REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 40 OF 2017

(From original conviction and sentence in Criminal Case No. 1257 of 2014 of the Senior Principal Magistrate's Court at Baricho).

JOHN MURAGURI IRUNGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant John Muraguri Irungu was charged before the Senior Principal Magistrate's court at Baricho in Criminal Case No. 1257/14 with the offence of defilement contrary to **Section 8(1)(2) of the Sexual Offences Act.** After a full trial he was convicted and sentenced to serve 20 years' imprisonment.

2. The appellant was dissatisfied with the conviction and the sentence and filed this appeal. The appellant filed amended grounds of appeal as follows: -

a) That the trial Magistrate erred in law and facts admitting a doubt-ridden evidence from prosecution case.

b) That the trial Magistrate erred in law and facts by failing to indicate the choice of language used during trial.

c) That the trial Magistrate erred in law and facts by failing to consider that voire dire was not conducted as per the requisite of law.

d) That the trial Magistrate erred in law and fact by failing to consider contradictions and inconsistencies inherited prosecution.

e) That the trial Magistrate erred in law and facts by failing to appreciate the vital witnesses were never called to adduce their evidence.

f) That the age of the complainant was not proved to threshold.

g) That my defence was not enough consideration.

3. He prays that the appeal succeeds in its entirety.

4. The appeal proceeded by way of written submissions. The appellant filed his submissions. For the respondent submissions were filed by G. Obiri Assistant Director of Public Prosecution. He urged the

court to dismiss the appeal.

5. I have considered the grounds of appeal, the submissions and the evidence which was tendered before the trial court. This is a 1st appeal and this court has a duty to re-evaluate the evidence and come up with a finding but bearing in mind that this court had no chance to see the witnesses and asses their demeanor and leave room for that.

6. I have considered the evidence and analyzed it. The issue for determination is whether the charge was proved beyond any reasonable doubts.

7. The brief facts of the case are that the complainant JMW is a boy who at the time he testified on 7/8/2015 was aged fifteen years. On 15/9/2014 he was at the home of the appellant where she had gone to charge his phone. It was at about 4.00 Pm. When he went to collect the phone appellant asked him to stay. He agreed and it got late. The appellant asked the complainant to spend the night in his house. the complainant slept with his clothes on the sofa set. Later when the complainant woke up he found himself naked and in bed with the appellant who was sodomising him. The appellant screamed for help and uncle to the appellant and neighbours went to his rescue. They took the complainant out of the house and went to the police station where the matter was reported.

8. The appellant was referred to Kerugoya Hospital where he was treated and a P.3 form was filled. The appellant was arrested and charged with this offence.

9. The appellant denied the charge in his unsworn defence and stated the headman had demanded Kshs3,000/- and after he was released the headman and police demanded Kshs15,000/.

10.The appellant faults the conviction on the ground that the trial Magistrate erred in both law and facts by admitting doubt ridden evidence from the prosecution's case. The appellant submits that the testimony of the complainant cannot be safely relied on for it raises doubts that he was really sodomized.

11.I have considered the ground. The complainant gave sworn testimony. He was aged 15 years at the time he testified. Though a minor as he was below Eighteen years, the threshold for taking oath by minors is 14 years. This has been stated by the Court of Appeal in the case of **Maripett –v- R** which I will consider late.

12.The evidence of the complainant was not challenged in cross-examination. The complainant was a victim of a sexual offence. **Section 124 of the Evidence Act** applies. It provides: -

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.***
>
> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

13.In this case the complainant gave a sworn testimony. His evidence was corroborated firstly by the accused's father Peter Irungu Githome (PW-3-) who testified that he had heard noise at the night. That the noise was that of a young person crying. He checked and did not see anything. He testified that the next morning the Assistant Chief went to his house with other ladies and asked him where Muraguri was. He called him. The Assistant Chief went to the house of the appellant and recovered a sweater, a mobile phone and Kshs 10/-. PW-3- testified that the clothes were identified to belong to JM.

14.There is also the testimony of PW-4- Sgt Elias Morit of Kibingoti AP Camp whose testimony was that

he was called by the Assistant Chief Kibingoti and informed that there was a boy crying who had reported that he had been sexually assaulted. He went and found the victim who informed him that he had been sodomised by the appellant. Kshs 10/-, a Samsung phone were recovered from the house of the appellant. The appellant then took them to get a trouser which was inside a bucket behind another house. There was a jeans trouser which was recovered from the house of appellant. The evidence was not challenged in cross-examination.

15.The complainants evidence was also corroborated by PW-5- David Wachira Maina who was the Area Assistant Chief. He testified that on 16/9/14 he was called by one lady from Karira who reported to him that a child was sodomised. He went to Karira and met the boy. He called police officers. The boy took him to where the offence was committed. He summoned the appellant and interrogated him. The appellant then took them to where he had hidden the T-shirt and trouser of the complainant. He also recovered a phone and Kshs 10/-.

16.PW-7- John Mwangi a Senior Clinical Officer confirmed the testimony of the complainant that he was sodomised. He testified that there were injuries on the anal opening.

17.PW-2- Mercy Wanjiru testified that on the morning of 16/9/14 the complainant went to her house and said he got lost at night and went to some home where he spent the night. He said he had been sodomised by John. PW-2- called the Headman Wachira. He went to the home of appellant. PW-2- testified that it is the appellant who sodomised the complainant. The boy said he had left his clothes in the house of John. The Headman went and recovered the clothes. PW-2- testified that the complainant was shivering when he went to her house as he only wore a cardigan he was given by another lady.

18.From the fore going, it is clear that there was no other person who was suspected to have committed the offence. The evidence of the complainant can safely be relied on contrary to the appellant's submission as it has been corroborated. Where evidence is corroborated the court can safely rely on it.

19.There is nothing in the evidence of PW-1- the complainant which suggests that it would not be safe to rely on his testimony. For the court to find that it is not safe to rely on the testimony of the complainant is a matter of evidence which must be deduced from his testimony. Where the testimony is consistent and has been supported by independent evidence nothing will prevent the court from relying on the testimony.

20.The appellant submits that the court did not indicate the language which was used in court.

Article 50(2)(m) of the Constitution provides that: -

> ***"Every accused person has the right to a fair trial which includes the right to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial."***

21.The accused person has a right to have the proceedings conducted in a language that he understands. From the record, the trial Magistrate did not indicate the language which PW2, 3, 6 testified in. The question is whether the appellant was prejudiced.

In **Munyasia Mutisya v Republic [2015] eKLR**

The Court in dealing with a similar issue stated;

> **The subsequent hearing date do not have any indication of the language used either by the court or by the witnesses.**
>
> **That was a mistake. The court should have indicated the language used by the court and the witnesses and translation if any. I however note that the appellant participated fully in the trial by cross examining witnesses. He cross examined PW1. He cross examined PW2. He cross examined PW4, 5, 7, 8 and 9. In my view therefore he understood the proceedings and**

the language used. In my view if the appellant had not understood the language used he would not have cross examined the witnesses. He would also have raised the issue of him not being able to cross examine witnesses. There is no record that he complained. He also does not alleged on appeal that he raised the issue and the court ignored it. The appellant also gave a clear sworn defence and he was cross examined and answered the questions. That in my view in totality shows that the appellant understood the proceedings and the language used in court.

22.As per the proceedings, on 07/08/2015, the language was indicated English/Kiswahili whereby both PW 1 and PW 2 testified. On 04/04/2016, the language was indicated English/Kiswahili whereby both PW 5 and PW 6 testified. However, for PW 3's evidence on 14/08/2015, the language was not indicated but the appellant was able to cross examine all the witnesses. The conclusion is that he understood the language and no miscarriage of justice or prejudice was occasioned.

23.The appellant submits that a miscarriage of justice was occasioned as no ***'voire dire'*** examination was conducted.

24.The appellant states that *voire dire* examination was not conducted and it was necessary to test competency of PW 1.

25. When dealing with the evidence of a child, ***Section 19* of the Oath and Statutory Declaration Act** is applicable it states;

*"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."*

26.Under **Section 19 of the Oath and Statutory Declaration Act** above, where the court is receiving evidence of a child of tender age, it must be of the opinion that she/he is possessed of sufficient intelligence to understand the duty to speak the truth.

Maripett Loonkomok v Republic [2016] eKLR

The Court of Appeal held;

It is firmly settled that not in all cases that *voir dire* is not administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has recently reiterate what has been said many times before that that question will depend on the peculiar circumstances and particular facts of each case. See James Mwangi Muriithi v R, Criminal Appeal No.10 of 2014…….

It follows therefore that the time-honoured 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 *per se* vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or 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;

"In appropriate case where voir dire is not conducted, but there is sufficient independent

evidence to support the charge… the court may still be able to uphold the conviction."

27. In this case PW 1 was aged 13 years at the time of the incident in 2014 so at the time he tendered evidence in 2015 he was 14 years. Therefore, as seen above, the threshold age of 14 years had been met.

28.Failure to conduct *voir dire* examination is immaterial. What determines that voir dire examination is the age of the child at the time he appears in court to give evidence and not at the time the offence was committed. It the victim was a child at the time the offence was committed and attains the threshold of takin oath at time of giving evidence, it would not be necessary to conduct the examination.

1. <u>The appellant submits that the evidence had Contradictions and inconsistencies</u>

The appellant alleges the following contradictions

i) PW 1's clothes

PW 1 stated he wore grey trouser and maroon t-shirt while PW 5 stated dark blue trouser and red t-shirt.

ii) Charging phone

PW 1 stated that phones were being charged at the appellant's Aunt's house while PW 8 stated appellant used to charge phone at his house.

iii) PW 1's rescue

PW 1 stated he screamed and the appellant's Uncle and neighbour came. PW 5 stated PW 1 escaped when the appellant went to answer call of nature. Later states PW 1 was found on the verandah.

29.The said discrepancies are minor and they do not affect the main substance of the prosecution's case that PW 1 was asked by the appellant to stay over since it was late and was later defiled and the culprit was identified as the appellant.

30.Minor contradictions will be ignored.

31. The appellant submits that Vital witnesses were not called.

Appellant's Uncle, neighbours and PW 1's Uncle were not called to testify.

The proviso to**<u>Section 124ofthe Evidence Act</u>**allows the court to convict on the sole evidence of a victim of a sexual offence if it is satisfied that the victim is being truthful.Accordingly, the prosecution need not call all witnesses who may have information on a fact. Failure to call a witness will only be fatal if the evidence presented by the prosecution is insufficient to sustain a conviction and contains gaps which could have been filled by a witness who was not available.

In addition, the above witnesses who were not called were not eye witnesses therefore failure to call them does not have a great impact on the evidence adduced.

In this case, the evidence of the prosecution witnesses together with the medical evidence proved that PW 1 had been defiled and the appellant was identified as the defiler.

32.This is buttressed by **<u>Section 143 of the Evidence Act</u>** which provides:-

> ***"No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."***

It is the prerogative of the State to call witnesses in support of their case. Failure to call witnesses would

be fatal where the evidence tendered is barely adequate. This is not the case. There were sufficient witnesses called to prove the charge.

33.The appellant submits that the age of the complainant was not proved. The complainant testified that he was 15 years old. The Grandmother also stated that he was Fifteen. Having been born in the year 2000 so at the time he gave evidence he was 15 years. The charge sheet states that he was 13 years. The prosecution produced a Baptism Card showing that the date of birth was 5/2/2000. The age of the complainant was stated as 13 years on the treatment notes. Prove of age in Sexual Offences is crucial as it determines the section under which the accused is charged and sentenced. The evidence by PW-6- and that of the complainant coupled with the Baptism Card confirmed the age of the appellant. **Section 8(1) as read with (3) of the Sexual Offences Act** provides:-

> ***(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.***

34.The age under the section is between 12 & 14 years. At the time the offence was committed the complainant was within that age bracket. The prosecution discharged the burden its obligation to prove the age of the minor at the time the offence was committed.

The Appellant submits that his defence not considered

35. As per the judgment page 6 and 8, the trial court considered the appellant's defence and stated that there were no doubts created which can be exercised in the appellant's favour. It was sufficient for the trial Magistrate to State that he considered the defence.

1. Whether the prosecution prove its case beyond reasonable doubt

36.Looking at the whole evidence adduced, the prosecution proved its case beyond all reasonable doubts. PW 1 was able to narrate the occurrence of the incident and what the appellant did to him. The entire evidence on record left no doubt, as the trial court found, that the appellant defiled PW 1 in the manner described. The trial court considered all the evidence presented and having done so, came to a proper and inevitable conclusion.

37.I find that the appeal is without merits and is dismissed.

Dated at Kerugoya this 21st day of June 2019.

L. W. GITARI

JUDGE