REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei – J

CRIMINAL APPEAL NO. 18 OF 2016

MUTUKU MUSYOKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal from the conviction and sentence of Hon L. Simiyu*

(Senior Resident Magistrate) in the Chief Magistrate Court at Machakos

***in Criminal Case S.O. 1626 of 2014 delivered on 6.4.2016*)**

BETWEEN

REPUBLIC.....PROSECUTOR

-VERSUS-

MUTUKU MUSYOKI.....ACCUSED

JUDGEMENT

1. The Appellant was charged, tried and convicted with defilement contrary to **section 8(1)** read together with **section (8)(3) of** the **Sexual Offences Act, 2006**. There was also an alternative charge of indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act**. The appellant was sentenced to 20 years imprisonment on the main count.

2. The evidence was as follows; **Pw 1 LMM** testified that the victim was her 1st child who was in class 8. She recounted how on 29th September, 2014 she went to Nairobi and she left the victim with PMM, however when she called the said Mumo, he informed her that the victim had spent the night with Mutuku. She testified that Mumo reported to the police and that the victim was taken to Masii Health Centre and later Machakos where she was examined and it was discovered that she had been defiled. She told the court that she was issued with a P3 form, PRC form and that the victim was aged 12 years as at the time of the offence; she tendered the age assessment form. She testified that she knew the appellant as a neighbour. On cross examination, she testified that she once met the appellant with his employer.

3. **Pw 2 LNM** testified in the absence of a voir dire examination that on 29th September, 2014, a Sunday she was with her uncle PM when Wambua Kioko informed her that the appellant had sent for her; she obliged and accompanied the said Wambua to the appellant's house and upon arrival at the appellant's place, she found the appellant on the road. She told the court how the appellant took her to a house belonging to one Esther and locked her up then threw her on a bed, undressed her, withdrew his penis and inserted it into her vagina. She stated that she stayed with him and at 5.00 am the appellant took her to her grandmother and coached her to lie to her mother that she had spent the night at her grandmother. She told the court that upon arrival at her grandmother, her cousin M opened the door and while she went into a room, the appellant and M went behind the house and spoke. She admitted that she went to her mother's house and lied that she had slept at her grandmother's house. She informed the court that she knew the appellant through a friend called Mumbua who stopped going to school and that she was taken to Hospital where she was examined and issued with a P3 form, PRC form and age assessment form. On cross examination, she testified that the appellant threatened her and she got confused because in her mind she had been sent to talk to the appellant only to find herself in somebody's house with the appellant.

4. **Pw 3 James Kilonzo** the Clinical Officer at Masii Health Centre for 7 years told the court that the victim was examined on 1.10.2014 and that she was a 12-year-old female. He told the court that he filled the P3 form on 3.10.2014. He stated that the examination revealed the absence of hymen but no physical injuries; that the weapon was a penis. He produced the P3 form and the PRC form as exhibits with no objection from the appellant. On examination by the court, he testified that he used the clinical notes and the PRC form to fill the P3 form and that the victim had been examined by Mutinda and not him.

5. **Pw 4 PMK** testified that on 29.2.2014 she was left with the victim who was his niece and at 10pm he noted that she was missing. He testified that on the following day at 6.00 am, she resurfaced and informed him that she had been at Alice's house; he discovered from M (Alice's son) that this was not true. On cross examination, he testified that M informed him that he had seen the appellant in the morning attempting to take the victim to Alice's house.

6. **Pw5, Boniface Musyimi Kioko** testified that on 30.9.2014 he heard Wambua being called out and as a result he was woken out from his sleep at 5.00 am by the victim who was in the company of the appellant. He testified that he heard that the victim slept with the appellant the previous night.

7. **Pw6, Veronica Mwikali Mutinda** a senior nursing officer at Machakos Level 5 Hospital testified that she filled 3 PRC forms for the victim on 1.10.2014. She told the court that she examined the victim and the finding of the examination was that the victim's hymen was broken and absent. On cross examination, she testified that the victim had intercourse prior to the complaint and that the hymen could have been broken in previous sexual conduct.

8. **Pw7 No.73778 Pc William Bosire** attached at Masii Police Station and the investigating officer in this matter told the court that on 1.10.2017 at 9.00 am, Paul Mulinge made a report that his niece was missing from the house and that on 30.9.2014 he discovered that the victim had slept at the appellant's house. He testified that he established that the victim had a relationship with the appellant and met regularly; that on the material day they had sex and on the morning of 30th, the appellant escorted the minor to her grandmother's house so as to conceal the fact that they were together but however the two were spotted by Pw.5 who reported the matter and the appellant fled. He testified that he issued a P3 form that was filled at Masii Health Centre and the PRC form was filled at Machakos Level 5 Hospital. It was his testimony that the age of the victim was established vide the age assessment report and she was confirmed to be 12 years old. The age assessment report was tendered with no objection from the appellant. He told the court that he arrested the appellant. On cross examination, he testified that the victim showed the police the appellant's house.

9. The court found that a prima facie case had been established against the appellant sufficiently to require him to make a defence and was thus placed on his defence whereupon he elected to give a sworn statement. He testified that on 13.10.2014 he was tending cows and on 14.10.2014 he was arrested for defiling a girl. He told the court that he was unfairly charged and that he did not commit the offence. He stated on cross examination that on 29.9.2014 he was alone at his employer's home. He maintained that the prosecution evidence was false.

10. The appeal was canvassed vide written submissions. It is the appellant's case that the prosecution did not prove its case to the required standard; that the trial court went into error in failing to conduct a voir dire and also in dismissing his defence. In placing reliance on the case of **John Mutua Munyoki v R (2017) eKLR** the appellant submitted that key witnesses were not summoned to his detriment; that the prosecution case was riddled with inconsistencies that went to the root of the case. The appellant also sought that the time he spent in custody be considered by dint of section 333(2) of the Criminal Procedure Code.

11. The state conceded to the appeal and submitted that the prosecution did not prove its case. He cited the cases of **Patrick Kathurima v R (2015) eKLR** and **Boniface Wambua Kiilu v R (2020) eKLR**.

12. This being a first appeal, the court is under legal obligation to re-evaluate, re-assess and re-analyze the evidence on the record and make its own findings and conclusions except having in mind that it did not have the advantage of hearing or seeing the witnesses testify.

13. The court has carefully considered the petition of appeal and submissions presented. The grounds of appeal may be collapsed into three grounds:

> ***1. That the trial Magistrate erred in law by convicting the Appellant for the offence of defilement in the absence of proof of the elements of the offence to the required standard;***
>
> ***2. That the trial magistrate failed to conduct a voir dire hence the trial is vitiated;***
>
> ***3. That the trial magistrate failed to consider the defence raised by the appellant***

14. Having considered this appeal, the evidence on record and the rival submissions, the issues for determination are whether the failure to conduct a voir dire vitiated the trial, whether the appellant was convicted of the offence of defilement on the basis of sufficient evidence, what orders may the court grant and whether the prosecution proved its case;

15. It is trite law that when a court is faced with a child which is stated to be 14 years and below, according to case law (**Kibageny Arap Korir v R [1959] EA 92-93**, the court must first establish whether the child is possessed of sufficient intelligence to justify the reception of that evidence and understands the duty of speaking the truth. In case the child is intelligent enough to give evidence but does not understand the duty of speaking the truth, his or her evidence may be taken without taking the oath but no conviction can follow unless, such evidence is corroborated by some other material evidence in support of it implicating the accused ***(Section 19 of the Oaths and Statutory Declarations Act).***

But if the child understands the duty to speak the truth, then the oath is administered before taking evidence from him or her.

16. Section 19 of the Oaths and Statutory Declarations Act provides: **"19. Evidence of children of tender years**

> ***(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***.

17. Section 233 of the Criminal Procedure Code has been repealed, however the import of section 19 above is to ensure that the courts take evidence of the child of tender age only upon satisfaction that the child is intelligent enough to testify on the matter before court and understands the duty of speaking the truth. In view of the statutory responsibility to assess the intelligence of the child and establish whether she/he understands the duty of speaking the truth, the trial court conducts a voir dire before taking the evidence of any child of tender age.

18. A Voir Dire (to speak the truth) is an Anglo-French legal phrase which in the context of common law criminal procedure, refers to a preliminary examination by a trial judge or magistrate to determine the competency of a witness of tender age as to whether he or she is possessed of sufficient intelligence to testify in the matter before court and understands the duty of speaking the truth. I am of the view that the section 19 is an abrogation of the right to fair trial of a child under Article 50 and right to protection under Article 53(d) of the Constitution because whereas an adult can choose to testify unhindered, a child whose evidence does not go through a voir dire automatically ceases to apply to his /her evidence rendering such evidence useless and of no legal effect. This leaves children who are victims of crime very vulnerable.

19. Having gone through the law and legal principles above, the record does not reveal that questions were asked and answers recorded and it cannot be said that it was conducted. The basis of the learned Magistrates opinion to swear in the victim is not known since he did not record any questions or answers to any question. There is no evidence of dialogue completely.

20. The next issue to be considered is that of the proof of the prosecution case, however the resolution is tied to my resolution of the 3rd issue.

21. On the issue of what orders the court may grant, a retrial is what comes to mind because I am not convinced that the flaw in taking evidence occasioned a miscarriage of justice. It simply resulted in failure to comply with a legal provision that is overdue for reform. In resolving this issue, the court would have to consider if there was independent evidence that could sustain a conviction in the absence of the evidence of the victim and therefore it cannot be said that the failure entitles the appellant to be released without considering the other evidence on record. From the evidence on record it is undisputed that the complainant was a person below 18 years, there is an age assessment report on record. The evidence on record points towards penetration and this was indicated on the P3 form, the PRC form and the account of the victim. What is in contention is the issue of identification of the appellant as the perpetrator because of the manner of taking the evidence that implicated him.

22. As was stated **in the case of Ahmed Ali Dharmsi Sumar vs Republic 1964 E.A 481** and restated in **Fatehali Manji vs The Republic 1966 E.A. 343**:-

> **"In general a re-trial 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 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 particular facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to the accused person."**

23. The Court of Appeal in the case of **Mwangi vs. Republic [1983] KLR 522 held** as follows;

> ***"…several factors have therefore to be considered. These include:***
>
> ***1. A retrial will not be ordered if the conviction was set aside because of insufficient evidence.***
>
> ***2. A retrial should not be ordered to enable the prosecution to fill up the gaps in its evidence at the first trial.***
>
> ***3. A retrial should not be ordered where it is likely to cause an injustice to the accused person.***
>
> ***4. A retrial should be ordered where the interest of justice so demand.***
>
> ***Each case should be decided on its own merits."***

24. I am satisfied that the prosecution evidence proved their case beyond reasonable doubt, however because of the infraction on the taking of evidence, I hereby order a retrial. The availability of witnesses shall not be complicated because the witnesses can be availed by the prosecution. Looking at the totality of the case I find the justice of the case warrants an order for a retrial. The appellant has barely served a fraction of the sentence.

25. In the result, I find merit in the appeal. The same is allowed with an order that the conviction is quashed and sentence set aside and substituted with an order for a retrial. The Appellant is ordered to be presented before the Chief Magistrate Machakos Law courts on the 23rd July 2020 or as soon as is practicable for the purposes of a retrial.

Dated and delivered at Machakos this 22nd day of July, 2020.

D. K. Kemei

Judge