



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

CRIMINAL APPEAL NO. 129 OF 2019

BETWEEN

JUVENALOS ITAMBO AFWAYO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Children's Court at Milimani Cr. Case No. 263'B' of 2016 delivered by Hon. H. M. Mbatia (RM) on 9th May, 2018).

JUDGMENT

Background.

1. The Appellant, **Juvenalos Itambo Afwayo**, was charged with defilement contrary to **Section 8 (1)** as read with **Section 8 (2)** of the **Sexual Offences Act No. 3 of 2006**. The particulars thereof were that on the 26th day of April, 2016 at about 1400hours in Kamukujji District within Nairobi County, intentionally and unlawfully caused his penis to penetrate the vagina of **SNM**, a child aged six (6) years. In the alternative, he was charged with committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006** in that he indecently touched the private parts namely, the vagina of **SNM**, a child aged six (6) years.

2. After the trial, he was found guilty of defilement and convicted accordingly. He was sentenced to serve life imprisonment. Aggrieved by both his conviction and sentence, he preferred the instant appeal to this court.

3. The appeal is based on five (5) grounds of appeal contained in the Petition of Appeal filed on 17th June 2019 by the law firm of Musyoki Mogaka & Co. Advocates. I reproduced them as follows:

a. That the honourable magistrate erred in law and in fact by misconstruing and misapplying Section 19 of the Oaths and Statutory Declaration Act (Cap 15) and therefore wrongfully convicted the Appellant on the basis of unsworn and uncorroborated evidence of PW1.

b. That the learned magistrate erred in law and in fact in failing to find that there were reasonable doubts in the evidence tendered by the prosecution which doubts ought to have been resolved in favour of the Appellant.

c. That the learned magistrate erred in law and in fact in giving superficial or no consideration to the evidence tendered in favour of the Appellant while giving undue and disproportionate weight to the evidence tendered by the prosecution.

d. That the learned magistrate erred in law and in fact by sentencing the Appellant harshly to life imprisonment while having the full knowledge that the alleged offence was committed by the Appellant while he was a minor.

e. That the learned magistrate erred in law and in fact by sentencing the Appellant harshly to life imprisonment and ignoring the mitigation tendered by the Appellant and the recommendations in the Probation Officer's Report.

Summary of Evidence

4. This being a first appeal, this court, as a matter of law, is enjoined to analyze and re-evaluate the evidence adduced by the witnesses before the trial court afresh so as to arrive at its own independent verdict whether or not to uphold the decision of the trial court. In doing so, this

court is required to take into account the fact that it neither saw nor heard any of the witnesses and give due regard to that. (See **Okeno v Republic (1972) EA 32**).

5. The Prosecution's evidence can be summarized as follows: On 26th April 2016, the complainant **PW1, SMN** then a minor aged six (6) years was playing in the field with her siblings when their neighbor, Jevo, the Appellant herein, called her to go and watch television in their single-roomed house. When they reached the house, the Appellant closed the door. He put oil on his "chuchu" then undressed her. He then applied oil to her private parts, covered her eyes and mouth with black cello tape and tied her hands with a rope. The Appellant then inserted his "chuchu" in her vagina and defiled her. He then untied her. PW1 wore her clothes and went home.

6. PW1's sister **PW3, BMM** was in her mother's hotel just next to their house when PW1 called her to the house crying. PW1 then reported to her what had happened. According to PW3, PW1's panty was filled with blood and her vagina had a hole. She later reported to their mother, **PW2, MNM** what PW1 had told her. PW2 testified that she saw blood and sperms dripping from her vagina to her legs.

7. PW2 took PW1 to the police station where she was advised to take her to the hospital. She took her to Kiambu hospital where she was attended by a Dr. Waihenya. On examination, PW1 had blood stains on her trouser and panty as well as her outer genital organs. She had lacerations on the vagina wall and her hymen was broken. The opinion formed was that the injuries were consistent with defilement. Samples were taken for laboratory investigation and PW1 put on pain killers among other treatment.

8. Thereafter, PW2 went to Pangani Police Station and reported the incident. The following day, she was sent to the police doctor but PW1 could not talk because she was traumatized. The police doctor advised that PW1 be taken for counseling first. PW2 took PW1 to Kariokor SDA church where the Sunday school teacher counseled her. On 27th April, 2016, they went back to the police station. PW2 gave the police the clothes PW1 was wearing on the day of the incident. The Appellant was well known to PW2 as he was a friend with her sons and would visit her house and hotel.

9. The investigating officer **PW6, Corporal Penina Omungala** of Pangani Police Station recorded the witnesses' statements and visited the scene of crime but could not trace the Appellant. The Appellant was arrested on 2nd May 2016 by night guards. She escorted PW1 and the Appellant to the police doctor for filling of the P3 forms. Thereafter, she proceeded to the government chemist where a swab was taken from the Appellant and PW1.

10. On 3rd and 6th May 2016, the Government Chemist Laboratory received from PW6 a white panty with blue signs along the waist (A1), buccal swab of the Appellant (B1) and buccal swab of PW1 (C1). Upon examination by **PW5, Lawrence Kinyua Muthini** an analyst from the facility, the panty was found to be slightly stained with human blood but had no semen or spermatozoa. PW5 also conducted a DNA profiling and concluded that the blood on the panty was PW1's. He produced the Analyst Report dated 20th March, 2017 in evidence. PW5 added that the absence of semen and spermatozoa did not mean that sexual activity did not take place.

11. PW6 produced in evidence PW1's panty, an exhibit memo dated 3rd May 2016 which accompanied PW1's buccal swab and panty; an exhibit memo dated 6th May, 2016 which accompanied the Appellant's buccal swab and PW1's birth certificate indicating that she was born on 4th May, 2009. The Post Rape Care form signed by the Dr. Waihenya was produced in evidence by his colleague **PW4, Dr. Paul Mbalu** of Kiambu District Hospital.

12. In defence, Appellant gave an unsworn testimony and called one witness. He testified as **DW1, the Appellant**. He stated that he was fifteen years old when he was arrested. He went on to state that on 23rd April, 2016, PW1's brother K went to their plot and found him fetching water. He greeted him and asked him if he had seen anyone hit PW1 because she was in the house crying and said someone from their side had hit her with a stone. He told K that he had not seen anything. Kiama told the Appellant to inform him in case he heard about the person who had done it. The following day, K went and said that he was the one who had hit PW1 with a stone and that PW1 was badly injured and was in hospital. When he denied, K started beating him. The landlord's son found them quarrelling outside the gate and intervened. The landlord's son cautioned K about fighting in their plot and threw him out then locked the gate. They went and informed PW2 what Kiama had done then went back to their plot. He said that K used to bully him when they were playing football in the field.

13. He informed his mother about what had happened in the evening. She did not follow up as the issue had been resolved. Two days later, he was arrested and only learnt about the offence in question in court. He denied committing the offence.

14. In her sworn testimony, the Appellant's mother **DW2, MH** stated that on 23rd April, 2016, she returned home from work in the evening when the Appellant informed her that the neighbour's son had come to beat him. She reiterated the testimony of DW1 in so far as the differences between DW1 and K were concerned, adding that K was a very rough boy who used to beat the Appellant. She cited one instance after the Appellant refused to give him a CD. The second time, he called the Appellant from the house and boxed him alleging that the Appellant had beaten his small brother E although the other children said that it was E who had abused the Appellant. The third time, PW2's house girl went to beat the Appellant at their landlord's house. The instant incident was the fourth time that her family had an altercation with PW2's family. She wanted to go and confront PW2 but the landlord's son advised her not to do so because he had solved the problem.

15. **DW3, VGK**, was the landlord's son. He stated that on 23rd April, 2016, he was at home with the Appellant. He went to visit a friend in the afternoon but upon returning, he found about four to five boys beating the Appellant. He did not know why they were fighting. He stopped the fight and went to PW2 and told her that he did not want people fighting in his father's plot. They solved the issue.

Analysis and determination

16. The appeal was canvassed by oral arguments. The Appellant was represented by learned counsel, Mr. Shadrack Wambui whilst learned State Counsel, Ms. Kibathi represented the Respondent. I have deduced that three issues arise for determination, namely whether a proper *voire dire* examination was conducted, whether there was sufficient evidence to warrant a conviction and whether the trial court misdirected

itself on the sentence.

Whether a proper *voire dire* examination was conducted.

17. Mr. Wambui submitted that the *voire dire* examination was not properly conducted. He argued that contrary to the provisions of **Section 19** of the **Oaths and Statutory Declarations Act**, the trial court did not first ascertain whether PW1 understood the nature of an oath. Counsel contended that the trial court did not consider whether PW1 was possessed of sufficient intelligence to justify the reception of her evidence before determining that she did not comprehend the duty of speaking the truth. In his view therefore, the trial court ought not to have admitted the evidence of PW1 and/or proceeded to convict the Appellant on its basis.

18. In support of his submission, counsel cited the cases of ***Eric Oketch Magera v Republic Nairobi H.C. Criminal Appeal No. 143 of 2018*** where the court stated that it is on the basis of the aforesaid assessment that the court decides whether the child should be cross examined. Counsel also relied on the case of ***Julius Kiunga Mbirithia v Republic [2013] eKLR*** where the court stated that non-compliance with the requirements of the said **Section 19** will result into quashing of a conviction unless there is other evidence before the court which is sufficient on its own to sustain a conviction.

19. In rebuttal, Miss Kibathi submitted that courts have held that the questions asked by the trial court in a *voire dire* examination to establish if a child understands the concept of truth and lie need not take any particular format and further, that the court only needs to record the questions. Counsel noted that even though the question as to whether PW1 understood the meaning of an oath was not put to her, no prejudice was suffered by the Appellant. In her view though, PW1 should have given a sworn statement instead of an unsworn one. However, since PW1 was cross examined by the Appellant, her evidence was tested and it was clear, candid and consistent. In support of this, Ms. Kibathi relied on the Court of Appeal's sentiments in the case of ***Maripet Loonkomok v Republic [2016] eKLR*** that it is not in all cases where a *voire dire* examination is not administered properly that the entire proceedings are vitiated.

20. Further, Ms. Kibathi submitted that in any event, **Section 124** of the **Evidence Act** allows the court to convict a sexual offender on the basis of a minor's evidence even if it is not corroborated if the court is satisfied that the child is telling the truth.

21. **Section 19(1)** of the **Oaths and Statutory Declarations Act** provides as follows:

***“19(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.*”**

22. The procedure to be followed in a *voire dire* examination was set out by the Court of Appeal in the case of ***Johnson Nyoike Muiruri vs. Republic [1983] eKLR*** as follows:-

***“We once again wish to draw the attention of our courts as to the proper procedure to be followed when children are tendered as witnesses. In Peter Kiriga Kiune, Criminal Appeal No. 77 of 1982 (unreported) we said: -*”**

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 event his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if it is the opinion of the court he is possessed of sufficient intelligence and understands the duty of talking 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 (sec.19, Oaths and Statutory Declarations Act, cap 15. The Evidence Act (section 124, cap 80).”

23. In the instant case, the trial magistrate recorded the following in the *voire dire* examination:-

***“My name is SMN. I go to [Particulars withheld] Primary School. I am in Class 1. I like the court it is nice. My class teacher is called J. English and Maths are my favourite subjects. I went to school yesterday. It was Monday. I don't know the days of the week. I go to Kariokor church. I go with N, my brother and sister. I live with my parents, 2 brothers and 2 sisters.*”**

If you say am sitting down it is not true. My sweater is white.

Court: Is your hair plaited? No.

If I say that your hair is plaited will I be saying the truth or a lie? The truth.

If you say that I have a pen? You will be saying the truth.

Court: I note that the minor does not comprehend the concept of truth or a lie. She will therefore give an unsworn statement.”

24. From the proceedings, it is evident that the trial court did not inquire whether PW1 understood the nature of an oath before deciding to apply the second limb. This did not meet the test under **Section 19 (1)** of the **Oaths and Statutory Declarations Act**. Further, the trial magistrate did not record her opinion on whether PW1 was possessed of sufficient intelligence to justify the reception of her evidence.

25. However, what is clear from the answers given by PW1 is that she was possessed of sufficient intelligence to justify the reception of her evidence. This formed the basis on which the trial court arrived at the decision she gives unsworn evidence. I therefore find that the trial court did not err in admitting PW1's testimony after the brief *voire dire* examination.

26. The Court of Appeal in the case of *Maripett Loonkomok v Republic [2016] eKLR* held that:

“It is firmly settled that not in all cases that voire 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 questions will depend on the peculiar circumstances and particular facts of each case. See James Mwangi Muriithi v R, Criminal Appeal No.10 of 2014.

Section 19 of the Oaths and Statutory Declarations Act is concerned with the reception and admissibility of evidence of a child of tender years. The section starts by declaring that where the child does not, in the opinion of the court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath. But that evidence shall only be received if, again in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth. So long as that evidence, though not on oath, is taken down in writing, it amounts to a deposition under section 233 of the Criminal Procedure Code. The Code does not prescribe the precise manner of ascertaining and determining whether the child witness understands the nature of the oath or is possessed of sufficient intelligence or even his or her ability to understand the duty of speaking the truth.....

Although this decision, through section 19 of Oaths and Statutory Declarations Act underpinned the legal practice in relation to children's testimony in Kenya, we reiterate that the format and procedure of testing the intelligence, and sufficient knowledge and nature of the oath has been varied. For instance, in the past the courts insisted that voire dire examination must be in the form of a dialogue, with the trial court recording questions posed to the child and the child's answers nearly verbatim in the first person before drawing its conclusion on the question of suitability of the child. See Johnson Muiruri v R (1983) KLR 447. The courts today accept both the question and answer format and the recording of the child's answers only. See James Mwangi Muriithi (supra). What is constant is that, whatever format the court adopts it must be on record.....”

27. However, it is surprising that even after directing that PW1 gives an unsworn testimony, the trial magistrate still allowed the Appellant's advocate to cross-examine her. This was improper and unprocedural notwithstanding that it did not prejudice the Appellant in any way. What the trial court ought to have considered is whether there was other material evidence in support of PW1's unsworn testimony that implicated the Appellant. I shall canvass this issue below.

Whether there was sufficient evidence to warrant a conviction

28. On this issue, Mr. Wambui submitted that none of the prosecution witnesses gave direct evidence linking the Appellant to the offence. He stated that based on the evidence of PW5 there was no sufficient evidence to warrant the conviction of the Appellant. In response, Ms. Kibathi submitted that all the three ingredients of the offence of defilement were sufficiently established by the evidence on record.

29. In determining this issue, the court is enjoined to establish whether the three ingredients of the offence of defilement were proved beyond a reasonable doubt, namely penetration, the age of the complainant and the identity of the perpetrator.

30. On penetration, PW1's testified that the Appellant inserted his “*chuchu*” in her vagina and did bad manners to her. This testimony was corroborated PW2 who stated that she saw blood dripping from PW1's vagina to her legs and when she checked her vagina, she saw sperms and blood continuing to drip. It was also supported by PW3 who stated that when PW1 called her back to the house, she removed her clothes and saw her panty filled with blood and her vagina had a hole. Most importantly, according to the medical evidence of PW4, when PW1 was presented at Kiambu District Hospital, she had blood stains on her trouser and panty as well as her outer genital organs. The doctor who examined PW1 found that she had lacerations on the vaginal wall and her hymen was broken. The opinion formed was that the injuries were consistent with defilement. In any event, PW5 opined that the absence of semen and spermatozoa on PW1's panty did not imply that sexual activity did not take place. In view of the foregoing, I am satisfied that there was sufficient evidence to prove that PW1's genital organ was penetrated.

31. As regards the identification of the Appellant, the same was by way of recognition since he was PW1's neighbour and therefore well known to her. This fact was confirmed by PW2, PW3 as well as all the defence witnesses. Further and in any event, the offence was committed in broad daylight when there was no possibility of a mistaken identity.

32. As regards the age of complainant, PW6 produced a Birth Certificate indicating that PW1 was born on 4th May, 2009. This sufficiently proved that PW1 was six (6) years as at 26th April, 2016 when the Appellant defiled her.

33. In the premises, I am satisfied that the prosecution proved beyond a reasonable doubt that the Appellant defiled PW1. His conviction was therefore safe and is accordingly upheld.

Whether the trial court misdirected itself on the sentence

34. As regards this issue, Mr. Wambui faulted the trial court for convicting the Appellant as an adult. He submitted that at the time the

offence was committed, the Appellant was sixteen (16) years old but had attained the age of the majority at the time the sentence was passed. Counsel urged the court to consider the provisions of **Section 191** of the **Children's Act** as well as the case of **Republic v Dennis Cheruiyot [2014] eKLR**, where the Court of Appeal set aside the life imprisonment of a convict who had not attained the age of majority at the time of commission of the offence and substituted it with ten (10) years imprisonment. Counsel also asked the court to review the Appellant's sentence in view of the Supreme Court decision in the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**.

35. On her part, the learned state counsel submitted that although the Appellant was sixteen years at the time of commission of the offence, nothing stops the court from handing him a custodial sentence. In support of this she relied on the case of **S.K.K v Republic [2013] eKLR**. Ms. Kibathi argued that the Appellant committed a serious offence in a violent manner as PW1's mouth was covered with cello tape and her hands tied with a rope. She therefore urged the court to mete out a definite commensurate custodial sentence in line with the **Muruatetu decision [supra]**.

36. The Appellant's birth certificate indicates that he was born on 23rd July, 1999. Thus, he was sixteen years old at the time of commission of the offence but had attained the age of majority at the time of sentencing. Courts have held that when dealing with such a scenario, the solution lies in **Section 191(1) (l)** of the **Children's Act** which provides that the offender in question be dealt with in any other lawful manner. In the case of **DKC v Republic [2014] eKLR**, the Court of Appeal pronounced itself as follows:

“Although the appellant was a minor, he must be brought to bear the consequences of his omission and lack of proper judgment. The appellant has served 5 years serving a life sentence; we do not however know whether that sentence was done as per the provisions of the Children Act or the Penal Code under which he was sentenced. Whatever the case, life imprisonment is not provided for under the Children Act, but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. We think that due to the gravity of the offence, and the current age of the appellant, he cannot be released to the society without being brought to terms with the consequences of his action or omissions by a custodial sentence. It is for this reason that we are inclined to allow the appeal against the life sentence imposed by the trial court and substitute it with imprisonment for a period of 10 years from the date of conviction.”

37. In **JKK v Republic [2013] eKLR**, the Court of Appeal had this to say:

“The purposes of the sentences provided for under the Children Act are meant to correct and rehabilitate a young offender, i.e. any person below the age of 18 years while taking into account that the overarching objective is the preservation of the life of the child and his best interest. A death sentence or a life imprisonment are not provided for but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. The offence committed by the appellant is very serious, an innocent life was lost, the appellant though probably a minor when he committed the offence must serve a custodial sentence so that he can be brought to bear the weight and responsibility of his omission or lack of judgment, by serving a custodial sentence. We are of the view that the appellant who is now of the age of majority cannot be released to the society before he is helped to understand the consequences of his mistakes, which can only happen after serving a custodial sentence.

[19] For the aforesaid reasons we are inclined to interfere with the death sentence imposed by the trial court and substitute it with imprisonment for a period of 12 years.

38. What is clear from the above decisions is that an offender who committed an offence, more so, a serious offence while he had attained the age of sixteen can be dealt with in any other manner other than is spelt out under Section 191 of the Children's Act. In this case, the Appellant committed a heinous act in such a brutal manner that it would be laughable to allow him to go unpunished without serving a custodial sentence. He must take responsibility for his actions and bear the consequences of messing up with a little child's innocence. Needless to say is that imposing a life sentence is not the option, more so, having regard to the **Muruatetu decision** (supra).

39. The totality of my finding is that the appeal on conviction fails. As regards the sentence, I set aside the life imprisonment and substitute it with fifteen years imprisonment. The period spent in custody from the date of his arrest on 2nd May to 5th December, 2016 when he was released on bail shall be taken into account to constitute part of the sentence. It is so ordered.

Dated and Delivered at Nairobi This 29th Day of April 2020.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of :

1. Mr. Njanji Mbirih/b for Omari for the Appellant.
2. Miss Nyauncho for the Respondent.