REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO.7 OF 2019

BONIFACE WAMBUA KIILU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

*(Appeal arising from the original conviction and sentence in Machakos Chief Magistrate's Court (Hon. J.N. Nyaga -CM), in Criminal Case. **1390 of 2014** vide judgement delivered on 30.4.2015)*

JUDGEMENT

1. This is an appeal from the conviction and sentence of Hon. J.N. Nyaga, Chief Magistrate in **Criminal Case No. 1390 of 2014** on 30.4.2015. The Appellant was on 28.8.2014 charged with 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 the appellant "on the 27th day of July, 2014 and 31st July, 2014 at Katheka kai Location in Machakos District of Machakos County intentionally and unlawfully caused his penis to penetrate the vagina of **IN** a child aged 14 years. The appellant also faced the alternative count of an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

2. The appeal was lodged on 10th December, 2018 pursuant to leave that was granted by this court to file the same out of time and the same is deemed to be properly on record. The appellant's case is four-fold. Firstly that the complainant was not the victim and that the victim was of immoral character. Secondly that victim consented to sex and the court did not consider the appellant's defence. Thirdly that the prosecution's case was riddled with inconsistencies and further vide the supplementary ground pursuant to section 350 v of the CPC there was no voir dire examination conducted on Pw1 and finally that the manner of his arrest was unsatisfactory.

3. The appellant's submissions dealt with the issue of failure to conduct a voir dire and the unsatisfactory arrest together with identification evidence. On the issue of failure to conduct a voir dire, the appellant submitted that the same was fatal to the case and placed reliance on the case of **Johnson Muiruri v R (1983) KLR 445.** On the issue of unsatisfactory arrest, he submitted that the failure to conduct an identification parade created a gap in the prosecution evidence. Reliance was placed on the case of **Titus Muindi Mukoma v R, Criminal Appeal 154 of 2007. I note that the same was overturned on appeal by the Court of Appeal in Titus Muindi Mukoma v R (2017) eKLR.**

4. The state conceded to the appeal vide submissions dated 25.10.2019. Learned counsel addressed the issue of failure to conduct a voir dire and that of proof of penetration.

5. On the issue of voir dire, counsel placed reliance on the case of **Samuel Warui Karimi v R (2016) eKLR** where the court of appeal quashed the conviction and sentence because the trial court failed to conduct a voir dire and urged the court to make the same finding. Counsel submitted that penetration was not proven by the medical evidence on record as the complainant's genitalia was normal and that there were no lacerations and hence concluded that the prosecution failed to prove its case and invited the court to find merit in the appeal.

6. This is the first appeal and this court has to evaluate the evidence afresh and make its own conclusion. **PW1** was **IN**, the victim who in the absence of a voir dire testified that on 27.7.2014 she and the appellant had sex and slept and that she and the appellant stayed together until 31.7.14 when her mother came and saw her in the appellant's house and came back with policemen. She testified that she was examined at Machakos Hospital and given a P3 form. On cross examination, she denied wanting to get married to the appellant.

7. **PW2** was **LZ**, Pw1's mother who testified that Pw1 was born in 2000 as per her clinic card. She testified that on 27.7.14 Pw1 was missing and she found her on 31.7.14 at the appellant's home where she was rescued and taken to Machakos Police station and later Machakos general hospital where she was examined and issued with a P3 form.

8. **PW3** was **Joash Ombati** who testified that on 27.8.14 he received a report that a suspect was required by the police and he was able to locate the appellant and he arrested him and took him to the police station and handed him over to the investigating officer. He testified that

the appellant was pointed out as the one who defiled Pw1.

9. **Pw 4** was **John Mutunga**, a medical officer based at Machakos Level 5 hospital. He testified of an examination that was carried out on 14.8.14 on Pw1 aged 13 years who had a history of defilement between 27.7.14 and 31.7.2017. The examination was carried out by Dr. Lorna whose handwriting he was familiar with. He produced the P3 form on her behalf. He testified that Pw1's genitalia had no lacerations but her hymen was torn.

10. **Pw5** was **Sgt Lorna Kemuma** the investigating officer in the case who testified that she received a report that the appellant lured Pw1 to his house and detained her and defiled her on several occasions between 27.7.2014 to 31.7.2014. She testified that she was given an immunization card that proved that the child was born on 9.12.2000 and that the child was taken for age assessment and her age was assessed as 14 years. The prosecution closed its case.

11. The court was satisfied that a prima facie case had been established against the appellant who was placed on his own defence. Section 211 Criminal Procedure Code was explained to the appellant and he opted to give unsworn evidence. He testified that his intention was to look for a wife and that he did not know that the complainant was in school. The court found that penetration was proven vide medical evidence; that age was proven vide the immunization card and age assessment report and that there was an eye witness account of the incident that was corroborated by medical evidence and that the appellant did not challenge the evidence against him. He noted that the defence under Section 8(5) was not available as there was nothing to make the court believe that the appellant believed that the complainant was over 18 years. He was convicted of defilement contrary to Section 8(3) of the Sexual Offences Act and he was sentenced to 20 years imprisonment under Section 8(3) of the Sexual Offences Act.

12. Having looked at the Appellant's and State's written submissions, the grounds of appeal and the evidence on the court record the following are the issues for determination:-

a. ***Whether or not the prosecution had proved its case beyond reasonable doubt.***

b. Whether or not the appellant had satisfied the court that the defence under Section 8 (5) and (6) is available to him.

c. Whether there are contradictions in the evidence of the prosecution that will vitiate the conviction against the appellant.

d. Whether the failure to conduct a voir dire would vitiate the trial.

13. The Appellant seems to challenge the complainant's age since he is relying on the provisions of section 8(5) of the Sexual Offences Act despite the fact that the age was confirmed to be 14 years. He challenged the evidence on identification and penetration. The evidence that is on record from the complainant confirms that she had sexual intercourse with the appellant. The appellant was in court and did not counter the said evidence save for stating that he wanted a wife and didn't know that Pw1 was in school and therefore it can safely be concluded that it was true that he had sexual intercourse. The sequence of events as recounted by the prosecution evidence point to the fact that the appellant was together with the complainant and at the time of arrest they were found together. The medical evidence that was adduced by Pw4 confirms that the complainant had a torn hymen. In terms of Section 2 of the Sexual Offences Act that provides that penetration means the complete or partial insertion of a genital organ into that of another there was thus proof of penetration. Because there is evidence of a torn hymen, the only irresistible conclusion is that it was occasioned by a male organ because according to the complainant she had sexual intercourse with him for about three days. This court agrees with the finding of the trial court and concludes that penetration was proven and therefore this ground of appeal raised by the appellant fails. The age of the complainant was equally proved vide the production of the child health card and which confirmed that the complainant was aged about 14 years old.

14. The appellant has challenged the decision of the learned trial magistrate for failing to consider the statutory defence under Section 8(5) and (6) of the SOA. A perusal of the proceedings reveals that he gave a brief unsworn evidence in which he stated that his intention was to look for a wife and that he did not know that the girl was in school. However he did not indicate the efforts that he took to establish that the girl was above 18 years of age or that the girl had deceived him into believing that she was an adult and therefore ripe to become his wife. I find the appellant's defence did not meet the threshold provided under the particular provision of the law.

15. This court has carefully considered the case of **Martin Charo v R (2016) eKLR** and found the same to have been distinguishable from the facts of this case as they related to instances where the evidence given by the accused person and his witnesses pointed towards establishment of the said defence. The complainant stated that the appellant had promised to give her bus fare to Nairobi only to dilly dally and later keep her in his house. In fact the appellant is reported to have locked her in his house every time he went out. This does not reflect a description of a wife and how she is to be treated as alluded to by the appellant. Looking at the evidence in totality I find that the defence under section 8(5) and 8(6) of the Sexual Offences Act is not available to the appellant.

16. The Appellant has raised the issue of contradictions in evidence as a ground of appeal. However he has not demonstrated what he considers as contradictory evidence. The court is not in a position to agree that there were any contradictions in the evidence since the evidence of the witnesses was seamless and the witnesses corroborated each other. There was no material contradictions in the evidence as contended by the appellant and therefore that ground of appeal must fail.

17. Up to that stage it would appear that the prosecution's case was all wrapped up until the appellant raised a germane issue namely that the trial court failed to conduct a voir dire examination on the complainant. The appellant has urged the court to allow the appeal on this ground. Learned counsel for the respondent conceded the appeal. The issue of subjecting young witnesses of tender age to voire dire examination is founded under section 125(1) of the Evidence Act that deals with competency of witnesses generally. Again section 19(1) of the Oaths and Statutory Declarations Act deals with the aspect of reception of evidence from witnesses of tender age. The Court of Appeal in the case of **Patrick Kathurima V Republic (2015)eKLR** stated as follows:

> ***"We take the view that this approach resonates well with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remain a reasonable indicative age for purposes of section 19 of Cap 15. We are aware that section 2 of the Children's Act defines a child of tender years to be one under the age of ten years. The definition has not been applied to the Oaths and Statutory Declarations Act cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes"***

The above position was reiterated by the said court in the case of **Samuel Warui Karimi v. Republic (2016) eKLR** where the court quashed the conviction and sentence of an appellant as the trial court had failed to conduct a voire dire.

In the present case it is noted that no voire dire was conducted by the trial court despite the fact that the complainant was a child of tender years. It matters not whether the child's age was on the borderline from those who appear physically to be young. It was necessary to conduct the said examination so as to establish whether the child knew the meaning and effect of taking oath. It is not proper for the trial court to just assume that the child knows it without subjecting her to the examination. Hence the failure to conduct such a voire dire was fatal and vitiates the entire case for the prosecution. It is therefore my finding that the prosecution's case was not proved beyond any reasonable doubt. The failure to conduct the voire dire by the trial court seems to be the prosecution's Achilles heel and which has been its undoing. I find the prosecution's case has not managed to go past the threshold of proof.

18. With the above finding the next issue for consideration is whether an order for retrial should ensue. It is trite that a retrial should not be ordered if there is likelihood of prejudice to the accused or where there is no possibility of securing witnesses who had already testified. The appellant was sentenced on 30.4.2015 and has so far served about one fifth of the sentence imposed. I find an order for retrial is not appropriate in the circumstances of this case as the appellant stands to suffer great prejudice. He has already served a substantial portion of the sentence and is deemed to have atoned for his sins somewhat.

19. In the result I find merit in the appeal. The same is allowed. The conviction is quashed and sentence set aside. The appellant is ordered to be set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Dated and delivered at **Machakos** this **31st** day of **January, 2020**.

D. K. Kemei

Judge