REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL NO. 119 OF 2016

JAMES MWENDIA MWANGI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

***(Being an appeal against judgement, conviction and sentence in Molo CMCRC 365 of 2016 delivered by Hon. Rita Amwayi – RM on 18th July 2016*)**

JUDGMENT

1. The Appellant was charged and convicted for the offence of defilement of a 15 years old girl namely LNW, hereinafter referred to as "the victim", on the 30th January 2016. He was sentenced to twenty five (25) years imprisonment under the provisions of **Section 8(1) as read with Section 8(3) of the Sexual Offence Act No. 3 of 2006,** on the 18th July 2016**.**

2. This appeal is against both the conviction and sentence, and is premised on the grounds that the trial magistrate erred in law and fact in failing to conduct a *voire dire* examination to the minor complainant before admitting her evidence, and relying on uncorroborated and circumstantial evidence that was weak to convict the appellant.

The appellant has urged for quashing of both the conviction and the sentence.

3. The appellant called 5 witnesses upon whose evidence the appellant was called upon to defend himself. It is upon the totality of the said evidence as recorded that the trial court found him guilty as charged and sentenced him to suffer 25 years imprisonment.

4. This court is alive to the principles laid down in the case of **Okeno –vs- Republic (1972) EA 32** that as the first appellate court, it is my duty to re-examine and weigh the conflicting evidence and draw my own conclusion, but not to merely scrutinize the evidence to support the lower court's findings and conclusions I must make own findings and draw own conclusions.

5. The victim's age of 15 years then is not in dispute having been proved by production of her health clinic card showing her birth date as 1st May 2001. She testified that she was a class seven pupil. Age is a crucial aspect in sexual offences as punishment depends, and is determined by the age of the victim – **Hillary Nyongesa -vs- Republic Criminal Appeal No. 123 of 2009.**

I have examined and re-evaluated the evidence as well as the submissions and the judgment of the trial court.

6. **Voire dire examination**

The appellant faults the trial magistrate for what he submits as failure to conduct a *voire dire* examination before admitting the victim's evidence.

Section 19 of the Oaths and Statutory Declarations Act provides that, where in the opinion of the court a child does not understand the nature of an oath, his evidence may nevertheless be received though not given on Oath. But if the court is of the opinion that the child is possessed of sufficient intelligence to justify reception of the evidence, it need not take the child through a *voire dire* examination, so long as the child understands the duty of speaking the truth.

7. The phrase "*Voire dire*" is a Latin phrase for saying "what is true." Blacks Law Dictionary 12th Edition Page 1805 defines the phrase as to mean "speak the truth", and a preliminary examination to test the competence of a witness or evidence.

8. The same phrase was examined by the **Court of Appeal in Maripett Loonkomok –vs- R (2016) e KLR** where it rendered that such examination ought to be conducted for a child of tender years, and citing **Section 2 of the Chidrens Act** and defined a child of tender years

to mean a child under 10 years, but relying on the old **Court of Appeal for East Africa case Kibageny Arap Kolil -vs- R (1959) EA** that the time – honoured **14 years** remains the correct threshold for *dire voire* examination, and added that each case ought to be considered in its peculiar circumstances. This has been the position and the courts have been so persuaded.

9. Thus the complainant in this appeal having been fifteen years old, there was no necessity of a *voire dire* examination I have looked at the evidence (PW2). It is well coordinated and nothing shows that she did not understand what she was testifying about. See also **Court of Appeal in Sahali Omar –vs- R (2017) e KLR – Criminal Appeal No. 44 of 2016 (Mombasa), Patrick Kathurima –vs- R (2015) e KLR.**

10. It is now acceptable that a child of over 14 years need not be taken though a *voire dire* examination unless special circumstances present themselves before the court. The trial court found no such special circumstances to warrant him to conduct a *voire dire* examination to the victim.

That ground of appeal fails. It is dismissed.

11. **Uncorroborated Evidence**

It is submitted for the appellant that there was no eye witness to the commission of the offence and what the prosecution did was to force and coarse the victim to implicate the appellant after she failed and refused to disclose her whereabouts the afternoon of the relevant day, and upon being detained at the police station the whole night.

12**. PW3**, mother of the victim confirmed that at the time she was allegedly seen coming out of the appellant's home upto when she was taken and detained at the police station, the victim failed to disclose where she had been nor did she implicate the appellant despite being pressed to give information of where she was the whole afternoon, until the following day after spending a night at the police station.

13**. Proviso to Section 124 of the Evidence Act** affords an exception to the general rule in cases of sexual nature where the child in question is the sole witness and victim, thus no corroboration is necessary, so long as the court is satisfied that the victim is telling the truth and the evidence is credible – See the **Patrick Kathurima –vs- R** above and **Johnson Muiruri -vs- R (1983) e KLR 445.**

14. I am minded that the victim did not mention anybody else as the perpetrator, except the appellant, and no witness to the offence was called to testify, regard to proviso to **Section 124 Evidence Act** cited above, despite there having been children who are alleged to have been playing with the victim when it is alleged that the appellant called her to his home and defiled, her around 4.00p.m.

15. In my considered opinion and guided by the holding by the **Court of Appeal in Sahali Omar –vs- R (2017) e KLR, citing the case of Bukenya and Others –vs- Uganda (1972) EA 549** that

> ***(1) "The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.***
>
> ***(2) That the court has the right and duty to call witnesses whose evidence appears essential to the just decision of the case.***
>
> ***(3) Where the evidence is barely adequate the court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution."***

16. In the present case the prosecution evidence in my view needed corroboration, by the very children who saw the victim get into and perhaps come out of the appellants house there being no other witness who saw or witnessed the events.

17. The trial court may not have seen the necessity of summoning witnesses to corroborate the evidence by PW1, PW2 and PW3 a fact supported in law by **Section 143 of The Evidence Act** that

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

However, the above depends on each particular circumstances and character of a case.

18. I am persuaded that there was necessity for the calling of the evidence of the children stated above for the court to be fully satisfied before it could render its decision that it did in its judgment finding that the prosecution had proved its case against the appellant beyond any reasonable doubt.

19. **<u>Circumstantial Evidence</u>**

I have carefully examined the victim **(PW2)** and her mother's **(PW1)** evidence.

It has not been explained why it took three days for the victim to be taken for medical examination yet, if what **PW1** stated were true that she confirmed that the victim had been defiled that very same evening.

20. It has also not been explained why and for what propose the girl victim had to spend a night at the police station. Could it be because she refused to disclose where she had been the whole afternoon or was it a way of pressing and coercing her with a view to implicating the

appellant? – (appellant's submissions).

21. The victim, 15 years old no doubt was intelligent enough to know that she had engaged in some sexual encounter but opted not to disclose the fact and the perpetrator to anybody including her mother (PW1) and PW3. This state of affairs, very peculiar, raise doubts in my mind as to her silence, until after spending a night at the police station. It actually defeats all reason, legal and common sense, as to why the young girl had to be locked up. I cannot be persuaded that her evidence implicating the appellant, and in the circumstances was obtained voluntarily or was through coercion.

22. The victim too testified to her previous sexual encounters with the appellant. The evidence was adduced without leave of the court as required under **Section 34 of the Sexual Offences Act**. This piece of evidence can therefore not form the basis of, nor can it be considered as part of the evidence upon which a conviction may be based.

23. **Section 34** states:

> ***"No evidence as to any previous sexual experience or conduct of any person against or in connection with whom any offence of a sexual nature is alleged to have been committed, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried shall be adduced --- unless the court has, on application by any party to the proceedings granted leave to adduce such evidence or to put such question."***

See also **S.J. –vs- R (2016) e KLR.**

24. It is further not explained why despite the victim spending a night at the police station her clothes were changed before she was examined by the doctor or clinician, a requirement that the police officers, would have informed the mother (PW1) if she may have been ignorant of the same.

25. **<u>Medical Evidence</u>**

I have considered the medical evidence produced by **PW4,** a clinical officer who examined the victim 3 days after the alleged defilement, and after she had been examined in another unnamed hospital. Those documents were not produced as exhibits. They were marked for identification - (PMFI). It is not explained why a second examination had to be undertaken.

26. **PW4's** observations were that the victim's hymen was broken and some discharge noted, with the vaginal walls with bruises – which the clinician opined was caused by forceful penetration. No probable date of defilement or age of the bruises was stated.

The appellant too was examined, with nothing detected to link the appellant to the offence. The clinician did not report on whether the appellant's semen or spermatozoa matched that found in the victim's vagina.

PExt 5 which I have seen is the appellant's laboratory results. Nothing was detected or noted.

27. To that end, would the appellant without any doubt be said to have been the defiler or linked to the offence? In my view, the medical report on the appellant did not show by any manner that the appellant was the perpetrator. Medical evidence is very crucial in a defilement matter. The medical Report lacks in detail and clarity save that there was penetration into the victim's genitalia.

28. In his sworn defence, the appellant denied having defiled the young victim on the material date or any other date or at all. For a conviction to be sustained upon circumstantial evidence the chain of events must be so complete that it establishes the culpability of the appellant and no one else without any reasonable doubt.

29. Without a doubt the victim knew the appellant both by name and appearance so are the prosecution witnesses as they all testified to have been neighbours for a considerable period of time. There was positive identification by recognition. This is not in dispute. However the question continues to linger in my mind as to whether it is the appellant who committed the crime.

30. If properly evaluated, and I believe I have done so, circumstantial evidence is as good as any evidence, and can prove a case with the accuracy of mathematics as rendered in the Case **Musili Tulo -vs- R, Cr Appeal No. 30 of 2013**, and for that, it must be so clear as to leave no room for speculation or suspicion.

31. Circumstances stated above, and especially by **PW3** whose evidence to say the least is hearsay can not be relied upon to sustain a conviction. This witness did not see the victim going into the appellant's house. She did not bring to court the person who informed her that she saw the victim going into the appellant's house.

32. There is too the medical evidence that the victim was defiled but the defiler, in my opinion remains unidentified for reasons I have stated above. I do not find the trial Magistrate's finding that the appellant's defence was unbelievable as plausible based on proper analysis of the entire evidence.

It would be a traversity of justice if the circumstantial evidence as adduced by the prosecution, with the numerous gaps were to be used to sustain the conviction.

33. In **Kiambu Criminal Appeal No.28 of 2018 Gabriel Gatonye Gakunya -vs- R (2019) e KLR** in very similar circumstances involving a 15 years old girl, the court set aside the conviction of the appellant upon medical evidence not having linked the appellant to the

commission of the defilement as salient questions, as to who may have defiled the victim were not answered to the required standard of proof.

See also **Peter Mwangi Muthanya –vs- R HCA No. 154 of 2005 (Nakuru).**

34. The prosecution failed to prove, beyond any reasonable doubt, and to justify the interference of guilty upon circumstantial evidence. That burden rested with the prosecution at all times.

35. It is trite that it is never the duty of the accused to prove his innocence as doing so would amount to shifting the evidential burden of proof to the accused. It is the duty of the trial court to ensure that before conviction on circumstantial evidence, that there are no other co-existing circumstances that would weaken or destroy the inference of guilt of the accused – **Republic –vs- Kipkering Arap Koske & another (1949) 16 EACA 135. -**

- See also Abanga *alias* **Onyango –vs- R Cr. Appl. No. 32 of 1990.**

36. Cumulatively I find the circumstances under which the appellant was convicted to be so weak, suspicious and speculative as to form a chain, so complete that it can only be inferred that the offence was committed by the appellant and no other – See **Abanga** *alias* **Onyango case (Supra)** above.

37. I therefore proceed to quash the conviction as well as the sentence with the result that the appeal is allowed in its entirety.

Unless otherwise lawfully held, the appellant shall be set at liberty forthwith.

Dated, delivered and signed at Nakuru this 20th Day of June 2019.

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J.N. MULWA

JUDGE