REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANGA

CRIMINAL DIVISION

CRIMINAL APPEAL NO 50 OF 2016

CKM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from original conviction and sentence in

criminal case no 2786 of 2014 of the SPM Court at Kigumu)

JUDGEMENT

1. The appellant was charge with the offence of incest contrary to section 20(1) of the Sexual Offences Act No 3 of 2006. Was tried convicted and sentenced to life imprisonment on the 2nd day of February 2016. Being aggrieved by the said sentence and conviction, he filed this Appeal and raised the following Grounds of Appeal:

A. The learned trial magistrate erred in Law and fact by failing to conduct voire dire examination contrary to section 215 of the Evidence Act

B. The learned trial Magistrate failed to conduct trial as provided for under Section 95 of the Children Act, thereby rendering the trial a mistrial and against the spirit of the Constitution

C. The trial magistrate failed to comply with the mandatory provision of section 211(1) of CPC.

D. Defilement and the age of the complainant were not proved.

DIRECTIONS

2. Directions were given that the appeal be heard by way of written submissions, which were duly filed.

SUBMISSIONS

3. On behalf of the appellant, it was submitted that the trial Magistrate failed to comply with section 215 of the Evidence Act which required the same to ascertain that the minor witness was possessed of sufficient intelligence and understood the duty to speak the truth and understood the nature of an oath. It was submitted that this was not done and that the voire dire was not conducted in the question and answer format, which was fatal to the trial.

4. It was contended that the age of the complainant was not ascertained and that there was no evidence tender before the court to support defilement as the evidence of the Doctor PW3 who examined the complainant stated that though her hymen was broken, there was no bleeding and or pus cells or spermatozoa. It was contended that the Appellant was not examines by the Doctor and that there was neither birth certificate or any document o prove the age of the complainant.

5. It was submitted that the evidence on record as per the complainant, she was ten years and further that she did not know her age while her mother stated that she was eleven years. It was therefore stated that the conviction was not safe and the sentence was excessive.

6. On behalf of the State it submitted that voire dire was conducted and that section 211 of CPC was complied with the appellant having opted to give unsworn statement of defence. It was submitted that incest was proved as the appellant was the complainants father and as per her evidence he inserted a big organ into her genitalia as confirmed through the P3 form.

7. It was contended that the age of the victim was proved through birth notification form which was produced by PW5 and therefore the conviction was safe.

PROCEEDINGS

8. This being a first appeal, the court is under a duty to re-evaluate and re-asses the evidence tendered at the trial and to come to its own conclusion, while giving allowance that unlike the trial court it did not have the benefit of seeing and hearing witnesses as was stated in **OKENO v. REPUBLIC.**

9. PW1 MW stated that the appellant was her father and that on 27th December 2014 at 9.00 am while she was with him at the compound together with her younger sister, whom the appellant instructed to go outside and play he picked her up and put her on her mother's bed, removed the pair of trousers she was wearing and her pants, took off his trouser and in her words saw "a big organ "which he inserted inside her and she saw blood coming between her legs.

10. It was her evidence that the appellant had defiled her several times but she did not tell her mother since he had warned her not to do so or else he would beat her. On this particle day when her older sister came from school, she informed her and it is the sister who informed their mother. She was then taken to the hospital where a P3 form was issued.

11. In cross examination she stated that her mother had gone to harvest tea and that the appellant had defiled her on several occasions and that there was a time when he chased away her mother from home, then he would bring her to his bed and defile her. She stated that there was on time when her bother peeped into the house and saw her being defiled. she stated that the appellant would on some occasions defile her once the mother leaves the house before he goes to his place of work.

12. PW2 N D W stated that on 28th of December 2014, PW1 confided to her that the appellant used to defile her and she decided to tell her Aunt who then informed their mother who then made a report the matter to the Headman.

PW3 JAMES MWANGI KARUGA a clinical officer produced the treatment card in respect of PW1 who was 11years old at the time with a report of having been defiled by a person known to her. He confirmed that her hymen was broken with no bleeding or discharge, he confirmed that she had contacted bacterial vaginitis, a venereal decease. He also produced a P3 form in respect of the same.

13. PW4 R. N the mother stated the age of the complainant to be eleven years, then in class four. She testified that her sister told her that **PW2** had informed her that the appellant had been defiling the complainant and when she asked her she confirmed that it was true and that he had defiled her on five separate occasions, she the reported to the Nyumba Kumi before taking the child to the hospital.

14. In cross examination, she stated that time when the report was received the complainant had been staying with her Aunt for three weeks and that on 27th the appellant was at work but she did not know whether he went back home but she had left the children at home.

15. PW5 CPL GEOFFREY MURIGI received the report on 30th December and interviewed the complainant who confirmed that she had previously been defiled. He produced the birth notification card in respect of the complainant and thereafter arrested the appellant. He stated that when he visited the appellants home to arrest him, he was not found and that he was arrest from the tea farm.

16. When put on his defence, the appellant stated that the charges were tramped up and that between September and October, he was at his place of work. He was later on called by the chief because his children were not going to school and told him to ask his wife, since at that time he was not staying with them and that he got home, he found that information was not true.

17. It was his evidence that while he was still at home, his wife children came to visit, which he was not comfortable with and that when his wife took the children back to her sister, she became hostile towards him. On 27th October in the evening the village elder summoned his wife and he was left alone with the children, when she returned back, she took the children away with her to her mother and that they differed over that.

18 He stated further that when he was being arrested the chief assaulted him, having summoned his wife at night before then and spent a lot of time with her and was therefore acting out of malice and that the police failed to summon his children. He denied ever committing the offence.

DETERMINATION

19. From the proceedings herein, the submissions and petition of Appeal, I have identified the following issues for determination:

A. Whether the trial court properly conducted voire dire

B. Whether the charges against the appellant were proved to the required standard

C. Whether the appellant defence was considered

D. Whether the trial is a mistrial.

20. On the issue of voire dire, the record of the proceedings confirms that the same was conducted with the only omission being that the trial court did not indicate on the record that she found the minor intelligent and understood the meaning of oath to enable her be sworn. This to my mind was not fatal to the proceedings herein as I take the view that the conduct of voice dire is for the benefit of the trial court and once the same is satisfied that the child of tender age is intelligent enough and understand the meaning of oath the same is sworn in and tenders his/her evidence on oath.

21. This position was confirmed by the Court of Appeal in the case of **JAPHETH MWAMBIRE MBITHA V REPUBLIC [2019] e KLR** as follows:

> **[13] As regards the second issue, the appellant has contended that the evidence placed before the trial court was not only contradictory, but that no *voir dire* examination was ever conducted on the minors (PW 2 and PW 3). *Voir dire* examination is a hearing to determine the admissibility of evidence or the competency or qualification of a witness or juror (See Duhaime, Lloyd. "Voir Dire definition" Duhaime's Legal Dictionary).**
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> **With specific regard to the testimony of children, *voir dire* examination is essential to enable the court satisfy itself that the child is conscious of the truth. The purpose of *voir dire* was explained by this court in Johnson Muiruri vs Republic [1983] KLR 445 as follows:**
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> > **1. "Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.**
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> > **2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.**
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> > **3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.**
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> > ***4.* A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.**
> >
> > **5. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction."**
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> **[14] In this case, a perusal of the record reveals that prior to receiving the respective testimonies of PW 2 and PW 3, the learned trial magistrate went on an enquiry of whether each of the witnesses understood the meaning of telling the truth and the consequences of lying. Having satisfied herself that the two minors understood the importance of telling the truth, the court went on to record their evidence. No objection was ever raised by the appellant regarding the *voir dire* examination or the subsequent admission of the minors' testimony. Again, it bears repeating that the purpose of voir dire is to ensure that the minor understands the solemnity of oath and if not, at the very least, the importance of telling the truth. In this case, the record shows that a brief interview was conducted in this regard on each of the two witnesses; to which the two minors even indicated to the court that failure to tell the truth renders a liar ineligible to go to heaven.**
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> **[15] Having satisfied herself that the two minor witnesses understood the import of speaking the truth in court and the consequences of lying, the trial magistrate then admitted their evidence and from the record, we see no reason to interfere with that finding. The evidence of FO and PW 3 was admitted within the confined of the law on *voir dire* examination. ……"**

22. I am satisfied that t evidence of PW1 was admitted within the confines of the law and that the Appellant was not prejudiced by the omission on the part of the trial court to indicate on record that she found the minor witness intelligent enough and understood the meaning of oath and would therefore dismiss this ground of appeal as lacking in merit.

23. On proof of the prosecution case against the appellant, the evidence on record is that the Appellant is the complainant father, her age was proved through the birth notification card and the evidence of her mother, the fact of penetration was proved through the P3 form and having been defiled several time as per her evidence in chief, the inconsistence on the dates are understandable and did not affect the evidence tendered in respect to the last incidence of assault.

24. I have taken into account on how the report was made and have come to the logical conclusion that the case was not made up as the appellant submitted. There is no evidence of collusion between the complainant's mother and another person to frame the appellant, as the complainant in spite of her age, and the fact that the Appellant is her father was able to give a graphic account on what the appellant had been doing to her.

25. Having re –assessed the evidence tendered before the trial Court, I am satisfied that the appellant defense was taken into account in compliance with the provisions of section 211of the Criminal Procedure Code and rightly rejected against the weight of the prosecution evidence and find that his conviction was safe and free from error and was therefore not a mistrial as submitted by the appellant.

26. On sentence, whereas the appellant submitted that the same was excessive, the sentence lawfully provided for under section 20(1) of the Sexual Offences where the victim is under the age of eighteen years is imprisonment for life.

The age of the complainant having been confirmed to be under eighteen years, the sentence given to the Appellant was lawful and within the discretion of the trial court noting that the appellant was the complainants father who was expected to provide her with parental love and care and not to convert her into his sex slave, while he could get all the sexual satisfaction from her mother and would therefore not interfere with the same.

27. It therefore follows that the appeal herein has no merit both on conviction and sentence which I herein dismiss. The appellant has right of appeal.

28. And it is ordered

SIGNED DATED AND DELIVERED THIS 29TH DAY OF NOVEMBER, 2021

J. WAKIAGA

JUDGE