REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL APPEAL NO. 57 OF 2018

OMAR ABDALLA OMAR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from a conviction and sentence of the Chief Magistrate Court at Malindi in Criminal Case No. 45 of 2017 in a Judgment dated 27.9.2018)

CORAM: Hon. Justice R. Nyakundi

Appellant in person

Ms. Sombo for the State

JUDGMENT

The appellant **Omar Abdalla Omar** was charged, tried, convicted and sentenced to serve life imprisonment with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11 of the same Act, which no findings were made in view of his conviction with the main charge.

Being aggrieved with both conviction and sentence, he appealed to this court citing the following grounds:

> ***1. That the Learned trial Magistrate grossly erred in both Law and fact by failing to consider that no voire dire examination was duly conducted to the complainant pursuant to Section 19 (1) of the Oath and Stability Declarations Act.***
>
> ***2. That the Learned trial Magistrate erred in both Law and facts by relying on incredible evidence from a single witness which was insufficient to prove the charge and not safe for conviction.***
>
> ***3. That the pundit trial Magistrate erred in Law and facts by failing to consider that the case was not properly investigated.***

The appeal was argued by way of written submissions. Before I deal with the various grounds challenging the Judgment of the trial court, I find it prudent to recapitulate only briefly the evidence which was before the trial court.

The facts of the case are as presented in the evidence by the following witnesses **PW 1 KKS**. a minor who testified that at the time to the incident she was aged 11 years. Stated that on 16.10.2017, she found herself in the appellant's house; where she went to collect vegetables. On the fateful day, the complainant gave evidence that the appellant held her by the shoulders and carried her to the house. While in the room the complainant stated that the appellant placed her on the floor, removed the inner wear followed by him inserting the penis to the genital organs. Thereafter appellant was done he gave her Kshs.20/= may be as an appreciation. On arrival at home the complainant was escorted to Malindi Hospital where an examination was conducted as to whether she had been defiled by the appellant.

It was **PW 2 Moses Rimba's** the clinical officer who gave evidence on behalf of **Dr. Ibrahim** that the examination done revealed sexual intercourse to have taken place against the complainant. According to PW 2 this finding were supported by the abrasions on the labia Majora and rupture of the hymen. The medical report, age assessment report, the laboratory results and post rape care form were all admitted in evidence to support the fact of defilement.

PW 3 - Corporal Miriam Hussein, a police officer attached to Malindi Police Station testified that she investigated the matter and recorded a charge of defilement be preferred against the appellant.

At the close of the prosecution case, the appellant took the witness stand and he denied the charges as framed and prosecuted by the state. He mainly recalled as having been arrested and lynched by a mob of people for an offence he did not commit.

This being the first appeal the court has to consider the entire evidence and draw its own conclusions on the matter. (See the principles in **Okeno v R [1973] EA**.

In summary form the charge sheet and findings by the trial Magistrate, the case against the appellant consisted the following ingredients:

(a). That the appellant had penetration sex with the complainant.

(b). That at the time of the said carnal knowledge, the complainant was aged 11 years old.

(c). That the appellant was identified by (PW 1).

The main ground of appeal is that the trial Magistrate never carried out a proper voire dire for the complainant's evidence to be received as such as provided for under Section 19 (1) of the Oaths and Statutory Declaration Act.

The court must therefore first identify and decide the age of the minor who is due to be summoned as a witness. If the child is not below ten years old, therefore being of lower years, the necessity of a voire dire and inquiry that goes with is not a requirement of the law. As to whether the child understands the nature of an oath to be sworn as an adult for her or his evidence to be taken is a matter for the discretion of the court.

From the provisions of the law under Section 19 of the purposeful Act on admission of evidence by minors. There is no precise formulae of the questionnaire. This has been left to individual trial Magistrates to tailor questions depending on individual demands of the intended witness.

In the interpretation and construing the provisions, the courts have envisaged the guiding principle of question and answer format as a test of complainant to Section 19 of the Act. The duty to ensure that a correct voire dire is carried rests squarely with the trial court which must be done so as not to cause any injustice. The evidence led voire dire as laid down in the above cited authorities is in the circumstances more appropriately when an appeal, wholly turns on such a ground.

The issue whether or not there was a proper voire dire cannot be divorced from the record of the trial court in.

The appellant submitted that the testimony of the complainant failed the legal test and for that matter her evidence remained inadmissible. For this legal proposition appellant cited the following cases **Samuel Ngugi v R [2012] eKLR, Gamaldin Abdi Addirahiman & another v R [2013] eKLR.**

On this ground **Ms. Sombo** submitted on behalf of the state that there was no error in the manner the Learned Magistrate conducted the voire dire. She placed reliance on the case of **Maripett Loonkomok v R [2016] eKLR** and **Athumani Ali Mwinyi v R Cr. Appeal No. 11 of 2015, DWM v R [2016] eKLR.**

An inquiry statement on voire dire made under Section 19 (1) of the Cap 15 of the Laws of Kenya is clearly said out in the Court of Appeal case of **Phisen Muiruri v R [1983] KLR** where it was held 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 Karega Kiuna v R CR. Appeal No. 77 of 1982 "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 even his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient evidence and understands the duty of speaking the truth. In the latter event an accused person shall not be liable to be convicted on such evidence unless is corroborated by material evidence in support thereof implicating him."***

It is important to secure the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellant court is able to decide whether this important matter was rightly decided and not be forced to make assumptions. A similar opinion was expressed by the Court of Appeal in England in **Regina V Campell (Times 10 of 1982)**

"If the girl (ten years) had given her sworn evidence, the corroboration of these 'fiscus' was an essential requisite. If she gave sworn evidence, there was no requirement that her evidence had to be corroborated but the jury had to be directed that it would not be safe to convince unless there was consideration."

Dealing with the question of the girl taking the oath, it should be borne in mind that where there was an inquiry as to the understanding of a child witness of the adult and solemnity of an oath, the Court of Appeal in R v Lalkhan [1981] 73 Cr. Appeal 190 made it quite clear that the questions put to a child must appear on the short hand note book so that the coarse the procedure took in the court below could be seen."

There level Justice Bridge said

> ***"the important consideration, when a Judge has to decide whether a child should properly be sworn, is whether the child has sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the state, which is involved in an oath, over and above the duty to tell the truth which is an order any duty of normal social conduct."***

There were therefore two aspects when considering whether a child should properly be sworn. First that the child had sufficient appreciation of the particular nature of the case and, second realization that following the oath did involve more than the ordinary duty of telling the truth in ordinary day today life in **Gabriel Slo Maholi v R [1960] EA Page 159** Again the court stated that:-

> ***"even in the absence of express statutory provision of the court to ascertain the competence of a child to give evidence. It is not sufficient to ascertain that the child has enough intelligence to justify reception of the incidence but also that the child understands the difference between the truth and false words."***

In the instant case, I observe that though the Learned trial Magistrate is being faulted with the procedure on voire dire as set out in the above authorities the complainant evidence was properly admitted as an unsworn and the appellant accorded an opportunity to cross-examine (PW 1) under Section 208 (2) (3) of the Criminal Procedure Code. Further in terms of Article 50 (2) (k) of constitution the interrogatories put forth by the appellant was meant to challenged her evidence, test, the velocity and the credibility of her testimony. However, it should be emphasized and pointed out that a remarkable feature of voire dire examination being an outstanding element of receiving evidence of a child of tender years should be judiciously carried out so as not to prejudice or occasion an injustice to the appellant. The wording of Section 19 (1) of Cap 15 of the Laws of Kenya and as interpreted in the various decisions provides a clear pathway conferred upon the courts to follow without lessening the threshold. There is no question here in this appeal (PW 1) gave evidence while aged 11 years old as to the events of the material day when the defilement took place. By the definition of Section 19 the complainant was above the border line age of 10 years old. Therefore, not clearly a child of tender years. She went further to positively identify the appellant as the man responsible for the intentional and unlawful acts of sexual intercourse.

The unsworn evidence did address the manner in which the appellant executed the offence. The accepted statement of facts from (PW 1) consisted an averment that she was treated at Malindi Hospital immediately after the incident.

The circumstances and medical evidence received by the trial court from PW 2 in my Judgment was undoubtedly independent evidence confirming the defilement of the complainant. A perusal of the treatment notes and P3 Form comprise of a significant feature found in the genital organs of the complainant. According to PW 2 the complainant suffered multiple abrasion and friction wounds on the labia majora, rupture hymen partially perforated reddish, bilateral labia minora.

In my view there was sufficient evidence to sustain the element of penetration in this matter as defined under Section 2 of the Sexual Offences Act. As regards this ingredient being partial or complete penetration of the genital organ of the complainant suffices to proof that sexual carnal knowledge took place beyond reasonable doubt. As it was stated in **R v Baskeveville 1916 2 KB 65B**

> ***"Corroboration medical direct evidence that the accused committed the crime: it is sufficient if it is merely circumstantial evidence of his connection with the crime, and we agree that it must be independent testimony which affects the accused by connecting or tendering to connect him with the crime. In other words, it must be evidence which implicates him, that is which confirms in some material particular not only the evidence that the crime has been committed here and that the prisoner committed it."***

It is evident from the record that the complainant was no stranger to mama O's house where she came in contact with the appellant.

As stated in the case of **Anjononi & others v R 1978 – 801 KLR 1560** the testimony by the complainant was that of recognition. On evaluation of her evidence on this issue and further aligning it will answers arising from cross-examination it follows that appellant was positively recognized by the complainant.

I answer to that evidence of the complainant as candid and did not fall short of the certainty that is required in the case of an identification by a single witness. It follows therefore that the complainant recollection of the chain of events which occurred during the commission of the offence were quite consistent with the state of her distressful condition.

The nature of her wounds and rupture of the hymen established through medical examination were circumstances which support forcible sexual intercourse and their age as deduced from the medical reports was fresh. The doctor's account filtered in with the complainant's testimony are proved on this incidence. I agree with the trial court that there was defilement of the complainant and appellant was actually recognized because he was known to (PW 1) before the incident. I therefore find no fatal defect on this grounds of appeal to render setting aside the conviction.

The issues raised in this appeal with regard to the evidence on a single identifying witness has been answered by the scrutiny and evaluation done on the above grounds of appeal.

Notwithstanding, the submissions by the appellant that the complainant was not a truthful witness there is substantial evidence against him to cast doubt that he did not commit the offence. There are the provisions of Section 124 of the Evidence Act designed to cater for the concerns raised by the appellant. In my view applying the provisions in Section 124 of the Evidence Act, the complainant testimony was corroborated by the medical evidence on canal knowledge and identity of the appellant. She gave graphic details on how the defilement and the scene of the crime where it occurred. There was strong evidence of penetration as confirmed from medical examination done by **Dr. Ibrahim** of Malindi Hospital. The authorities of **Boniface Ngoba v R CR Appeal No. 51 of 2016 Frad Mohammed v R [2003]** are distinguishable from the facts of this appeal. That the Magistrate was entitled to convict as she did as the medical evidence corroborated (PW 1) testimony on the injuries found on her genitals. Therefore, down on this issue the appellant defence failed to dislodge the prosecution's case on this ground.

The next error of procedure submitted of by the appellant was in the line of investigations and proof of age of the complainant. On these issues the appellant submitted that PW 3 Corporal Hussein did not visit the scene nor present any report to implicate him with the offence. He discredited the investigations conducted as shoddy and poor which occasioned a total failure of justice. What was the nature of the poor investigation to entitle this court to disregard the testimony of PW 3 was never raised during the trial neither has the appellant submitted new evidence for consideration in this appeal.

As for the ingredient on age of the action of sexual offence, the Court of Appeal in **Kaingu Elias Kasumo v R CR Appeal No. 504 of 2010** analyzed the situation and laid the criteria together with the importance of proving age as a key element for the offence. The court held that it is essential that it be proved by credible evidence for the appropriate sentence to imposed against an offender. See also **Alfayo Okello v R [2010] eKLR.**

In this appeal the trial court had the testimony of the complainant which was corroborated by the medical assessment report carried out by **Dr. Ibrahim** of Malindi Hospital. The appellant in his defence never contravened the ingredient on age of PW 1 being 11 years old at the time of the defilement.

The case as investigated by PW 3 and presented by the prosecution involved the statements taken from the complainant and medical doctor. The medical evidence was admitted in consonant with Section 77 of the Evidence Act. It is trite as held in the case of **R v Rono Khalif Ahmed [2015] eKLR** and **Naomi v R [2018] eKLR** that the operation of the Section depends upon the ascertainment that the document or the medical report is admissible. First, whether or not the matter came to court. Secondly, that such basis be laid for the document, or report to be admitted in evidence without calling the maker for reason that he or she cannot be procured without unreasonable delay, cost and expense or was out of jurisdiction of the court.

Thirdly, in having the document produced under Section 77 of the Act, there is little likelihood that the appellant would be prejudiced or a failure of justice to occur. The fact that the P3 was not produced by the maker did not cripple the applicant from testing the reliability and authencity of it through cross-examination. In his appeal, the appellant has not brought himself within the prejudice and the injustice test to warrant this court to interfere with the admission of the medical evidence.

Further in his address to the court, the appellant did not sufficiently state any examples of inadequacy of investigations that resulted the trial to be fatally defective.

On consideration of the various grounds set out by the appellant and also the learned prosecution counsel, the logical conclusion by this court is that the appellant designed the designed the unlawful acts of carnal knowledge with the complainant.

I take judicial notice that the appellant might have been much older in age than the complainant which the very least brings the power relation and very little resistance from the complainant.

It is perfectly clear to me that there sound direct and circumstantial evidence to proof beyond reasonable doubt penetration, age and identification of the appellant.

I find no reason to interfere with the discretion of the trial court on the issue of conviction of the appellant.

Sentence

Section 8 (2) of the Sexual Offences Act provides that:

> ***"Any person who commits an offence of defilement with a child aged 11 years or less shall be liable upon conviction be sentenced to imprisonment of life."***

The general principle as to sentence under this Section 8 (2) and (2) of the Act is that once the prosecution proves an offender had sexual intercourse with a child aged 11 years old and below he will be imprisoned for life. It is trite Law that children of that age are incapable of consenting to the act of carnal knowledge to put up any defence or was presumably above 18 years. That being the case, the court had no discretion but to impose the minimum sentence. However, punishment under Section 8 (1) (2) of the Sexual Offences Act can now be considered under the principles by the Supreme Court in the case of **Francis Karioko Muruatetu v R 2017 eKLR.** The dicta in this case is that the mandatory nature of the death penalty contrary to Section 203 of the Penal Code was found to be unconstitutional. The Court of Appeal in the case of **Injiri v The republic 2019 eKLR** pursuant to **Muruatetu (supra)** set aside the sentence for life imposed for an appellant charged under Section 8 (2) of the Sexual Offences Act by substituting it with a sentence of 30 years imprisonment.

The view I take of this matter, is that the foundation of the discretionary sentence has been properly laid down by these two superior courts. In determining the appropriate sentence I am also guided by the principles in the case of **R v Bull [1951] 35 Cr. Apph 164,** where the court stated that:

> ***"In deciding the appropriate sentence, a Court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it."***

The guideline set in **Muruatetu and Injiri case** will apply to this appeal where the determinate sentence imposed by the trial court was that of life imprisonment. As a result of taking into account the aggravating factors, mitigation and the age of the appellant the threshold of imposition of the custodial sentence shall incorporate the range of the maximum of life commensurate to the gravity a seriousness of the offence and the protection of public element combined. In the circumstances I sentence the appellant to 30 years imprisonment from the date

of indictment on the 18th October 2017. 14 days right of appeal.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF OCTOBER 2019.

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R. NYAKUNDI

JUDGE