REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 54 OF 2016

AKM……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(Being an appeal from the Original Conviction and Sentence in Mutomo Principal Magistrate's Court Sexual Offence Case No. 5 of 2015 by Hon Z.Y. Nyakundi (PM) on 3/2/16)

J U D G M E N T

1. **AKM,** the Appellant, was arraigned in court following an accusation of having defiled a child aged **thirteen (13) years;** with an alternative count of committing an indecent act with the child.

2. After being taken through full trial he was found guilty of the main charge, convicted and sentenced to serve **twenty (20) years imprisonment,** aggrieved by the decision of the court he appeals on grounds that: critical witnesses were not called to testify which was a violation of **Section 150** of the **Criminal Procedure Code;** wrong principles of law were applied as the court failed to note that there was no witness who attested to screams and PW2 testified that there were many people along the road; **Section 19** of the **Oath and Statutory Declaration Act, Cap 15** of the Laws of Kenya was violated, evidence adduced was contradictory and inconsistent and the defence put up was not challenged.

3. Facts of the case were that the complainant was from church when he encountered the Appellant who asked her to stop. She did and he took her to the bush, removed her clothes, pant then removed his and proceeded to violate her sexually. On finishing the Appellant saw the complainant's father PW2 **MK** and fled. The complainant's father had gone ahead of her. When she took long to reach home he decided to go and look for her only to see 2 (two) people emerging from the bush and the man ran away. They reported the matter to the police who investigated, arrested the Appellant and charged him.

4. When put on his defence the Appellant who opted to make an unsworn statement testified that on the material date when he left church he went home to study. At about **7:00 P.M.** he heard a person calling him but she was told he was studying. The following day his aunt informed him of allegations that he had defiled the complainant. He went back to school when they opened. While studying on one of the days he was arrested.

5. The Appellant canvassed the appeal by way of written submissions. He urged that the court failed to confirm if the complainant understood the nature of oath or was intelligent enough to understand the duty of speaking the truth. In this regard he cited the case of ***Johnson Mururi Versus Republic (1983) eKLR 445*** where the court held that:

"***2). It is important to set out the questions and when deciding whether a child of tender years understands the nature of an Oath so that the Appellant Court is able to decide whether the important matter was rightly understood***.

5) ***The judge is under duty to record the terms in which he was persuaded and satisfied that the child understood the nature of***

Oath. The failure to do is a fatal conviction".

6. That vital witnesses namely T, MM, R were not called as witnesses who would have shed some light on what actually transpired and failure to call them failed to alleviate a situation where an innocent victim of circumstances suffered. He cited the case of ***Bukenya Verus Unganda [1972] E.A 549*** where it was held that:

"…The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent; the court has the right, and the duty, to call witnesses whose evidence appears essential to the just decision of the case; 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".

7. He pointed out various contradictions and inconsistencies that emerged in the matter. That such evidence could not be relied upon as was stated in the case of ***Augustine Njoroge Versus Republic Criminal Appeal Number 185 of 1982*** thus;

"Contradicted evidence is unreliable" the above stated case shows clearly that is trite law that where the evidence is contradicted or inconsistent the court should not rely upon it".

8. It was contended that per the evidence of the complainant there were many people passing along the road yet none of them was called to testify as to the alleged screams and his defence was unchallenged.

9. That his rights as envisaged in **Article 50 (2) (h) (j)** and **Article 25 (l)** of the **Constitution** were violated as the magistrate failed to explain to him promptly of the right to be assigned an advocate as substantial injustice was likely to result. That he could not have prepared fully for the case without reasonable access to the evidence and even after the case was conducted the copy of proceedings will not availed to him in good time and the case by the prosecution was not proved beyond doubt.

10. The State through learned counsel **Mr. Mamba** opposed the Appeal. He urged that the Appellant was identified as the person who emerged from the bush with the complainant. On examination the complainant's hymen was missing therefore the finding of the trial court was not proper.

11. This being the first Appellate Court, I am duty bound to re-evaluate the evidence that was adduced before the trial Court and come to my own conclusion bearing in mind that I never saw or heard the witnesses who testified. **(See *Okeno vs. Republic (1972) EA 32).***

12. It is argued that the case was not proved to the required standard. This being a case of defilement the prosecution was required to prove;

i) The age of the complainant;

ii) Proof of penetration;

iii) Positive identification of the assailant (See ***Charles Wamukoya Karani versus Republic Criminal Appeal Number 72 of 2013).***

13. The complainant told the court that she was **thirteen (13) years** old and in class 5, a pupil at **[Particulars Withheld] Primary School.** An acknowledgement of birth notification issued to parents indicated the date of birth as **26.4.2001.** This was proof of the fact that the complainant was **13 years old**.

14. In the case of ***Kibageny Arap Korir versus Republic (1959) E.A* 92,** the Court of Appeal held that tender years means a child under the age of **14 years.** Therefore the complainant herein was a child of tender years.

15. **Section 19(1**) of the **Oaths** and **Statutory Declaration** Act provides thus;

"where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath,

his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section".

This is a case whose the complainant was not subjected to **Voire dire examination.** And it is the contention of the Appellant that failure to ascertain the complainant's competence occasioned a miscarriage of justice as that would have been the only way to tell if the witness was truthful.

In the case of ***Samuel Warui Karimi versus Republic [2016] eKLR*** the Court of Appeal stated thus;

***"…We are in agreement the purpose of undertaking voire dire examination in a criminal trial is to protect the guaranteed right of a fair trial. Where the witness as in this case is aged 12 years and that essential step was not taken in a criminal trial that becomes problematic. In the circumstances we find the evidence by the complainant was not properly received thus, the conviction of the appellant becomes unsa*fe to sustain as she was the complainant and not a witness".**

16. The learned Magistrate having failed to undertake the important enquiry of testing the complainant's intelligence could not tell if the complainant was competent to testify or if she understood the nature of the oath she took or the importance of speaking the truth. This was prejudicial to the Appellant.

17. On the failure to call vital witnesses, it was held in the case of ***Keter Versus Republic (2007) 1EA 135*** thus

"***The Prosecution is not obliged to call a superfluity of witnesses but only such witnesses that are sufficient to establish the charge beyond any reasonable doubt."***

This was a case where the complainant clearly stated that the Appellant found her waiting for **T** along the road. The alleged **T** was stated to have been at the shop. However when the alleged act was committed she was not present therefore her evidence was not relevant.

18. The complainant was subjected to medical examination. PW4 **Daniel Mulwa** the clinical officer filled the P3 form. He stated that the complainant's hymen was missing and she had a tear on the posterior part of her vagina. She had whitish discharge and spermatozoa was present. This was evidence of having engaged in penetrative sexual intercourse.

19. It was her evidence that the assailant who perpetrated the act of penetration into her genital organs was the Appellant. PW2 her father saw two people emerging from the bush but he couldn't identify them as it was at 7.00 PM or thereabout. The man ran away and when he encountered the complainant she told him that the Appellant was a student at [Particulars Withheld] Secondary School and he had defiled her.

20. When the Appellant was arraigned in court, there's no indication of having been informed promptly of the right to legal representation. What the learned magistrate caused to be filed was a Probation Officer's Report that indicated the Appellant's age as **eighteen (18) years** and a student at **[Particulars Withheld] Secondary School.** It was further stated that he was a total orphan whose guardian was in court and infact he was being sponsored by **Tsavo East National Park Foundation.**

21. Article 50 (2) (h) of the constitution provides thus;

"***"(2) Every accused person has the right to a fair trial, which includes the right—***

(h) To have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

In the case of ***Thomas Aluga Ndegwa v Republic (2018) eKLR;*** the Court of Appeal appreciated the fact that **Article 50 (2) (h)** of the **Constitution** should be implemented so that any person requiring such services can apply for the same in writing. The

provision of legal services as stipulated is a constitutional requirement but would be achieved progressively and not instantaneously (***See David Macharia v Republic (2011) eKLR.*** This means that the Appellant was not prejudiced on that basis.

22. From the foregoing having at the outset found that evidence by the complainant was received irregularly, it was unsafe to convict the Appellant. Therefore I find the appeal having merit. In the result, I quash the conviction and set aside the sentence meted out. The appellant shall be released forthwith unless otherwise lawfully held.

23. It is so ordered.

DATED, SIGNED and **DELIVERED** at **KITUI** this **9TH** day of **JANUARY, 2019.**

L. N. MUTENDE

JUDGE