REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 158 OF 2017

JNK.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

{Being an appeal against the Conviction and Sentence by Hon. E. Nyongesa – SRM Gatundu

dated and delivered on the 23rd day of May 2017 in the original

Gatungu Senior Principal Magistrate's Court

Criminal Case No. 36 of 2016}

JUDGEMENT

The appellant was charged with the offence of **Defilement of a child contrary to Section 8 (1) as read with Sub-section 8 (2) of the Sexual Offences Act.** He also faced an alternative charge of **committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act.**

The particulars of the principal charge were that on 15th December 2016 at Gatundu North Sub-county within Kiambu County he intentionally and unlawfully committed an act that caused penetration of his genital organ, namely penis, into genital organ, namely vagina of SWKG aged 4 years.

In the alternative charge it was alleged that on 15th of December 2016 at Gatundu North Sub-county within Kiambu County the appellant intentionally and unlawfully touched the vagina of SWK a child aged 4 years.

The appellant who was unrepresented pleaded not guilty to the charge. However, upon hearing and considering evidence from five prosecution witnesses and evaluating it against the appellant's testimony, the trial Magistrate found him guilty on the main charge and subsequently sentenced him to imprisonment for thirty (30 years. Being aggrieved by the conviction and sentence the appellant preferred this appeal.

At the hearing of the appeal the appellant introduced amended grounds which though without leave I shall deem as properly on record as they were not opposed by Prosecution Counsel.

The grounds of appeal are: -

> **"1. THAT, the Hon. Trial magistrate erred in matters of law and fact by failing to note that the appellant's rights to a fair a trial were violated for the denial to cross examine pw1 on her adverse evidence.**
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> **2. THAT, the Hon. Trial magistrate erred in matters of law and fact by failing to find that penetration by the accused person was not proved to the requisite threshold.**
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> **3. THAT, the Hon Trial magistrate erred in matters of law and fact by failing to find that the explicit contradictions on record not only impugned on the credibility of the various witnesses to say the truth but on the prosecution's burden of prove in the whole case.**

4. THAT, the Hon. Trial magistrate erred in matters of law and fact by rejecting the cogent defence case which reasonably exonerated him from the commission of the offence.

5. THAT, in default of acquittal, this court considers reviewing my sentence in appreciation of the need to afford the appellant an opportunity to rehabilitate as enshrined under the sentencing policy guidelines."

The appeal was vehemently opposed and was canvassed by way of written submissions.

As the first appellate court I have a duty to analyse and re-evaluate the evidence before the trial court and come to my own independent conclusion bearing in mind that I did not see or hear the witnesses give evidence – **see Okeno v Republic [1972] EA 32.**

To prove the charge against the appellant the prosecution was required to prove the following elements beyond reasonable doubt: -

"(i) The age of the victim.

(ii) Penetration.

(iii) Identification of the perpetrator of the offence." (S*ee Fappyton Mutuku Ngui v Republic [2012] eKLR).*

To prove the **age of the complainant** the prosecution produced a Birth Notification showing that she was born on 1st June 2013 which means that as at 15th December 2016 when the offence was committed she was three years old. However, her mother, the P3 Form and other medical notes put her age as four years old and the trial Magistrate assessed her apparent age to be four years old. However, what is important for the purposes of this case is that she is a child under the age of eleven years. The first ingredient of the offence was therefore proved beyond reasonable doubt.

On the issue of **penetration,** it is contended that the evidence adduced was contradictory and inconsistent and that in the end penetration was not proved. The complainant gave evidence as Pw1. She stated that the perpetrator of the offence did bad manners to her in the shamba and in the store. She explained that this occurred when she accompanied a friend of hers to her grandmother's place. She pointed to her private parts as the place the perpetrator did the bad manners. She further stated that he had removed her clothes and pant and made her to lie on her back facing upwards. The complainant stated that the perpetrator told her he wanted to remove a flea from her private parts and when he did the ***"tabia mbaya"*** she felt a lot of pain. The clinical officer (David Kabuga – Pw5) testified that when he examined her there were bacterial yeast and pus cells in the vagina. There were no spermatozoa but the libia majora was swollen and reddish in colour. He stated that the child had pain in her private parts and classified the degree of injury as harm.

I have evaluated the evidence by the complainant and the clinical officer carefully and I notice that nowhere did the complainant allege there was penetration of her vagina by the perpetrator using his penis. All she stated is that he did bad manners to her and pointed to her private parts. Nobody bothered to ask her what he used to do the bad manners to her. In the charge sheet it was alleged that the appellant used his penis and that was what the prosecution was required to prove beyond reasonable doubt for the charge of defilement to stand.

The **Act** defines penetration as **"the partial or complete insertion of the genital organs of a person into the genital organs of another person."** It is instructive that the clinical officer (Pw5) made reference to **"alleged defilement"** but did not conclusively state there was penetration. The trial Magistrate therefore misdirected herself when she found there was penetration when there was no evidence to that effect. Her judgement was at complete variance with the evidence when at **paragraph 3 line 20, 21 and 22 on page 10** she stated: -

"The minor gave a vivid description of how the accused person whom she previously new defiled her. She stated in part "he lay me on the ground facing upwards and removed my clothes and his trouser and did bad manners to me here (pointing at her vagina.)"

However, the proceedings both handwritten and typed record the child as stating: -

"…… Then while there, accused did bad manners to me while in the shamba and in the store. Njeri was the one who had taken me to the grandmother's place. Njeri is a friend and a neighbour (Guka/grandfather who is in court (Pw1) points at the accused did bad manners to me here (Pw1) points a finger at her private parts. He removed my clothes and pant and did bad manners……. Guka took me to the store saying he wanted to remove a flea from my private parts/vagina (the witness shows to court her private parts) when he did this I cried so much, because guka had done bad manners on me, as I had slept down facing up. My guka is called N. After that we went to the police station with my mother."

The proceedings do not record the child as saying that guka removed his trousers. If she did, then the trial Magistrate was in error for not recording it. As found by the trial Magistrate due to her tender age the child may not have known the proper terminologies to use but it was the duty of Prosecution Counsel who was in conduct of the case to prod her to say exactly what happened. Bad manners could be anything other than penetration. It could be an indecent act or even kissing. All those are also bad manners to a child of that age and it was an error for the trial Magistrate to assume it meant penetration when there was no evidence of penetration. Even the clinical officer (Pw5) did not come to that conclusion. He kept using the phrases **"allegation of being defiled"** and **"had allegedly been defiled"** and appears to have confined himself to the findings of the examination and left it to the court to determine whether there was penetration or not. In common parlance he was non-committal on whether penetration occurred or not and clearly his testimony did not go into **"proving that there was indeed penetration on the victim." (See page 8 lines 18 – 19 of the judgement)**. Had the trial Magistrate paid closer attention to the evidence of the child she would not have come to the conclusion that there was penetration. In my view the evidence supports the charge of indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act rather than defilement.

On **whether the appellant was identified as the perpetrator of this offence,** my finding is that he was. The complainant knew the appellant very well and referred to him as "guka" Kikuyu for grandfather. She even stated his name correctly as N. Further, the offence occurred in broad daylight and the circumstances favoured a positive recognition. Like the trial Magistrate I do not find the defence that the appellant was framed convincing. It was his own evidence that there were no differences between him and the family of the complainant which could have occasioned them to frame him. I would have found him guilty and convicted him on the charge of indecent act. However, in his submissions, and this is supported by the record, he raises a pertinent issue that he was not allowed to cross examine the complainant. **Article 50 (2) (k) of the Constitution and Section 208 (2) of the Criminal Procedure Code** give the accused person the right to cross examine witnesses. Where the accused is unrepresented **Section 208 (3) of the Criminal Procedure Code** requires the court to bring this right to the attention of the accused. What is the effect of this omission by the trial court?

In **H.O.W. v Republic (Kisumu Criminal Appeal No. 326 of 2010) [2014] eKLR** cited by the appellant in his submissions and also cited with approval in **John Lolim v Republic [2017] eKLR** the Court of Appeal stated:-

> ***"The first such matters and which is the main one is on point of procedure which in law, we feel fundamentally prejudiced the entire case and the appellant. This is that the complainant, J. S. who was a minor was taken through voire dire examination and this was proper in law for whatever evidence was given on age, she was not above twelve (12) years in age. The learned trial magistrate found as a result of voire dire examination that she did not know the normal duty of telling the truth and its normal consequences. She was ordered to give unsworn statement and she did so. That evidence seriously implicated the appellant, but at the end of it, for some reasons unrecorded, it was not subjected to cross examination by the appellant who was present in court. There was no indication or any record to show that the appellant was afforded an opportunity to cross-examine this witness and no reasons were recorded as to why that procedure was not done. Unfortunately the appellant was unrepresented and clearly could not apprehend his right to cross-examine the witness. He clearly relied on the trial court which had a duty to invite him at the end of the witnesses' evidence in chief to cross-examine the witness, which invitation did not come forth in respect of this witness. We can find no reason for this serious omission except that we think perhaps the court erroneously felt that as an accused person who gives unsworn evidence is not to be cross-examined so would any witness who gives unsworn evidence not be cross-examined. Of course that was a misapprehension of the law….."***

Similarly, in **Nicholas Mutula Wambua v Republic Criminal Appeal No. 373 of 2006 (Mombasa) (**unreported**)** – cited with approval in **John Lolim v Republic (supra) and David Waweru Githii v Republic [2019] eKLR** the Judges of Appeal stated: -

> ***"The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross-examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined… It would appear that misconception arises from a view that because accused persons are not cross-examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined."***
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> ***That thinking is expressed in Section 208 of the CPC which governs hearing of Criminal proceedings in the Magistrate's courts. It provides that during the hearing, the accused persons or his advocate may put questions to each witness produced against him. accordingly, all prosecution witnesses are liable to be cross-examined in order to test the credibility and the veracity of the witness. The trial courts should always observe that requirement of the law in criminal trials to obviate an otherwise stable case from being lost on that omission."***

In the High Court the opinions differ. In **John Lolim v Republic (supra)** Chitembwe J, held: -

> ***"Given the evidence on record, I do agree with the prosecution that the conviction is not safe. The two crucial witnesses were not subjected to cross-examination. Their evidence remains unchallenged……***
>
> ***The procedure used by the trial court not to allow Pw2 and Pw3 to be cross-examined was improper. The trial was not fairly conducted."***

In **E.O.O. v Republic [2018] eKLR Riechi J**, held: -

> ***"…..The learned trial magistrate in the above analysis was alive to the gaps in the prosecution case in particular the lack of evidence of the complainant's sister; the person the complainant reported the defilement to and the impact of lack of cross examination of the complainant in the prosecution evidence. The existence of these gaps in the prosecution case showed that the prosecution did not prove the charge beyond reasonable doubt. I find these gaps were fatal to the prosecution case."***

However, in **David Waweru Githii v Republic [2019] eKLR** Kemei J was of a different view. While finding there was a violation of the appellant's constitutional right to challenge the evidence of the minor witness, the Judge was of the view that that was not fatal and proceeded to determine whether there was other independent evidence that could support the conviction. I find the decisions of Chitembwe J & Riechi J more persuasive and accordingly find that the omission by the trial Magistrate to call upon the appellant to cross examine the complainant resulted in a mistrial.

Having found there was evidence that could support the alternative charge of indecent act with a child but having found that the appellant's right to a fair trial was violated by the trial court not inviting him to cross-examine the complainant, what am I to do? Should I refer the case for retrial? A retrial is ordered only where the original trial was defective due to a mistake on the part of the court but it cannot be made to provide the prosecution with an opportunity to improve their case or to correct their mistake – **see Joseph Lekulaya Lelantile & Another v Republic [2002] eKLR.** Even then, as was held by the Court of Appeal, even where the conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that retrial should be ordered and each case must depend on its

peculiar facts and circumstances and a retrial should only be ordered where the interest of justice require it. In this case I am satisfied that an order for retrial would serve the interest of justice.

Accordingly, the appeal is allowed, the conviction is quashed and the sentence is set aside and it is hereby directed that the case shall be remitted back to the lower court for retrial by a Magistrate other than E. Nyongesa. It is so ordered.

Signed and dated this 23rd day of September 2019.

E. N. MAINA

JUDGE

Dated and delivered in Kiambu this 26th day of September 2019.

C. W. MEOLI

JUDGE