REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 232 OF 2017

ALPHONCE MLANDO.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTOR

(An appeal from the decision of Hon. Kagoni E.M., Senior Resident Magistrate,

delivered on 20th December, 2017 in Mombasa Chief Magistrate's Court

Criminal Case No. 38 of 2017)

JUDGMENT

1. The appellant was convicted for the offence of defilement contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on 10th and 11th day of March, 2017 at [particulars withheld] area at Kisauni Sub-County within Mombasa County intentionally caused his penis to penetrate the vagina of MN [name withheld] a girl aged 13 years.

2. The appellant was sentenced to 30 years imprisonment. He was aggrieved by the decision of the lower court and on 29th December, 2017 he filed a petition and grounds of appeal.

3. On 3rd December, 2019 he filed his amended grounds of appeal, with leave of the court. He raised the issues that the charge against him was defective; that *voir dire* examination was not conducted and that penetration was never proved in accordance with the law. The appellant also raised the ground that he was convicted on evidence admitted under Section 124 of the Evidence Act.

4. He raised the issue of the Trial Magistrate's non-compliance with Section 109 of the Evidence Act. He also stated that his defence was not considered and that the sentence imposed on him was harsh and excessive.

5. In his written submissions, the appellant stated that the charge against him was defective for omission of the word *"unlawfully"* from the particulars of the charge. He pointed out that the particulars should have read that he "intentionally and *unlawfully* caused his penis to penetrate ……"

6. He indicated that a charge of defilement is properly drafted when the word *"unlawfully"* is included in the particulars of the charge. He submitted that the prosecution should have amended the charge at the earliest opportunity.

7. It was submitted that the Trial Magistrate failed to conduct *voir dire* examination to test if the 13 year old child understood the importance of speaking the truth and that she was well informed about the nature of an oath. The appellant contended that the said Magistrate failed to adhere to the provisions of Section 19 of the Oaths and Statutory Declarations Act. It was stated that the Trial Magistrate never recorded in the proceedings that he was satisfied that the alleged victim was telling the truth. The appellant relied on the decision in **Kaingu *alias* Kasomo**, Malindi Criminal Appeal No. 504/ 2010, where it was stated that there is no room for assumption and speculation in a criminal case.

8. It was submitted that the Trial Magistrate should have conducted *voir dire* examination so as to satisfy himself of the credibility of the victim. The appellant contended that in the said circumstances, Section 124 of the Evidence Act was wrongly applied in this case.

9. The appellant submitted that the issue of penetration was not proved as against him. He stated that penetration is not always conclusive evidence of defilement. He relied on the case of **Moses Kipchirchir v Republic** [2017] eKLR, where the Judge stated that the charge of

defilement was not proved as no external injuries were visible on the victim therein.

10. The appellant stated that the prosecution failed to call his sister who was an important witness. It was submitted that the sentence imposed on him was harsh and excessive and that he was not given a chance to mitigate and that by so doing, the Trial Magistrate acted contrary to Section 215 of the Criminal Procedure Code. The appellant submitted that his defence, which he considered as being reliable was not taken into account.

11. The DPP through Ms Mwangeka, Prosecution Counsel, filed written submissions on 10th February, 2020. On the issue of the claim that the charge was defective, she cited the case of **Isaac Omambia v Republic** [1995] eKLR, on what constitutes a defective charge.

12. It was submitted that for the charge to be deemed as being fatally defective, the court has to consider whether the charge as drafted disclosed in sufficient detail a statement of the specific offence or offences with which the accused person was charged, together with such particulars as may be necessary which give reasonable information as to the nature of the offence. She stated that in addition, the evidence adduced must support the charge as laid out in the charge sheet.

13. It was stated that the omission of the word *"unlawfully"* from the particulars of the charge in this case did not in any way prejudice the appellant or occasion a miscarriage of justice. It was indicated that when the charge was read out to the appellant in Kiswhaili, he responded by saying it was "not true". It was indicated further that the appellant understood that he was facing a charge of defilement and that he actively took part in the trial through cross- examination of the prosecution witnesses. It was stated that during the defence hearing, the appellant confirmed that he knew the charges facing him. Ms Mwangeka urged this court to invoke the provisions of Section 382 of the Criminal Procedure Code to cure the defect pointed out by the appellant.

14. On the issue of failure by the Trial Magistrate to conduct *voir dire* examination, the Prosecution Counsel relied on the case of **Mwangi Muriithi v Republic**, Criminal Appeal No. 10 of 2014, where it was held that whether *voir dire* is administered or is not administered properly does not render the entire trial vitiated, as the same will depend on the peculiar circumstances and particular facts of each case.

15. It was submitted that the Trial Magistrate in the Judgment stated that the impression of the complainant, her demeanour and age at the time she testified informed the court's decision not to conduct *voir dire* and to allow her (PW2) to testify under oath.

16. It was submitted that the appellant was given an opportunity to cross-examine the complainant of which he did, thus no prejudice was suffered by him.

17. Ms Mwangeka also submitted that in convicting the appellant, the Trial Magistrate was guided by the provisions of Section 124 of the Evidence Act and held that PW2's evidence was corroborated by that of PW3 and that the said Hon. Magistrate had no reason to doubt her testimony. That he said her evidence was straight forward, flawless and not shaken during cross-examination by the defence and that she was a candid witness.

18. In submitting on the issue of penetration, Ms Mwangeka stated that PW2's evidence was that the appellant lured her into his house, locked her inside and forcefully defiled her twice. That when he did so on the 2nd day it was in the presence of a woman. It was stated that medical examination of PW2's genitalia established that her hymen was broken and she had a whitish discharge. It was stated that the observation made upon the said examination was consistent with defilement.

19. On the issue of failure by the prosecution to call one Zuhura as a witness, Ms Mwangeka relied on the case of **Erick Onyango Ondeng v Republic** [2014] eKLR and stated that the holding in the above decision is applicable where the evidence adduced in a case is barely adequate. She indicated that the provisions of Section 143 of the Evidence Act to the effect that in the absence of any requirement by any provisions of the law, no particular number of witnesses shall be required for the proof of any fact, apply herein.

20. On the issue of the sentence, it was submitted that the 30 years imprisonment imposed on the appellant cannot be said to be either harsh or excessive, considering the aggravating factors in this case, such as the fact that the appellant on one occasion defiled PW2 in the presence of a woman. It was stated that the Trial Magistrate noted that the appellant did not seem remorseful for his actions.

21. Ms Mwangeka submitted that the prosecution proved its case beyond reasonable doubt and prayed for this court to uphold the conviction and sentence and dismiss the appeal.

22. A perusal of the lower court proceedings reveals that evidence adduced by Dr. Tima Nasir of Coast Province General Hospital (CPGH) was that she filled a P3 form for PW2 on 13th April, 2017. PW1's findings were that PW2 had a broken hymen and a whitish discharge. She indicated that the offence occurred on 12th March, 2017 and that she filled the P3 form on 13th April, 2017.

23. PW2 was a minor who on being sworn gave her name as MN [name withheld]. She stated that she was 13 years old but she did not know her birthday. She adduced evidence of how she was heading home for lunch on 10th March, 2017 when the appellant's sister by the name Zuhura called her to their place. That she asked PW2 to get inside their house wherein she found the appellant. That Zuhura followed her into the house and left her with the appellant, who locked the door and begun touching her as he asked for sex. It was PW2's evidence that she declined but he insisted and overpowered her. PW2 stated she could not scream as the appellant covered her mouth with his hands. He then forcefully had sex with her and then released her to go home. She indicated that on reaching home, she did not tell anyone about the incident.

24. PW2's testimony was that the same incident was repeated the following day in the presence of a woman whom the appellant introduced to PW2 as his wife. PW2 stated that the appellant locked the door and asked the woman to hold her hand as he had sex with her. That the woman did as directed and the appellant had sex with her in the presence of the said woman. PW2 testified that after the appellant was done with defiling her, he asked her to leave and she left him with the woman who was inside the house. PW2 stated that she went home and told

her mother what had transpired and she was taken to Nyali Police Station the following day and to the hospital for examination.

25. PW2's mother, by the name LA [name withheld] testified as PW3. She stated that PW2 was born on 8th November, 2004. PW3 adduced evidence that on 11th March, 2017, PW2 went to school on a Saturday, but she failed to return at noon as expected. That she had still not reached home at 1:00p.m. PW3 went to PW2's school to check on her. On reaching the said school, she was informed that PW2 had left. PW3 stated that she went back home and after a while, PW2 reached home.

26. PW3 stated that on asking PW2 where she had been, she said that Mama Ibra had tuned her (sic) outside their house. PW2 further told her that Mama Ibra's brother had sex with her and that it had happened on that day and on the previous day.

27. PW3 went back with PW2 to school and she informed the teachers what had happened. She was given a note to take to CPGH. PW3 indicated that PW2 told her that the person who had defiled her was the appellant. She stated that Mama Ibra (Zuhura) was once married to their neighbour.

28. PW4 was No. 95610 PC Rose Webi of Nyali Police Station Gender Desk. She testified that on 13th March, 2017, she received a report from PW3 that her daughter had been defiled on 2 occasions when coming from school. That a woman would call PW2 before the man defiled her. PW4 stated that on 19th March, 2017, PW2 led police officers to the appellant's house from where he was arrested. PW4 said that the woman who used to call PW2 to be defiled was not arrested. She indicated that age assessment of PW2 was done at CPGH and the age assessment report indicated that she was about 12 years old.

29. This court has re-examined and analyzed the evidence adduced in the lower court by prosecution witnesses and the defence raised by the appellant. The manner in which the Trial Magistrate treated the issue of *voir dire* examination is worrying. PW2 said that she was 13 years old but did not know her birthday. Since she was a minor and the charge indicated that she was 13 years of age, the Trial Magistrate was under an obligation to comply with the provisions of Section 19 of the Oaths and Statutory Delectations Act which state as follows-

> ***"(1) 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.***
>
> ***(2) If any child whose evidence is received under subsection (1) wilfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of an adult with imprisonment."***

30. The Trial Magistrate made no effort to conduct *voir dire* examination of PW2 to find out if she understood the nature of an oath, whether she was possessed of sufficient intelligence to give evidence and if she understood the duty of telling the truth. From the proceedings of 28th April, 2017 the Trial Magistrate went ahead to swear PW2 before conducting the preliminary examination on the said minor.

31. In the case of **Kibangeny v Republic** [959] EA 92, the Court of Appeal stated as follows on the definition of children of tender years-

> ***"There is no definition in the oaths and statutory declarations Ordinance of the explanation "child of tender years" for the purposes of Section 19. But we take it to mean, in the absence of special circumstances, any child of an age, or an apparent age of under fourteen years."*** (emphasis added).

32. The Trial Magistrate tried to justify his failure to comply with the provisions of Section 19 of the Oaths and Statutory Declarations Act by stating the following in his Judgment –

> *"My impression of the complainant and considering her demeanour and age at the time she testified informed the court's decision not to conduct voir dire and allow her to testify under oath."*

33. It is apparent to this court that the Trial Magistrate failed to pay heed to the requirements of the law for no good reason. PW2 informed the court that she was 13 years old but she was not sure about it. The Trial Magistrate should have proceeded with abundant caution and conducted *voir dire* examination on PW2.

34. There is no dearth of authorities on the importance of courts to conduct *voir dire* examination in cases where minors are called upon to testify. The explanation given by the said Trial Magistrate is not convincing at all. In the case of **John Okeno Oloo v Republic,** Criminal Appeal No. 350 of 2003 (unreported) the Court of Appeal stated as follows –

> ***"In our view, whereas we agree that as concerns C, who was said was 13 years old, the trial court should have, note of caution, formed an opinion on a voir dire examination whether she understood the nature of an oath before she could be sworn. We do not agree with the superior court that failure to do so could not have occasioned miscarriage of justice had that been their only witness on the issue that was before the court."***

35. In the case of **Marripett Loonkomok v Republic** [2016] eKLR, the Court of Appeal held thus –

> ***" …… It follows therefore that the time honored 14 years remains the correct threshold for voir dire examination. It follows from a long line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not perse vitiate the entire prosecution case. <u>But the evidence taken without examination of a child of tender years to determine the child's intelligence to understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this court recently found that</u>;***
>
> ***"<u>In appropriate case where voir dire is not conducted, but there is sufficiently independent evidence to support the charge…….the court may still be able to uphold the conviction</u>."*** (emphasis added).

36. In the said case of **Maripett Loonkomok v Republic** (supra) the court was of the view that the trial was not vitiated by the failure of the Trial magistrate to conduct *voir dire* examination because of utmost significance was the admitted fact that the appellant took the complainant and lived with her as his wife after paying dowry. The said court found that the complainant's evidence was congent, she was cross-examined and that medical evidence confirmed penetration. The said court also found that even without the complainant's evidence, the offence of defilement of a child was proved from the totality of both the prosecution and defence evidence.

37. In the present case, the only evidence available on record as to who the perpetrator of the offence was and how the said offence happened was based on what PW2 narrated before the Trial Magistrate.

38. In the absence of any other evidence as to the circumstances surrounding the commission of the offence and because of the failure of the Trial Magistrate to conduct *voir dire* examination, his invocation of the proviso to the provisions of Section of 124 of the Evidence Act cannot cure the error of his failure to conduct the said preliminary examination on PW2. Even if he found that her evidence was congent and that she was steadfast and truthful, failure to conduct *voir dire* examination in this case vitiates the appellant's conviction. I therefore quash the conviction and set aside the sentence imposed on the appellant.

39. This court has considered whether the appellant should be subjected to retrial and it is of the view that he should. PW2 was consistent in her evidence and gave a clear account of how the offence occurred. This court is also of the view that if the preliminary examination of PW2 had been conducted by the Trial Magistrate, the conviction against the appellant would have been upheld. In this case there were no gaps which were left unfilled by the prosecution.

40. In the case of **Yusuf Sabwani Opicho v Republic** [2009] eKLR, the Court of Appeal held thus on the issue of retrials-

> ***"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 in 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 interest of justice require it."***

41. Needless to say that one Zuhuri (the appellant's sister) who lured PW2 to the appellant's house for purposes of facilitating her defilement should have been charged in court for the offence she committed. The said Zuhuri was well known to PW2. PW3 also knew her as Mama Ibra and that she was once married to a man who was their neighbour. Faced with that kind of evidence, it is unconscionable and difficult to understand why the prosecution would leave such a woman to go scot free. Doing so would embolden her to continue committing such offences without her being censored. The prosecution should not only have pursued the appellant as the principal offender but also Zuhuri as an accessory to the offence of defilement. The ball remains squarely in the court of the Director of Public Prosecutions.

42. This court has said enough to demonstrate that the appellant should undergo retrial based on the charge of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006, with the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. He will be arraigned before the Chief Magistrate's Court at Mombasa to answer to the said charges.

It is so ordered.

DELIVERED, **DATED** and **SIGNED** at **MOMBASA** on this **29th** day of **January, 2021. Judgment delivered through Microsoft Teams online platform due to the outbreak of the covid-19 pandemic.**

NJOKI MWANGI

JUDGE

In the presence of -

The appellant present

Mr. Muthomi for the DPP

Mr. Oliver Musundi - Court Assistant