Case Number:	Criminal Appeal 26 of 2018
Date Delivered:	28 Nov 2019
Case Class:	Criminal
Court:	Court of Appeal at Mombasa
Case Action:	Judgment
Judge:	Daniel Kiio Musinga, Agnes Kalekye Murgor, Stephen Gatembu Kairu
Citation:	Gailord Yambwesa Landi v Republic [2019] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Mombasa
Docket Number:	-
History Docket Number:	Criminal Appeal 31 of 2016
Case Outcome:	Appeal allowed.
History County:	Mombasa
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MUSINGA, GATEMBU & MURGOR JJ.A)

CRIMINAL APPEAL NO. 26 OF 2018

BETWEEN

GAILORD YAMBWESA LANDI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from judgment of the High Court of Kenya at Mombasa (W. Korir, J.) dated 16th April 2018

in

HCCRA No. 31 of 2016)

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JUDGMENT OF THE COURT

Gailord Yambwesa Landi, ***the appellant***, was charged with the offence of defilement contrary to ***section 8 (1)*** and ***(2)*** of the ***Sexual Offences Act, 2006***. The particulars of the offence are that on 25th March 2016 at Manda Maweni area, Lamu County within Coast Region, he intentionally caused his penis to penetrate the vagina of ***the complainant, DK, (PW2),*** a child aged 8 years.

The appellant was charged with an alternative count of committing an indecent act with a child contrary to ***section 11 (1)*** of the ***Sexual Offences Act,*** in that on diverse dates he intentionally and unlawfully touched her vagina using his penis.

Upon considering the evidence, the learned trial magistrate found that the offence had been proved to the required standard and, upon conviction sentenced the appellant to life imprisonment. The appellant appealed to the High Court, which upheld the conviction and sentence imposed by the trial court.

The appellant now prefers an appeal to this Court on the grounds that the High Court did not appreciate that the charge sheet was defective; that in failing to conduct a DNA test on the semen, the prosecution failed to prove its case beyond reasonable doubt; the first appellate court did not re-evaluate the evidence, and that he was denied the right to challenge the evidence of DK and the intermediary, PW1; that the assessment report was not produced by the maker of the document or by a person with knowledge and expertise which was contrary to the stipulations of ***section 35 (1)*** of ***the Evidence Act;*** that the trial court failed to appreciate the contradictions and gaps in the witness evidence; and finally, that both the lower courts did not take into account his defence.

The appellant filed written submissions that he presented in Court. At this point, there is one issue to which we think would be prudent to confine ourselves. It is the appellant's complaint that his rights to a fair trial were violated because he did not have an

opportunity to cross examine DK or her intermediary; that after DK testified, he was not accorded an opportunity to cross examine her and instead the court went on to hear the testimony of PW3; that as a consequence, he did not have an opportunity to challenge or test the complainant's evidence, and was accorded a fair hearing.

Mr. Fedha, learned Senior Prosecution Counsel for the State opposed the appeal but unfortunately, did not address us on this particular issue. However, he submitted that the trial court evaluated and analysed the witness evidence. The complainant was 8 years of age and an age assessment report was produced. Both the High Court and trial court found that there was penetration based on evidence corroborated by the medical report produced by Joseph Nderitu, PW 4, a clinical officer. The complainant testified that the appellant whom she positively identified, took her into the bush and defiled her. Finally, it was submitted that PW 3, the complainant's father confirmed that the complainant informed him of the defilement.

We have been through the record, and the submissions of the parties, and find that the issue for consideration is whether by failing to provide the appellant an opportunity to cross examine the complainant, his rights were violated as he was not subjected to a fair hearing.

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."

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.

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".

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."

In the instant case, the record shows that the trial magistrate having declared DK to be a vulnerable witness, by virtue of ***section 31 (4)*** of the ***Sexual Offences Act***, appointed her mother, PW1, as an intermediary to assist her in giving her testimony to the court. DK testified as PW2 and gave unsworn evidence. The record further shows that after DK testified, the appellant did not cross-examine her, but instead, the court went on to hear the evidence of PW 3, without either DK or her mother who was the court appointed intermediary being subjected to cross examination by the appellant.

Clearly there was a misstep or omission on the part of the trial court. It was the appellant's right to test the child's evidence through cross examination. In this case the court had appointed an intermediary to assist the child. Having made such appointment, there was all the more reason for the trial magistrate to ensure that DK's evidence was subjected to cross examination. The election on whether to cross-examine or not is the prerogative of the accused and not of the witnesses or of the court. And the record does not show the appellant was afforded the opportunity and elected not to cross examine the child. In view of this apparent lapse in the trial process, we are satisfied that the appellant was not afforded a fair hearing, which was contrary to the stipulations of the Constitution and the law.

Given the aforegoing, 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."

In the case of ***John Njeru vs Republic [1980] eKLR***, this Court held;

"In general, a retrial should be ordered only when the original trial was illegal or defective, as otherwise an order for retrial would give the prosecution an opportunity of filling gaps in its case; see Aloys v Uganda [1972] EA 469, which followed the earlier decision Fatehali Manji v The Republic [1966] EA 343. This is particularly so where the first trial has resulted in an acquittal".

In applying the factors outlined in the above cited authorities to the circumstances of this case, the record shows that the appellant was charged with the offence of defilement on 29th March 2016. The trial court rendered its judgment on 11th July 2016. The appellant was dissatisfied with the judgment of the trial court and appealed to the High Court which rendered its judgment on 16th April 2018. Between the time that the appellant was charged and the date the High Court rendered its judgment is approximately 2 years. At the commencement of the trial the complainant was eight years old. At this point in time she would be about 12 years old. In our view, remitting the case back to the trial court for retrial 3 years after the appellant was charged with the offence is not an inordinately long period, and we do not envisage that any prejudice will be occasioned to either the complainant or the appellant. Additionally, despite the passage of a period of 2 years, we do not consider that there will be any serious challenges faced in tracing the witnesses.

Considering that the factors favouring an order for retrial far outweigh any other order, we are satisfied that the order which best lends itself to us in the circumstances of this case would be to remit the case back to the trial court for retrial.

As such, we allow the appeal, quash the conviction and set aside the sentence of the appellant by the trial court. We direct that the appellant shall be retried on the same charges before a Magistrate of competent jurisdiction other than Hon. N. Thuku, and for that purpose, he shall remain in custody and shall be taken before a Senior Resident Magistrate at Lamu Senior Magistrates' Court to plead to fresh charges within 14 days from the date of this order. We further order the case be heard on a priority basis.

It is so ordered.

DATED and delivered at Malindi this 28th day of November, 2019.

D.K MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU FCIArb

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JUDGE OF APPEAL

A.K MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR