



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 143 OF 2018

BETWEEN

ERICK OKETCH MAGERA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court Makadara

in Cr. Case No. 13 of 2016, delivered by Hon.E. Kimaiyo Suter, SRM, on 3rd August, 2018)

JUDGMENT

1. The Appellant herein was charged with the offence of defilement of a child contrary to **Section 8(1)** as read with **Section 8 (2) of the Sexual Offences act No. 3 of 2006**. The particulars of the offence were that on 1st November, 2015 at Pipeline in Embakasi Sub-County intentionally caused his penis to penetrate the vagina of SK a child aged five years. In the alternative he was charged with indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act No. 3 of 2006** in that he intentionally touched the vagina of SK a child aged 5 years. After the trial, he was found guilty of the main count and sentenced to life imprisonment.

2. Dissatisfied with both the conviction and sentence, he preferred the instant appeal. In a Petition of Appeal filed on 30th August, 2018 by M/s Osoro Omuoyo and Company Advocates, nine grounds of appeal were set out. I summarize then as follows; that the trial court failed to properly evaluate the evidence on record thus occasioned a miscarriage of justice to the Appellant; that the prosecution failed to discharge its burden of proof as required by the law, that the evidence of the prosecution was uncorroborated and therefore lacked in credibility; that the learned trial magistrate failed to have regard to **Section 36 of the Sexual offences Act No. 3 of 2006**; that a proper *voire dire* examination was not conducted before the minor victim testified; that the Appellant's defence was not considered and that in passing the sentence, the court failed to consider the Appellant's mitigation.

3. Before I reconsider the evidence that was adduced before the trial court and also fully analyze the submission by the respective parties, it is paramount that I determine one legal issue raised in the Grounds of Appeal, which if determined in favour of the Appellant may render the court to declare that the entire trial was a mistrial.

4. The Petition of Appeal at ground 6 states as follows: ***“that the trial court erred in law and fact by not conducting voire dire examination to the standards required by the law.”*** The requirement to conduct a *voire dire* examination is set out under **Section 19 of the Oaths and Statutory Declaration Act Cap 15 laws of Kenya Section 19(1)**. The same provides as under:

“Where, in the 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, shall be deemed to be a deposition within the meaning of that Section.”

5. From the above provision it is mandatory that a *voire dire* examination be conducted to any child who is of tender years with a view to establishing whether the child understands the nature of an oath in which case the court would direct that he/she testifies under oath and to test whether the child is possessed of sufficient intelligence to justify the reception of the evidence he/she adduces and therefore understands the duty of speaking the truth. Based on the assessment the court makes, it then determines whether the child should be cross-examined.

6. It suffices therefore that the court reverts to the record of proceedings to assess the manner in which the *voire dire* examination was conducted and thereby determine whether it met the threshold set out under **Section 19(1) of the Oaths and Statutory Declarations Act**. The same was conducted on 23 March, 2016 in the following manner:

“VIVA VOCE

Question: name

Answer: SN

Question: Home

Answer: Far away

Question: Home with who

Answer: Daddy and mum JW

Question: Do you go to school

Answer: Not since no school feel

Question: Who taught you how to write

Answer: my mum

Question: Truth

Answer: Mum told me to write another name”

7. From the above excerpt it is clear that the learned trial magistrate failed to ask the minor the requisite questions that would meet the threshold set out in **Section 19(1)**. For instance, the last question reads, **‘truth’** and the answer the victim gave was **‘mum told me to write another name**. A scrutiny of the flow of the questions and answers shows a clear disconnect of what was expected of the child to be tested on. In fact, none of the questions or answers purported to test whether the victim understood the meaning of taking an oath and as to the essence of speaking the truth by reception of evidence.

8. It follows then that the *voire dire* examination conducted on PW1 was flawed and did not accord with the law. Surprisingly, the learned trial magistrate went ahead and allowed her to be cross examined when no test as to her ability to speak the truth was done. I am in no difficulties in concluding that the *voire dire* examination did not meet the test of the law and was as good as to none being conducted. The net effect of this is that the entire trial was compromised, rendering it a nullity.

9. The other issue raised was in respect of breach of Section 36 of the Sexual Offences Act. The provision deals with production of evidence of medical, forensic and scientific nature. The Section provides as hereunder:

“(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.

(2) The sample or samples taken from an accused person in terms of subsection (1) shall be stored at an appropriate place until finalization of the trial.

(3) The court shall, where the accused person is convicted, order that the sample or samples be stored in a databank for dangerous sexual offenders and where the accused person is acquitted, order that the sample or samples be destroyed.

(4) The dangerous sexual offenders databank referred to in subsection (3) shall be kept for such purpose and at such place and shall contain such particulars as may be determined by the Minister.

(5) Where a court has given directions under subsection (1), any medical practitioner or designated person shall, if so requested in writing by a police officer above the rank of a constable, take an appropriate sample or samples from the accused person concerned.

(6) An appropriate sample or samples taken in terms of subsection (5)-

(a) shall consist of blood, urine or other tissue or substance as may be determined by the medical practitioner or designated person concerned, in such quantity as is reasonably necessary for the purpose of gathering evidence in

ascertaining whether or not the accused person committed an offence or not; and

(b) in the case a blood or tissue sample, shall be taken from a part of the accused person's body selected by the medical practitioner or designated person concerned in accordance with accepted medical practice.

(7) Without prejudice to any other defence or limitation that may be available under any law, no claim shall lie and no set-off shall operate against -

(a) the State;

(b) any Minister; or

(c) any medical practitioner or designated persons, in respect of any detention, injury or loss caused by or in connection with the taking of an appropriate sample in terms of subsection (5), unless the taking was unreasonable or done in bad faith or the person who took the sample was culpably ignorant and negligent.

(8) Any person who, without reasonable excuse, hinders or obstructs the taking of an appropriate sample in terms of subsection (5) shall be guilty of an offence of obstructing the course of justice and shall on conviction be liable to imprisonment for a term of not less than five years or to a fine of not less fifty thousand shillings or to both."

10. In the ground of appeal filed by counsel for the Appellant, it is alluded that there was fault in gathering evidence so as to ascertain whether or not the accused committed the offence. Under sub (1) above, the law provides for the taking of appropriate sample(s) from an accused person for purposes of forensic or other scientific testing including DNA so as to ascertain whether the accused committed the offence. Learned counsel did not specifically submit on this ground of appeal. However, there is on record that the mother of PW1 who testified as PW3 kept in safe custody the under pants that PW1(victim) wore on the date of the incident. She testified that the said pants were soiled which was a further testament of defilement. She added that she however discarded the pants after the Appellant went underground for a month before his arrest. I get the Appellants counsel therefore to be submitting that probably a DNA test ought to have been conducted to establish whether the soiling of the pants could be linked to the Appellant.

11. I would agree that that would have amounted to a crucial process of investigation and therefore give good result that would render any evidential value to the evidence the prosecution adduced. Nevertheless, an offence of the nature in this case need not necessarily be established by scientific proof. A court may convict based on any other sufficient evidence that establishes the offence. Thus, in this case, scientific evidence not having explored the court would have to rely on any other evidence adduced and make an independent decision as to whether it incriminated the Appellant.

12. The above notwithstanding, I have already rendered myself that the trial was vitiated for want of conducting a proper *voire dire* examination. The result is that the court must order a retrial. Before doing so, it must satisfy itself that certain conditions have been met. In the case of **Ekimat vs Republic [2005] 1KLR, 182** the Court of Appeal held that:

"A retrial should not be ordered unless the court is of the opinion that on a consideration of the admission or potentially admissible evidence a conviction might result, each case must depend on its particular facts and circumstances but an order of a retrial court should be made only where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person".

13. The same court in the case of **Opicho vs Republic [2009] KLR, 369** delivered itself thus:

"In general a retrial 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 own facts and circumstances and an order for retrial should only be made where the interest of justice require it."

14. In the present case, the prosecution lined up five witnesses. Its case was that on the material date, PW1 who was the complainant then aged five years was playing outside their residential apartment at Pipeline Estate with another child called Wesley. The Appellant lived in the same block of apartments but separated by a few house from the house of PW1. It is then that the Appellant called PW1 into his house where he went and defiled her. PW3, the mother to PW1 coincidentally was calling out PW1 to go back to the house. PW1 was answering back but from inside a house that PW3 could not immediately identify. The latter started walking around the houses when she stumbled on one of the slippers of PW1. She then peeped through the door into that house and saw the Appellant seated on a seat whilst PW1 was trying to dress up back her pants.

15. PW1 was also screaming after the ordeal. PW3 then stormed in and picked up her daughter and then reported the matter to another neighbor and her husband. PW1 was subsequently taken to the hospital and the matter reported to the police. Unfortunately, the Appellant could not be immediately arrested as he went underground until towards the end of the subsequent month. He had relocated to another house. Upon his arrest he was charged accordingly.

16. Medical evidence did establish interference with her labia minora as a testament of penetration. The age of the victim was also established by the production of a Birth Notification Card showing that she was 5 years as at the time of the incident. The issue of identification was also not in issue as the victim clearly knew the Appellant as their neighbor and referred to him as Baba Faith. It is case therefore where the prosecution proved the necessary element of offence of defilement. In my view, a retrial is likely to result in a

conviction.

17. On other parameters of consideration, this is a case in which the trial began in February, 2016 and the conviction made on 3rd August, 2018. I have noted that the Appellant was on bond throughout the trial and has therefore been in custody for only the period after the conviction of one year three months. He would therefore not be prejudiced if a retrial is conducted. The offence is also serious and public interest demands that a proper trial be conducted. The rights of the victim must also be protected through the process of a fair and just trial. On the whole, the interests of justice tilt towards ordering a retrial.

18. In the upshot, this appeal partially succeeds. I quash the conviction, set aside the sentence and order that a retrial be conducted. The Appellant shall be escorted to Embakasi Police Station not later than 10th December, 2019 for preparation to take plea not later than 13th December, 2019 to take plea. The Deputy Registrar of this court shall remit the trial court file to the Magistrate's court for purposes of the retrial. It is so ordered.

Dated and Delivered at Nairobi This 28th day of November, 2019.

G.W.NGENYE-MACHARIA

JUDGE.

In the presence of:

1. Sheddrek Wambui h/b for Mr. Osoro for the Appellant

2. M/s Kimaru for the Respondent