REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 49 OF 2015

(Being an Appeal from Original Conviction and Sentence in Criminal Case No. 3350 of 2011 of the Chief Magistrate's Court at Naivasha – S. Mwinzi, SRM)

GERISHON KABERI CHEGE…….....APPELLANT

-VERSUS-

REPUBLIC……...RESPONDENT

J U D G M E N T

The Appellant was tried and convicted for the offence of Defilement Contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act. The particulars stated that on the 13th day of November, 2011 at around 12.00pm at [particulars withheld] village, within Nyandarua County, he intentionally and unlawfully caused his genital organ (penis) to penetrate the female genital organ (vagina) of **R.W.K.** a girl aged 12 years old. He was sentenced to serve 20 years imprisonment.

2. Aggrieved with the outcome, he now appeals to this court, relying on four amended grounds of appeal as follows:-

> **"(i) THAT the learned trial magistrate erred in law and fact when he relied on an evidence adduced before the court by prosecution without to note that the voire dire was not conducted according to the trial procedure.**
>
> **(ii) THAT the learned trial magistrate erred in law and fact when he relied on prosecution side while investigation of this case was poorly done e.g.**
>
> **a. Lack of exhibit before the court during the trial like a pant of the PW1.**
>
> **b. Investigating officer to give evidence which was not at the PW1 evidence for (10/=).**
>
> **(iii) THAT the learned trial magistrate erred in law and fact when he put on a defence evidence without to apply Section 211 of the CPC according to the trial court procedure according to law.**
>
> **(iv) THAT he erred in law and fact in rejecting my defence in contravention of Section 169 (1) of the CPC."**

3. Concerning the first ground of appeal the Appellant complains that no *voir dire* examination preceded the testimony of the complainant, aged 12 years at the time of the trial. The Appellant submitted that the complainant was a child of tender years within the meaning of Section 19 of the Oaths and Statutory Declarations Act, hence the need to determine advance whether the complainant was a competent witness.

4. The third ground also raises a legal point. It is the Appellant's contention in that regard that the trial court did not comply with Section 211 of the Criminal Procedure Code at the close of the prosecution case. Grounds 2 and 4 relate to the quality of the prosecution evidence and the alleged unjustified dismissal of the Appellant's defence. This is the substance of the Appellant's written submissions in support of the grounds of appeal. The DPP opposes the appeal, reiterating evidence adduced at the trial.

5. This being a first appeal, the court is obligated to review the entire evidence and to draw its own conclusion. The Court of Appeal for Eastern Africa stated in **Pandya -Vs- Republic [1957] EA 336** that:-

> **"On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided**

to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

6. The prosecution called four witnesses during the trial. The gist of their evidence is that the Appellant was known to the complainant **R.W.K.** (**PW1**) being a fellow villager at [particulars withheld] **village**. He also performed odd jobs for the complainant's family. It seems that the Appellant had previously tried to seduce **PW1** but been rebuffed.

7. On 13th November, 2011 the complainant remained at home while her parents, including her mother **M.W.K. (PW2)** went to church. A younger child, and the family's 5 cows were left in the care of the complainant. Early afternoon as the younger child slept, **PW1** led the cows to water at a nearby river. On her way back home, she noted the Appellant trailing her. Upon reaching the home, the complainant tethered the animals. At that moment, the Appellant grabbed her hand and forced **PW1** into a room used to store animal fodder. He undressed **PW1** before undressing himself and forcing the complainant to lie on the floor of the store. He then defiled her before leaving the homestead.

8. At 3.00pm when **PW2** returned home, she found her daughter in tears. On learning what had happened, she and her husband reported to police at Kwa Haraka Police Station. The Appellant was spotted at a stage within the local trading centre and arrested. Both the Appellant and complainant were referred to Naivasha District Hospital for examination. The doctor noted a breach of the hymen and a vaginal discharge (pus cells) in the complainant's genitals. The Appellant was subsequently arraigned in court.

9. The legal challenges raised on this appeal can be considered together with those concerning the evidence tendered at the trial. **PW1** and **PW2** indicated that the former's age was 12 years during the time in question. It is true as the Appellant observes his submissions, that the trial court did not conduct a *voir dire* examination prior to receiving the evidence of **PW1**. He suggests that the failure vitiated the trial. The answer partly lies in answering question whether the complainant was a child of tender years; and if secondly the answer is in the affirmative whether the omission in this case is fatal to the prosecution case.

10. In the **M Loonkomok -Vs- Republic [2016] eKLR**, the Court of Appeal observed:-

"Section 19 of the Oaths and Statutory Declarations Act is concerned with the reception and admissibility of evidence of a child of tender years. The section starts by declaring that where the child does not, in the opinion of the court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath. But that evidence shall only be received if, again in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth. So long as that evidence, though not on oath, is taken down in writing, it amounts to a deposition under Section 233 of the Criminal Procedure Code. The Code does not prescribe the precise manner of ascertaining and determining whether the child witness understands the nature of the oath or is possessed of sufficient intelligence or even his or her ability to understand the duty of speaking the truth. *Voir dire*, a latin phrase (*verum dicere*) for saying "what is true", "what is objectively accurate or honest" has been used in most Commonwealth jurisdictions and in some instances in the United States of America,

as "a trial within a trial", a hearing to determine the admissibility of evidence or the competency or qualification of a witness or juror See Duhaime, Lloyd. "*Voir Dire* definition" Duhaime's Legal Dictionary. But the origin of the rule on *voir dire* examination of a child witness as we know it today was first applied in the ancient yet landmark English case of Republic -Vs- Braisier (1779) 1 Leach Vol. I, case XC VIII, PP 199 – 200, which incidentally was a case involving sexual assault on a girl under 7 years of age. The twelve Judges in that case stated, in part, that;

***".. an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination* by the court, to possess a sufficient knowledge of the nature and consequences of an oath… for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence"** *(our emphasis)*

The question therefore is, who is a child of tender years? The Sexual Offences Act and the Oaths and Statutory Declarations Act are silent on this question. However way back in 1959 in the celebrated case of Kibageny Arap Kolil -Vs- Republic (1959) EA 82 the Court of Appeal for Eastern Africa held that the phrase "a child of tender years" meant a child under the age of 14 years. The only statutory definition of a "child of tender years" is Section 2 of the Children Act where it is defined to mean a child under the age of 10 years. This Court has recently in Patrick Kathurima -Vs- Republic, Criminal Appeal No.137 of 2014 and in Samuel Warui Karimi -Vs- Republic Criminal Appeal No.16 of 2014 stated categorically that the definition in the Children Act is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. 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.*

See Athumani Ali Mwinyi -Vs- Republic Cr.Appeal No.11 of 2015"

11. In the present case and in light of the foregoing, **PW1** was definitely a child of tender years and her evidence should have been preceded by *voir dire* examination to confirm her competency to testify. The complainant in **M** was aged about 7 years. Her evidence at the trial was sworn but was not preceded by a *voir dire* examination by the trial court. The Court of Appeal did not agree with defence submission that the evidence was irregular therefore the trial vitiated.

12. The Court stated:

> **"We turn to consider the effect of failure by the trial court to administer *voir dire* on the complainant. It is fully settled that not in all cases that *voir dire* is not administered or is not administered properly the entire trial is vitiated. This court sitting at Nyeri has recently reiterated what has been said many times before that the question will depend on the peculiar circumstances and particular facts of each case See James Mwangi Muriithi –Vs- Republic Criminal Appeal No. 10 of 2014."**

13. The court revisited this question in the passage cited previously by stating that in appropriate cases, despite the court's failure to conduct a *voir dire*, where independent evidence supports the charge, a conviction, could be upheld.

14. In conclusion, the Court of Appeal stated in **M** that:-

> **"On the peculiar facts and circumstances of this case, it is our considered view that the trial was not vitiated by failure to conduct *voir dire* examination. The complainant's evidence was cogent, she was cross-examined and medical evidence confirmed penetration……"**

The court also considered the admitted fact that the Appellant had taken the complainant and lived with her as a wife and the existence of medical evidence to corroborate defilement.

15. In this case, the evidence by **PW1** though not preceded by a *voir dire* examination was firmly corroborated by the independent medical evidence via the P3 forms and PRC forms, the latter completed on the day of the offence (see Exhibit 1 and 2). The breach of the hymen accompanied by the presence of pus cells noted in the complainant's high vaginal swab, as well as documented trauma to the chest, upper limbs and thighs is enough confirmation of **PW1's** testimony regarding the sexual assault. Besides, she reported to her mother when she arrived. **PW2** said the child was crying when she got home and immediately stated that she had been defiled, naming the assailant as the Appellant. He was arrested on the same day at the local stage.

16. The trial court was alive to the law relating to the evidence of minors and the need to test the same. He stated:-

> **"The issue of corroboration of the evidence of a defilement victim is addressed in Section 124 of Evidence Act, Cap 80 Laws of Kenya with the provision that:**
>
> **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 reason to be recorded in the proceeding, the court is satisfied that the alleged victim is telling the truth.**
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> **As the trial court, I need to test the evidence of the victim of credibility. In the present case, I find the evidence so consistent that I cannot agree with the proposal by the accused that it was fabricated. In any event, I have already found that the evidence of PW2 and the medical report support the victim's account, in so far as discharge was discovered on her private parts. She says she knew the accused very well. Am therefore satisfied that the accused penetrated the victim's vagina with his penis.**
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> **In the absence of any evidence to the contrary, I have no reason to disbelief the evidence of the complainant, which I find consistent, detailed and credible as per the test applied Willian Simba & Another –Vs- Republic [2013] eKLR, Sitati J. upheld the use of the evidence of a child to convict without any other corroboration noting that the evidence was consistent and detailed."**

17. Reviewing the evidence by **PW1** and **PW2** alongside medical evidence, it is evident that penetration had occurred. The failure by the prosecution to produce the alleged soiled panty does not detract from the weight of that evidence. The medical evidence reports the incidence of a vaginal discharge and hymenal breach. As to the issue of Shs 10/= which was allegedly given by the Appellant to the complainant, that is neither here nor there. It is immaterial whether any money was passed on to the complainant during the assault. At any rate, **PW1** stated that he had previously rebuffed several romantic advances by the Appellant prior to the material date. I can find no reasons to fault the trial court's findings on this aspect.

18. The Appellant's defence was made upon the ruling being read and his election of the mode of defence. Whereas it is important for the trial court to indicate compliance with Section 211 of the Criminal Procedure Code by recording the actual words contained in the explanation given to an Accused, it is not mandatory. In this case, the record of the day clearly shows that the Appellant understood what options were available to him for his defence. He elected to give an unsworn statement and to call two witnesses. Indeed he gave an unsworn statement and called as a witness his grandmother **M W** (**DW2**).

19. His defence amounted to a mere denial. While I do not agree with the trial magistrate's approach in the judgment which seems to point to a certain duty on the part of the Appellant to explain his movements of the day, I think the Appellant's defence was totally displaced by the prosecution evidence.

20. The Appellant was well known to the complainant. The offence occurred in day time and there is no discernible reason why **PW1** would

have invented the events of the day; and more, frame up an innocent person with whom she had no previous grievance. The Appellant's defence deserved to be dismissed as it was by the trial court. I find no merit in this appeal and will dismiss it.

Delivered and signed at Naivasha, this 20th day of February, 2018.

In the presence of:-

Miss Gikonyo for the DPP

Appellant – present

C/C – Quinter

C. MEOLI

JUDGE