REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 62 OF 2016

SAMMY MUGO NDEGWA.....APPELLANT

VS

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the Principal Magistrate's Court

at Mukuruwieni (Hon. V.O.Chianda,SPM.) delivered on

3rd August, 2016 in Criminal Case No. 184 of 2015)

JUDGMENT

1. The Appellant, **Sammy Mugo Ndegwa** was charged with the offence of attempted defilement contrary to **Section 9(1)(2)** the **Sexual Offences Act.** The particulars of the charge are that on the 6th June, 2015 at [particulars withheld] Village within Mukuruweini Sub-County the appellant intentionally attempted to cause his member to penetrate that of a child aged nine (9) years.

2. In the alternative, the appellant was charged with the offence of Indecent Act with a child aged nine (9) years contrary to **Section 11(1)** of the **Sexual Offences Act, 2006.**

3. The facts of the case as recorded by the trial magistrate are that the appellant waylaid the complainant **(PW1)** as she carried out an errand; she told the court that the appellant had first made some lewd suggestions to her and he then placed her on his shoulders and carried her into a thicket by the roadside; there he removed his clothes and lay on top of her; her mother **(PW2)** testified to having heard her child screaming and that the place of the incident was a short distance from their homestead so she arrived at the scene shortly and caught the appellant red-handed; that he was naked and was lying on top of the minor; she screamed for help forcing him to flee; **PW3** a Nyumba Kumi coordinator was attracted to the scene by the screams of **PW2** and upon rushing to the scene found the complainant lying on the ground without her panties; thereafter the minor was taken for treatment at Mukurweini Hospital and was issued with a P3Form; the matter was reported at Mukurweini Police Station;

4. The Appellant was arrested subsequently charged, tried and convicted at the Senior Principal Magistrates Court Mukurweini and sentenced to twenty (20) years imprisonment.

5. Being aggrieved by both conviction and sentence, the appellant filed a Petition of Appeal and raised the grounds of appeal as are summarized hereunder;

(i) The charges laid against the appellant were non-existent in the Sexual Offences Act;

(ii) The trial court erred in convicting the appellant based on the evidence of the complainant **(PW1)** and her mother **PW2**; their evidence was doubtful; that crucial witnesses were not called;

(iii) The trial court convicted the appellant on charges that were not proved beyond reasonable doubt;

(iv) The trial court rejected the appellants sworn defence without considering that it was not displaced by the prosecution's case;

(v) The sentence imposed was non-existent and not legal;

6. When the appeal came up for hearing the appellant was represented by learned Counsel Mr Wahome Gikonyo and Mrs Gicheha appeared as Prosecuting Counsel for the State; both counsels made oral presentations; hereunder is a brief summation of their respective and rival submissions;

APPELLANTS' SUBMISSIONS

7. The appellants contention was;

(i) The offences the appellant was charged with were not in conformity with the law;

(ii) The charge was for attempted defilement and the Charge Sheet cited Section 9(1)(2) of the Sexual Offences Act; that the appellant was charged with a section that was non-existent in the Sexual Offences Act; the cases cited in support of defects in the charge are **Joseph Toro Mwangi vs R Cr.Appeal No.206 'B' of 2010 (unreported) and Kamunya vs R EA (2009) 181;**

(iii) That a Charge for any criminal offence must be specifically stated and communicated to the appellant; the wording of the particulars was not in conformity with Section 9(1) of the Act; in that it lacked the words ***"commit"*** as required under Section 9(1); it should have read;

> ***"…attempted to commit an act which would cause penetration with a child"***

(iv) The act of causing penetration is defined in Section 2 of the Act as ***"partial or incomplete insertion into the genital organs of another";*** the legal wording in law which ought to have been used in the particulars of the main charge were '***genital organs'***; as opposed to penis and vagina;

(v) The alternative charge was also not correctly worded in that the crucial words that were missing in the particulars were ***"committing" "unlawfully"*** and ***"intentionally";*** the section makes reference to ***"genital organs"*** and words such as penis and vagina are also not contained in the definition of the offence of Indecent Act; cases relied on **Achoki vs R EA (2000) 283; Charles Karuga Kinyua Cr.App.No.319 of 2008 (unreported); Erasmus Wachuiri Wachira (unreported) Cr.App.No.55 of 2009;** these persuasive authorities support the fact that by failing to state the crucial words the charge is rendered as fatally and incurably defective;

(vi) **'Voire dire' test;** the test conducted on the minor did not comply with the set down guidelines; the questions put to the minor were not recorded; there was no testing on whether the minor understood the nature of an oath; nor was it recorded that the minor understood the importance of telling the truth;

(vii) A trial court must record the following; the questions and answers; whether the child appreciates where she is; appreciates the responsibility and duty to tell the truth; the sufficiency of intelligence; the opinion formed on whether the minor understands the nature and solemnity of the oath; satisfaction that the child can give sworn evidence; all these must be recorded so as to enable an appellate court to arrive at a decision on whether this important factor was rightly decided; the failure to record the terms of satisfaction is fatal to the conviction; case relied on **Johnson Muiruri vs R (1983) eKLR.**

(viii) The test is mandatory when a minor is called to give evidence; in its absence there is no evidence upon which a conviction can be based; in the case of **JGK vs R [2015] eKLR** the holding of the Hon. Mativo J was that the minor's evidence ought to be excluded entirely from the proceedings.

(ix) The minors evidence made no mention of the genital organs; she stated as follows;

> **"….he removed his clothes and lay on top of me"**

(x) The minor's evidence was also inconsistent in that she stated in evidence that the appellant removed her trouser and bikers; but made no mention of her panties being removed; under cross-examination she changed and introduced the skirt.

(xi) The minors evidence contradicts that of her mother **(PW2);** in that the minor stated in her evidence that she didn't scream yet the mother states that she heard her child scream; **PW2** stated that she caught the appellant red handed as he lay naked on top of the minor yet in her evidence the minor states that she was alone when her mother found her in the thicket; the mother stated that the minor was taken to hospital whereas the minor stated that she had been taken to the police station;

(xii) That the conviction of the appellant was improper and a miscarriage of justice as the trial court created a lot of the evidence in its judgment that did not come from the evidence of **PW2** and or the doctor **(PW4)**.

(xiii) **On conviction & sentence**: the appellant was acquitted on the main charge and convicted of the offence of attempted defilement; the judgment did not comply with the provisions of Section 169(1) and 169(2) of the Criminal Procedure Code in that it did not specify the offence nor was the section for the sentence cited; the maximum sentence provided under Section 9(2) is ten (10) years yet the sentence meted out by the trial court was for twenty (20) years;

(xiv) The trial court was enjoined to carefully consider the appellants defence; the trial court did not address the appellants defence of alibi nor did it give the reasons for its dismissal;

(xv) The appellant urged this court to find and hold that the conviction was unsafe; to allow the appeal and to quash the conviction and to set aside the sentence.

RESPONDENTS SUBMISSIONS

8. In response Counsel for the State opposed some of the grounds of appeal but conceded the appeal on the grounds that the **"voire dire"** examination was not properly conducted;

9. Counsel submitted that the charge was properly drafted in line with Section 134 of the Criminal Procedure Code; which section reads that the particulars of the charge should be as follows;

> **"….with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

10. The drafter did not go out of the legal provisions when he/she specifically mentioned the penis and the vagina;

11. However Counsel conceded the appeal on the grounds that the '**voire dire'** examination was not conducted to the required standards; that the evidence of **PW1** having been taken unprocedurally may not stand as admissible; the lack of a proper '**voire dire**' test invalidates the entire case; the case law referred to is **JGK vs R (supra);**

12. The test is can the rest of the evidence stand on itself without the evidence of **PW1**; without the evidence of **PW1** the prosecution's case collapses entirely; the evidence of **PW2** was contradictory in part to the minor's evidence; relying on the evidence of **PW2** without that of **PW1** would be prejudicial to the appellant;

13. As for the sentence meted out the same was illegal as it was not provided by the law;

14. In the light of the above counsel conceded the appeal and submitted that the case was not proved beyond reasonable doubt; and therefore the conviction was unsafe.

ISSUES FOR DETERMINATION

15. After taking into consideration the submissions of both the Appellant and Respondent this court has framed the following issues for determination;

(i) Whether a satisfactory ***'voire dire'*** examination was carried out;

(ii) Whether the sentence was lawful.

ANALYSIS

16. This court being the first appellate court it is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion bearing in mind that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified. Refer to the case of **Okeno vs Republic (1972) EA 32.**

Whether a satisfactory 'voire dire' examination was carried out;

17. The appellants contention is that the **'voire dire'** test conducted on the minor did not comply with the set down guidelines; the complainant herein was aged nine (9) years as indicated on the Charge Sheet thus making her a minor; it was therefore necessary for the test to be conducted before her evidence was received;

18. Counsel for the appellant in his submissions went to great lengths to point out the guidelines for a '**voire dire'** examination and cited in particular the case of **Johnson Muiruri vs R (supra);**

19. This court is guided by the above authority and hereunder restates the holding of the Court of Appeal on the proper procedure that ought to be followed when children are tendered as witnesses; the Court of Appeal held as follows;

> **"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 the oath in which even his sworn evidence may be received. If the court is not so satisfied his and unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence 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 it is corroborated by material evidence in support thereof implicating him;**
>
> **It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.**
>
> **The judge is under a duty to record the terms in which he was persuaded and satisfied that child understood the nature of the oath. The failure to do so is fatal to the conviction. "**

20. The court record shows the answers to preliminary questions put to the minor by the trial court which was meant to be a '**voire dire'** interview; the answers read as follows;

> **"My names are J.W. Aged 9years. I go to church and understand when I go to church that it is bad to lie. I go to [particulars withheld] Primary School in class 3."**

21. The trial court then proceeded to make the following finding;

> **"Court – Voire dire examination reveals child understands nature of proceedings."**

22. As stated in the guidelines that trial court must record the following; the questions and answers; whether the child appreciates where she is; appreciates the responsibility and duty to tell the truth; the sufficiency of intelligence; the opinion formed on whether the minor understands the nature and solemnity of the oath; satisfaction that the child can give sworn evidence or otherwise;

23. All these must be recorded so as to enable an appellate court to arrive at a decision on whether this important factor was rightly decided; and that the failure to record the terms of satisfaction is fatal to the conviction;

24. Going by the guidelines set down in **Johnson Muiruri vs R (supra)** and bearing in mind that the minor was aged nine (9) years it is clear from the court record that the trial court failed to record the questions put to the minor; nor was it recorded whether the minor understood the nature of an oath; and further failed to record whether the minor understood the importance of telling the truth;

25. The trial court only recorded that the minor understood '***the nature of the of the proceedings'***;

26. After making the above finding the minor proceeded to give her testimony; there is no indication as to whether the minor was sworn or gave unsworn testimony; essentially a witness maybe sworn or affirmed as is required under Section 151 of the Criminal Procedure Code; in this case the manner of taking evidence of a minor is covered by Section 19 of the Oaths and Statutory Declarations Act; it is this courts considered opinion that after interviewing the minor the trial court ought to have indicated whether the evidence taken was under oath or unsworn; it is apparent that there was a flaw in procedure and it is unclear whether the appellant was convicted on evidence made under oath or otherwise; this court finds that the appellant is not liable to be convicted on such evidence;

27. All said and done this court is satisfied that the '**voire dire'** test conducted on the minor did not comply with the set down guidelines and therefore did not meet the required standards; that the evidence of **PW1** having been taken unprocedurally is therefore inadmissible; this court concurs with the Prosecuting Counsels submission that the evidence of **PW2** and **PW4** cannot stand on its own to show that there was an attempted defilement of the minor and without the evidence of **PW1** the prosecution's case collapses entirely;

28. This court was minded to order for a retrial had the offence been that of defilement; the appellants saving grace was that the offence was that of attempted defilement and that no injury was inflicted probably due to the fact that he was interrupted;

29. This court finds is ground of appeal is found to be meritorious and is hereby allowed.

30. In passing this court has noted an issue that is important though it was not raised by the appellant is the language(s) used at the trial; when the plea was taken the appellant was asked which language he spoke or understood; the record reflects the appellants answer was that he understood **'English'**; the trial court proceeded to read the charge to the appellant in **'Kiswahili'**;

31. The record reads as follows;

> **"Court- Which language do you speak/Understand?**
>
> **Accused- English.**
>
> **Court – Reads out the charge and all its particulars in <u>Kiswahili</u> language and asks the accused person if he admits or denies the truth of the charge.** (emphasis mine)
>
> **Accused responds;-**
>
> **<u>COUNT 1</u>**
>
> **Not true.**
>
> **<u>ALTERNATIVE CHARGE TO COUNT 1</u>**
>
> **Not true.**

32. The matter proceeded to full hearing on the 2/07/2015 and it is further noted that the trial court did not even indicate the choice of language(s) used throughout the trial; nevertheless in this instance the record clearly demonstrates that the appellant understood and was able to follow the proceedings throughout; normally such failure to record the language used at trial if found to be prejudicial to the appellant

would have vitiated the entire proceedings; but this was not the case in this instance.

Whether the sentence imposed was lawful;

33. Upon perusal of the record it is noted that the trial court states in its judgment that it ***"acquitted the appellant on the main charge"*** and thereafter proceeded to convict him ***"of the offence of attempted defilement"***; and imposed a sentence of twenty (20) years imprisonment; this court has perused the court record at length and has noted that the main charge and the particulars all relate to the offence of attempted defilement; and the trial court acquitted the appellant on the main charge and then proceeded to convict the appellant on the same offence; there is an error that is plainly obvious as an acquittal cannot be followed simultaneously with a conviction; it is trite law that the a previous acquittal for the same offence operates as a bar to the conviction for the same offence; a presumption can be made that the trial courts intention was to convict the appellant on the alternative count of Indecent Act with a child which carries a minimum sentence of ten (10) years; sentencing is always left to the discretion of the trial court it is noted in this instance that the fact that the appellant was a first offender did not move the trial court to pass a lesser sentence.

34. This court finds that the decision of the trial court to acquit and convict the appellant simultaneously for the same offence to be irregular and bad in law;

35. This ground of appeal is found to have merit and is hereby allowed.

FINDINGS

36. For those reasons this court makes the following findings;

(i) The '**voire dire'** examination was not conducted to the required standards; the flaw in procedure renders the conviction unsafe.

(ii) The decision of the trial court to acquit and convict the appellant simultaneously for the same offence is found to be irregular and bad in law;

DETERMINATION

37. The appeal on sentence is found to be meritorious and it is hereby allowed.

38. The conviction is hereby quashed and the sentence is hereby set aside; the appellant to be set at liberty unless otherwise lawfully held.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 13th day of March, 2018

HON.A. MSHILA

JUDGE