REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL NO. 13 OF 2015

JAMES MUSYOKA MUEMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the conviction and sentence of L. Simiyu (SRM) on 26th January, 2015 in Machakos Chief Magistrate's Court Criminal Case No. 499 of 2014)

JUDGEMENT

1. The appellant was convicted and sentenced to life imprisonment for the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act. The particulars of the said offence was that the appellant on 29th March, 2014 at [particulars withheld] location market in Kathiani Sub-County within Machakos intentionally and unlawfully caused his penis to penetrate the vagina of S.W.W. a girl aged 10 years. He faced an alternative charge of committing an indecent act with S.W.W. on the same date contrary to section 11 (1) of the Sexual Offences Act.

2. Dissatisfied by the conviction and sentence, the appellant filed this appeal on grounds that he was convicted on insufficient evidence and that he not was positively identified. This being a first appeal, this court is under duty to re-evaluate the evidence tendered in the trial court and come to its independent conclusion as to whether or not it should uphold the conviction and sentence of the trial court. In so doing, the court must have in mind the fact that it did not have the benefit of hearing the witnesses and observing their demeanor.

3. To secure a conviction for the offence of defilement under section 8 (1) of the Sexual Offences Act ('***the Act'***), the prosecution must establish that an accused has committed an act which causes penetration with a complainant who is a child. Penetration has been defined under section 2 of the Act to mean, the partial or complete insertion of the genital organs of a person into the genital organs of another person. He also faced an alternative charge of indecent act with S.W.W. Indecent act is defined under section 2(1) of the Act as an unlawful intentional act which causes any part of the body of a person with genital organs, breasts or buttocks of another, but does not include an act that causes penetration.

4. The evidence on the record is that on 29th March, 2014 at about 4.00 am, E M W (PW1) woke up and lit the lamp to visit the toilet. She saw the door open and on checking, she saw the appellant who was her neighbour lying on her daughters' bed. The appellant was holding S.W.W. tightly and he had inserted his penis in her vagina. D, PW1 screamed. The appellant then grabbed her, strangled her and threw her onto the table. Her children screamed. She struggled with the appellant who finally threw her down and took off. She took S.W.W, the panga and the sandals to the AP Post. There she was given a note and directed to take the minor to Kathiani Hospital. She examined S.W.W. and noticed sperms and semen. She stated that S.W.W. was aged 10 years at the time.

5. S.W.W. (PW2) recounted that appellant who goes by the name James but whom the children fondly call Kassanova came to the house and had sex with her. Her mother (PW1) saw him with the lamp she had lit but he grabbed PW1 and threw her and ran away. She stated that the appellant inserted his penis into her vagina. PW1 went with her to the police at Miomboni and later took her to Kathiani Hospital for treatment. PW2 stated that that was the first time the appellant had intercourse with her. That the appellant fled leaving behind a machete and his shoes.

6. APC Cheriot Samuel (PW3) stated that a female complainant made a report to him on 29th March, 2014 at about 7.00. Later, the appellant went to the police station shouting and he arrested him and took him to Kathiani Police Station.

7. P.C. Samuel Kathero (PW4) stated that S.W.W. accompanied by PW1 made a report of the incident at Kathiani Police Station. That the report was that the appellant secretly entered their house and defiled S.W.W. PW1 heard a commotion and upon checking found the appellant defiling S.W.W. PW1 reported to the Administration Police Post. PW4 issued them with a p3 form and recorded their statements. He took S.W.W. for age assessment at Machakos Level 5 Hospital and her age was ascertained to be 10 years. The age assessment report was produced as P. Exhibit 3. He stated that they had not known the appellant previously. PW1 grabbed the appellant and struggled with him before he fled. That PW1 and PW2 told him that they saw the appellant. He took a machete and sandals brought to him by the Administrative

Officer from Miumbuni.

8. Dr. Michieka Okioga (PW5) examined PW2 and filled her p3 form. It was stated that she had hoarseness of voice due to strangulation. Her hymen was raptured and had irregular margins. The age of S.W.W. was assessed to be 11 years. PW5's opinion was that S.W.W. had been defiled.

9. The appellant was put on his defence whereupon he gave a sworn statement. He stated that he was not arrested rather that he heard about the complaint and went to the police station where he was chased away. He was later chased and arrested and taken to Kathiani. That he never broke the door or went into the house. He stated that the house is a single room occupied by six people. That the doctor examined his urine and a blood sample was taken and no entry made. He denied that the sandals and machete were his. That the charge was fabricated since his brother also faced a similar charge.

10. It was submitted for the appellant that PW1 stated that she saw sperms on S.W.W. That equally, the appellant's urine sample was taken but the prosecution failed to adduce evidence with regard to the urine sample and or semen so as to connect the appellant to the offence. It was submitted that there were irregularities in the way the trial was conducted thus there is no indication in the proceedings that the appellant was given the chance to cross examine PW2 and was thereby prejudiced. That his right under Article 50 (2) (k) and section 302 was breached. To support his argument, the appellant cited **Nicholas Mutiso Nzioka v. Republic Criminal Appeal No. 154A of 2014** where Hon. Nyamweya J cited the pronouncement in **Nicholas Mutula Wambua v. Republic MGA Criminal Appeal No. 373 of 2006** thus:

> ***"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 obvious 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."***

11. It was submitted that the prosecution case raised material doubt but that burden was shifted to the appellant rather than left for the prosecution thereby the conviction was unsafe. That the appellant stated that he stays alone and the trial magistrate was insistent that he ought to have brought someone to account for the hour of the alleged offence. In support thereof the appellant cited **Samuel Maina Mwangi v. Republic [2014] eKLR**.

12. It was submitted that proof of the age of a child was critical in proving the offence of defilement. It was submitted that there was no room to estimate the age. That age having not been proved, the appellant was convicted on uncorroborated evidence. In support of this argument, the appellant cited. **Criminal Appeal No. 504 of 2010 Kaingu Elias Kasomo v. Republic.**

13. The appellant argued that he was not properly identified. That the prosecution did not call any of the children who were said to have been present at the time of the incident. That there was no evidence on how the appellant got to be arrested. That despite making a report PW1 did not give to the police the appellant's description. The appellant in this regard relied on **Samuel Maina Mwangi v. Republic [2014] eKLR** and **Bukenya and others v. Uganda [1972] EA 549**.

14. The respondent on the other hand submitted that PW1's evidence as to the age of S.W.W. was corroborated by PW4 who produced the assessment report. That it emerged from the evidence of PW1 that the appellant who was well known to her thereby he was positively identified and that the defilement was confirmed by PW5's evidence. It was further submitted that under Section 143 of the Evidence Act the prosecution is not under any obligation to call a particular number of witnesses. In this regard the respondent relied on **Julius Kalewa Mutunga v. Republic Criminal Appeal No. 31 of 2005** and **Bukenya** (supra).

15. On the issue of not being given a chance to cross examine PW2, it was submitted that under section 19 of the Oaths and Statutory Declaration Act, where a child of tender age is called as a witness in a proceeding, there are two things the trial court must be satisfied about. First, whether the child understands the nature of oath and secondly, if the child, in the opinion of the court does not understand the nature of oath, whether the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth. It was submitted that the inquiry should graduate to the second level if the child does not understand the nature of the oath. That it is only after inquiry that the testimony of a child of tender age is received. That the trial magistrate found that S.W.W. did not know the normal duty of telling the truth and its normal consequences and was ordered to give unsworn statement which was corroborated by PW1's and that the appellant was not prejudiced in any manner when he did not cross examine S.W.W.

16. In view of the provisions of the law cited earlier in this judgment, it is for this court to determine whether or not there was penetration, S.W.W. was a child and the appellant properly identified. In the alternative, whether or not an indecent act was committed with S.W.W. by the appellant. Besides these issues, it is appropriate that I preliminarily determine the issue raised by the appellant as to the manner in which the trial was conducted thus the fact that PW2's evidence was not subjected to cross examination.

17. The evidence tendered on the age of S.W.W. emanated from PW1 and PW4 who stated that S.W.W. was aged 10 years and PW5 stated that she assessed her to be 11 years of age. It is my considered view that the Doctor was in a position to assess S.W.W.'s age. See: **Francis Omuroni v. Uganda Court of Appeal in Criminal Appeal No. 2 of 2000** where it was held:

> ***"In different cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense…"*** (Emphasis mine)

It follows therefore that S.W.W.'S age was not above 11 years thereby she was a child of tender age. See the pronouncement of the Court of Appeal in **Patrick Kathurima v. Republic [2015] eKLR** where it was opined that a child below the age of 14 years is a child of tender

years.

18. Having so found, the trial magistrate ought to have after determining that she was unable to comprehend the issues subject her evidence to cross examination. Having not done so, the appellant was prejudiced by the omission. See the Court of Appeal's holding in **H.O.W. v. Republic [2014] eKLR** which cited **Nicholas Mutula** (supra) with approval thus:

> ***"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. An accused person who chooses to give unsworn statement in his defence does so as a result of the provisions of the Criminal Procedure Code which protect him from being cross-examined if he chooses to give unsworn statement in his defence. It must be appreciated that the accused person cannot in law be charged with the offence of perjury in respect of a statement he gives in defence of himself in a criminal case brought against him. That protection is not available to a witness in a criminal case. Section 208 of the Criminal Procedure Code is clear on this aspect. It states:***
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> ***"208 (1) If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence (if any).***
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> **(2)** ***The accused person or his advocate may put questions to each witness produced against him.***
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> **(3)** ***If the accused person does not employ an advocate, the court shall, at the dose of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any questions to that witness and shall record his answer."***
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> ***(underlining supplied)***
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> ***This provision is clear on the duty of the court to ensure that at the end of any evidence in chief, the accused is not only afforded opportunity to cross-examine that witness but if he is unrepresented, he is asked by the court to do so if he wishes and his answer to that question shall be recorded. The learned trial Magistrate did not do this, perhaps because he thought as we have stated that as J.S. gave unsworn evidence she would not be subjected to cross-examination. With respect he was wrong and the learned Judge of the High Court failed to note and to act on this serious failure in law.***
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> ***In the case of Sula v Uganda (2001)2 EA 557The Supreme Court Uganda stated as follows: "Although an accused person is not liable to cross-examination if he chooses to give unsworn testimony, the law does not prohibit the cross-examination of a child witness who has not given sworn testimony because she did not understand the nature of oath. A child witness who gives evidence not on oath is liable to cross-examination to test the veracity of his/her evidence."***
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> ***…This is the law. We only need to add for emphasis that the proviso to Section 19 of the Oaths and Statutory Declarations Act, the section that gives guidance on the evidence of children of tender years states:***
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> ***"If any child whose evidence is received under subsection (1) willfully gives false evidence in such circumstances that he would, if the evidence had been given on oath, have been guilty of perjury, he shall be guilty of an offence and liable to be dealt with as if he had been guilty of an offence punishable in the case of adult with imprisonment."***
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> ***In our view, unless such a child's evidence is subjected to cross-examination, it would be impossible to know whether the evidence he gives is false or not. This provision in our view strongly supports the law as above that Section 208 of the Criminal Procedure Code applies to all witnesses who give evidence and is not confined to only those witnesses who give sworn evidence. It covers children giving evidence not on oath as well. Thus the learned court erred in law in failing to ask the appellant to cross examine J.S. if he wished to do so, and the High Court erred in failing to direct its mind to that serious legal lapse. We say serious legal lapse because the conviction was based on that evidence on the main."***

19. In view of the aforegoing disposition, I find that the trial was conducted in a manner prejudicial to the Appellant since his right to a fair trial was infringed upon. It is noted that the Appellant was sentenced to life imprisonment on the 26/1/2015. There is need to have the conviction quashed and the sentence set aside. The next issue to consider is whether a retrial should be ordered. In the case of **FATEHALI MANJI =VS= REPUBLIC [1964] EA 481** the court held as follows:-

> ***"Even where a conviction vitiated by a mistake of the trial court of which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to the accused person"***

Looking at the record of the lower court it is noted that the Respondent's case was weighty save only for the failure by the trial court to allow the Appellant cross–examine the complainant minor. The Appellant has barely served a fraction of the sentence, I find the interests of justice

tilts in favour of an order for a retrial. The retrial is not likely to cause injustice to the Appellant.

20. In the result, I allow the appeal. The conviction is hereby quashed and the sentence set aside and order for a retrial in this case. The Appellant is ordered to be produced before the Chief Magistrate at Machakos for the purpose of retrial which shall be conducted by a different magistrate other than Hon. L. Simiyu.

Orders accordingly.

Dated and delivered at Machakos this **30th** day of **May, 2018**.

D. K. KEMEI

JUDGE

In the presence of:-

Kyalo for Mutinda - for the Appellant

Machogu - for the Respondent

Kituva - Court Assistant