwa who is said to have passed on. This witness told the court that he had a report from the Government Analyst and a memo form attached to it and that the report showed results of DNA establishing the appellant has the father of the child born of the complainant.

What is surprising is that the record did not indicate that those documents were produced as exhibits and so marked. I have compared the typed proceedings and the handwritten proceedings. The trial magistrate did not record that the memo form and the report were produced as exhibits. The fact that they were marked as exhibit 2 and 3 and the complainant's birth certificate as exhibit 1 is a pointer that they were indeed produced. Why then did the trial magistrate omit to record this?

More surprises are found in the judgment. The trial magistrate states:

> **"Further corroboration came in the form of the DNA report dated 4.10.12 which states that examination of blood samples between the deceased child, F.N the complainant and accused, confirmed to a certainty of 99% that he was the biological father (sic)."**

The trial magistrate had overlooked that he had omitted to record that such report was produced as evidence.

Coming back to the grounds of appeal, it is my finding that the age of the complainant is not an issue. I have noted that the birth certificate was marked as MFI-1 but there is no record that it was produced although marked Ex. 1!

There is no evidence from the police to indicate to the court as to how the DNA samples were obtained. Since there is no evidence that the DNA report was ever produced the issue that it was irregularly admitted does not arise. What arises is that the trial magistrate relies on it in his judgment when the record does not show that it was produced.

In respect to failure to consider defence, the trial magistrate mentioned in passing that the appellant did not substantiate the alleged grudge between him and the family of the complainant.

The sentence imposed is the minimum sentence provided for in law when evidence exists to prove defilement of a girl aged between 12 and 15 years. The issue should be whether the available evidence proves this case beyond reasonable doubt.

On failure to record crucial evidence, I agree with the appellant. This case was badly handled and with respect, the trial magistrate approached this case with certain casualness that diminishes the seriousness of the offence. As a result this case forms a bulk of many cases that become very difficult to handle at appeal stage and pose challenges to the appeal court not because the issues are complex but because it was casually handled and the record improperly kept.

Learned state counsel has asked the court to order a retrial so that additional evidence, specifically on DNA report, can be adduced. The law is clear on the cases that can be referred to retrial. In **Fatehali Manji v. Republic (1966) E.A 343** the court stated:

> **"In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it."**

Courts have pronounced themselves on this issue in various decisions and a retrial should not be ordered unless the appellate court is of the view that on a proper consideration of the admissible evidence or potentially admissible evidence a conviction might result (see **Mwangi v. Republic [1983] KLR 522**).

I have given this case much thought and in my view interests of justice will be served by having the case retried. The case was heard during the latter part of 2012 and the judgement delivered as late as October 2013. I think it will not present the police with difficulty in tracing the witnesses.

To enable a retrial, it is the order of this court that the conviction is hereby quashed and the sentence set aside. The appellant shall be presented before the Magistrate in Charge of Mwingi Law Courts for mention with the objective of assigning the case a hearing date before another magistrate of competent jurisdiction for retrial. It is so ordered.

Dated, signed and delivered this 14th July 2014.

S.N.MUTUKU

JUDGE