**Haji v Republic (Criminal Appeal E020 of 2023)**
**[2023] KEHC 26498 (KLR) (15 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26498 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MARSABIT**

**CRIMINAL APPEAL E020 OF 2023**

**JN NJAGI, J**

**DECEMBER 15, 2023**

**BETWEEN**

**MOHAMED OSMAN HAJI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the original conviction and sentence by Hon. M. S. Kimani, Principal Magistrate, in Moyale Principal Magistrate's Court Criminal Case No. E006 of 2022 delivered on 27/07/2023)***

## JUDGMENT

1. The appellant herein was convicted for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006 and was sentenced to serve 20 years imprisonment. The particulars of the offence were that on the 2nd day of September 2022 at [Particulars withheld] Mosque within Moyale County he intentionally caused his penis to penetrate the anus of A. M, a child aged 11 years. The Appellant was aggrieved by both the conviction and the sentence and filed the present appeal.

2. The grounds of appeal are that:

   (1) That the learned trial magistrate erred in law and fact by failing to note that the voir dire examination was not properly conducted since there was no finding that the complainant PW2 understood the importance of giving evidence on oath.

   (2) That the learned trial magistrate erred in law and fact by failing to find that the age of the complainant was not proved.

(3) That the learned trial magistrate erred in law and fact by failing to find that the whole case against the Appellant was based on suspicion which the same cannot form a basis for as conviction.

(4) That the learned trial magistrate erred in law and fact by convicting the appellant to serve 20 years imprisonment without supportive evidence.

(5) That the learned trial magistrate erred in law and fact by dismissing the appellant's defense without giving cogent reasons of dismissing it.

**Prosecution's Case.**

3. The prosecution called 4 witnesses in the case.

The complainant`s father, M H M, PW1, testified that he lives in [Particulars withheld] and is a casual laborer. That he recalled that on 2/9/2022, he was at home when his son A. M. then aged 11 years came from school, changed his clothes and left to go play. He did not return home on that day. They looked for him among their family members in Moyale Kenya and Moyale Ethiopia to no avail. That on the evening of 3/9/2022, PW1 made a report of a missing person at Moyale Police Station. As he was leaving the police station, he met with his nephew H N in the company of his missing son, A.M. H N told him that the complainant had told him that he had been defiled by a man called Chaya. PW1 knew the said person. They went to the person`s home and found him in the company of his mother and his brother. They reported the matter at [Particulars withheld] AP camp and the said person, the appellant, was arrested. On the 4/9/2022, they went back to the Ap camp and they were directed to Moyale police station where they made a report. They were then directed to Moyale Sub County Referral Hospital (MSCRH) for examination and filling of the P3 form. They were referred to Afya Nursing home for purposes of some tests being run. The P3 form was completed. The appellant was charged with the offence of defilement.

4. The Complainant, PW2, testified that he was at the time aged 11 years. That it was his mother who told him his age. That he was at the time attending [Particulars withheld] school and was in grade 3. That on the 2/9/22 he left school at about 12 pm and went home. He changed to home clothes and went to play with friends. That as they did so, the appellant who was known to him as Chaya went there and asked him to help him sell memory cards and would give him 300/=. He agreed and followed him to a certain busy area near Saint Mary. On getting there he asked the appellant whether that is the place they were to collect the cards. The appellant instead fetched a dagger from his waist and brandished it towards him and told him not to utter a word. The appellant held him by the collar and removed the complainant`s pair of trousers and his under wear. The appellant then lowered his pair of trousers up to knee length and exposed his penis. He inserted his penis into the anus of the complainant while holding his mouth with one hand and the dagger with the other hand. He finished and asked the complainant to go home. He threatened to murder him if he told anyone about what had happened.

5. The complainant went back to his playmates. In the evening he feared to go home and slept at the mosque. On the following day he slept at the same place and was going to eat at his aunt`s home in Ethiopia. On Monday he met Hussein who asked him why he was not going home. He told him what had happened. The went and told his father. They proceeded to Chaya's home and found him with his mother. They reported to the police. The appellant was arrested. On the following day he was taken to hospital for examination. He was examined on the anus. Further tests were done at another hospital near Baraza Park. The police then took down his statement. He stated that he knew the appellant as Chaya and that he had known him for a while.

6. The doctor who examined the complainant, Dambe Bako Dawe, PW3, testified that he had been a medical officer for 6 years. That on the 5/9/2022 he examined the complainant who presented to him a history of defilement by a person known to him. He noted that he had multiple abrasions on the anal area at 4.10 o'clock and 12 o' clock which were super facial lacerations. He went ahead to complete the P3 form and the PRC form. He stated that the injuries on the anal region were evidence of penetration.

7. It was the evidence PC John Muriithi, PW4, that at the material time he was stationed at Moyale Police Station. That on the 4/9/2022 he and Corporal Godana went to Manyatta Police post which is under Moyale Police Station and picked the appellant who had been arrested over allegations of defilement. They transferred him to Moyale Police Station pending further investigations. On 5th September, he escorted the appellant and the complainant to Moyale Sub-County Referral Hospital for clinical examination and they were both examined. They were then referred to Afya Nursing Home for further tests. The conclusion was that the victim had been defiled. The appellant was then charged with the offence.

8. It was further evidence of PW4 that the complainant identified the appellant as the perpetrator. That the victim was subjected to age assessment and it established that he was aged 11 years. His father also stated that his son was aged 11 years.

**Defence Case**

9. When placed to his defence, the appellant stated in an unsworn statement that on 4/9/23 he was at home at about 7:30 pm when two police officers went there. They told him that somebody had complained to them that he had stolen his memory card. He was escorted to the chief's camp. He was then told that he had defiled the complainant. He was later transferred to Moyale Police Station. On 6/9/23 he was arraigned in court and charged with defilement. He denied committing the offence.

10. The appellant called his younger brother, Abdi Osman Haji, DW2, as a witness in the case. It was the evidence of the witness that on 4/9/22 he was at home with the appellant and other members of his family. That some members of the public went there looking for the appellant. The father to the complainant asked him to ask the appellant what he had done. The complainant stated that the appellant had taken his memory card. The complainant`s father kicked the appellant asking him why he had defiled the complainant. He, DW2, urged the complainant`s father to go and come back with the police. Two police officers went to their home and escorted the accused to the police station.

**Submissions**

11. The appellant made written submissions while the respondent made oral submissions.

**Appellant's Submissions**

12. The Appellant submitted that the complainant was a child of tender years but that no voir dire examination was conducted on him before he gave evidence on oath. That as a result, the court did not find out whether the child understood the importance of giving evidence on oath and as such there was contravention of section 19 of the *Oaths and Statutory Declarations Act*. The appellant cited the case of *Kibangeny Arap Korir v Republic* [1951] EA 92 where it was held that a child of tender years means a child under the age of 13 years. He submitted that the overlooking of such an undertaking by the trial court rendered the trial a nullity.

13. The Appellant also submitted that the age of the complainant was not proved and as such he could not be found guilty of defilement. He submitted that the complainant told the court that he was told of his age by his mother who however was not called to testify in the case.

14. The appellant further submitted that the evidence of the investigating officer, PW4, that the complainant was subjected to age assessment was not proved since there was no evidence adduced to that effect by the doctor, PW3, who filled the P3 form.

15. The Appellant submitted that the whole case against him was based on suspicion. To that end, he relied on the cases of *Michael Mugo Musyoka v Republic* [2015] and *Joan Chebichi Sawe v Republic* [2003] eKLR where courts said that suspicion however strong cannot provide a basis for inferring guilt on the part of an accused person.

16. The Appellant further submitted that the trial court failed to faithfully, impartially, objectively, dispassionately and rationally analyze the evidence tendered as a whole to determine his criminal culpability. More so, that there was no direct, cogent, convincing, and compelling evidence to warrant the trial court to convict him of the offence. He submitted that the case was not proved beyond reasonable doubt. He urged the court to quash the conviction set aside the sentence.

**Respondent's Submissions**

17. The respondent conceded to the appeal on the basis that the complainant who was aged 11 years gave sworn evidence without undergoing a voir dire examination. They submitted that the conviction was not safe. They urged the court to quash the conviction but order for a re-trial.

**Determination**

18. This being a first appellate court in the matter, the duty of the court is as was set out in the case of *Okeno vs. Republic* [1972] EA 32 where the Court of Appeal set out the duties of a first appellate court as follows:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya vs. Republic* (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala v R.* (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters vs. Sunday Post* [1958] E.A 424."

19. It is the duty of the prosecution in a criminal case to prove the case against an accused person beyond reasonable doubt. In the case of *Miller v Ministry of Pensions*, [1947] 2 All E R 372, Lord Denning stated the following regarding the degree of proof beyond reasonable doubt:

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

20. I have considered the evidence adduced at the lower court and the submissions by both the appellant and the respondent. The issues for determination in this appeal are:

    (1) Whether the ingredients of the offence of defilement were proven.

    (2) Whether failure to conduct voir dire was fatal to the case.

21. The key ingredients for the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the appellant was the perpetrator of that offence.

22. The Appellant submitted that the prosecution did not prove the age of the complainant. He submitted that the complainant told the court that he was told of his age by his mother but that the prosecution did not call the complainant`s mother to prove that fact.

23. The age of a person can be proved in various ways. In the case of *JOA v Republic* [2019] eKLR it was held as follows regarding the issue of age,

> " whereas proof of age of a complainant in defilement cases is a duty of the prosecution, to establish the age of the victim of defilement, it is equally trite law that proof of age or apparent age can be done by other means other than documentary evidence in the form of birth certificate, birth notification, baptismal card or the child Health or Immunization Card. In addition, proof of age can be by observation by the court, or testimony by the parent or guardian as long as the court believes that they are saying the truth and makes such observations on the apparent age of a victim.

24. The father to the complainant, PW1 testified that his son was aged 11 years. The estimated age of the complainant in part 'C' of the P3 form and in the Post Rape Care report as indicated by the doctor, PW3, who examined the complainant is that he was aged 11 years. I find that the evidence of the complainant`s father that the minor was aged 11 years was corroborated by the evidence of the doctor, PW3. It is permitted for the court to go by the estimated age where actual age is not available. I find that the prosecution had sufficiently proved that the complainant was at the material time aged 11 years.

25. Having determined the age of the complainant, I will move to consider whether failure to conduct the voir dire examination on the complaint was fatal to the prosecution case.

26. The law is that absence of voir dire examination is not automatically fatal to the evidence of a witness. This was the observation made by the Court of Appeal in *Maripett Loonkomok v Republic* (2016) eKLR where it was held that:

> We turn to consider the effect of failure by the trial court to administer voir dire on the complainant. It is firmly settled that not in all cases that voir dire is not administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has recently reiterated what has been said many times before that that question will depend on the peculiar circumstances and particular facts of each case. See *James Mwangi Muriithi v R*, Criminal Appeal No.10 of 2014.

27. This position was echoed by the Court of Appeal in *Athumani Ali Mwinyi v Republic*, Criminal Appeal No.11 of 2015 where the court stated that:

> " In appropriate case where voir dire is not conducted, but there is sufficient independent evidence to support the charge... the court may still be able to uphold the conviction."

28. In *Sammy Ngetich v Republic* [2018] eKLR where the trial court took the evidence of a complainant in the case who was aged 13 years without conducting a voir dire examination, Mrima J. quashed the conviction and said that:

> 15. The Court of Appeal has also through a long line of cases held that voir dire examination of children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. However, the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person unless there is sufficient independent evidence to support the charge. (See *Maripett Loonkomok vs. Republic* (2016) eKLR).

29. In *Abdi Abdiraham & another v Republic* (2013) eKLR, the High Court at Garissa set aside a conviction and sentence of the appellant on account of failure on the part of the trial magistrate to conduct voir dire examination of the child who was aged 13 years at the time she gave evidence.

30. In *Samuel Warui Karimi v Republic* [2016] eKLR where the trial court failed to conduct a voir dire examination on a complainant aged 12 years, the Court of Appeal held that her evidence was not properly received and the conviction of the appellant was unsafe.

31. In this case, the child who was aged 11 years gave evidence on oath without voir dire examination being conducted on him. The trial magistrate in convicting the appellant of the charge stated that he had observed the complainant when he was testifying and there was nothing from his demeanor to suggest that he was lying.

    It is clear from the judgment of the trial magistrate that he did not place the evidence of the child in its proper place. The court did not examine the child to ascertain whether he understood the meaning of an oath and the duty of telling the truth. The magistrate in the circumstances could not form a sufficient basis of the demeanor of the child when he did not test through a voir dire examination the competency of the child to give evidence on oath. The law is that where voir dire examination is not conducted the evidence of the child cannot be used as he basis of a conviction on an accused person unless there is some other independent evidence to support the charge. The question then is whether there was such evidence in this case.

32. The magistrate held that the evidence of the complainant was corroborated by the clinical officer PW3 who examined him and found him with injuries on the anus. Was this independent evidence in support of the charge?

33. The independent evidence that was required in support of the charge is one which affected the appellant by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it -see the case of *R v Baskerville* [1916] 2 KB 658.

34. In *Mukungu v Republic* [2002] 2 EA 482, the Court of Appeal citing *Mutonyi vs. Republic* [1982] KLR 2003, held that:

> "An important element in the definition of corroboration is that it affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it: See *Republic vs. Manilal Ishwerlal Purohit* [1942] 9 EACA 58, 61."

35. In *Moses Mutahi Mugo v Republic* [2022] eKLR, Odunga J. (as he then was) cited the case of *R vs. Kilbourne* [1973] 2 WLR 254, 267, where Lord Hailsham of St Marylebone LC stated:

> " Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. If his evidence is not credible, a witness's testimony should be rejected and the accused acquitted, even if there could be found evidence capable of being corroborated in other testimony. Corroboration can only be afforded to or by a witness who is otherwise to be believed."

36. In the instant case, there was no independent evidence to support that the appellant committed the offence. The evidence of the clinical officer was to the effect that the complainant had injuries in the anus but not that the appellant is the one who committed the offence. The evidence of the clinical officer thus was not independent corroborative evidence that the appellant committed the offence. His evidence could not corroborate the defective evidence of the child, PW2. The conviction of the appellant on the basis of the evidence of the child, PW2, was therefore not safe.

37. The state conceded the appeal on the ground that the conviction was not safe for lack of voir dire examination on the key witness for the prosecution. I find that they were right in conceding to the appeal.

38. The upshot is that the appeal is allowed and the conviction and the sentence are hereby set aside.

39. The respondent while conceding to the appeal asked the court to order a retrial. The law is that the court can only order a retrial if the interest of justice so require and only where no prejudice will be occasioned to the accused. In the case of *Fatehali Manji vs Republic* [1966] EA 343 the Court of Appeal when dealing with the issue, gave the following guideline: -

> " In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when 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 a retrial should only be made where the interests of justice require it." (See *Philip Kipngetich Terer –vs- Republic* [2015] eKLR)In *Muiruri Vs R* [2003] KLR 552, the Court held that: -
>
> > "It [retrial] will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial. (See *Zedekiah Ojuondo Manyala Vs Republic* (Criminal Appeal No. 57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the court's."

40. In *Mwangi –versus- Republic* [1983] KLR 522, the Court of Appeal held at page 538 that: -

> " We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant."

41. In *Pius Olima & another v Republic* [1993] eKLR, the Court of Appeal stated as follows on the issue:

> Our attention was drawn to authorities that deal with the principles that should be applied when considering whether a retrial should be ordered or not. These are:- *Ahmed Sumar v Republic*, (1964) EA 481; *Manji v The Republic*, (1966) EA 343; *Mujimba v Uganda*, (1969); and *Merali and Others v Republic*, (1971) 221. The principles that emerge are that a retrial may be ordered where the original trial, as was found by the High Court and with which we agree, is defective, if the interests of justice so require and if no prejudice is caused to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case.

42. In this case, the trial was defective. However, the appellant was facing a serious offence of defiling a child of 11 years of age. The offence is said to have been committed in September 2022 which is about a year and 3 months ago. In my view, the interests of justice would call for a retrial. I do not see any prejudice to be occasioned to the appellant if a retrial is so ordered. In the premises, I order that the appellant be retried of the offence before a magistrate of competent jurisdiction other than Hon. M.S. Kimani.

**DELIVERED, DATED AND SIGNED AT MARSABIT THIS 15TH DAY OF DECEMBER 2023.**

**J. N. NJAGI**

**JUDGE**

In the presence of:

Mr. Otieno for Respondent

Appellant – present in person

Court Assistant – Jarso

14 days Right of Appeal.