REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 192 of 2015.

BETWEEN

D N M.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(***An appeal from the original conviction and sentence in the chief Magistrate's Court at Makadara Cr. Case No. 1856 of 2013 delivered by Hon. E. K. Suter, R.M on 6th November, 2015).***

JUDGMENT.

Background.

1. The Appellant herein was charged with the offence of incest contrary to Section 20(1) of the Sexual Offences Act. The particulars of the offence were that on diverse dates between the months of January, 2013 and 21st April, 2013 within Nairobi County, caused his penis to penetrate the vagina of P O N, a child aged 8 years, who was to his knowledge his daughter. He was charged in the alternative with committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act in that he intentionally and unlawfully touched the vagina of P O N, a child aged 8 years with his penis.

2. The Appellant was arraigned in court and at the conclusion of his trial found guilty for the main count. He was sentenced to imprisonment for life. Being dissatisfied with both the conviction and sentence he preferred the instant appeal. His grounds of appeal are set out in his petition of appeal filed 20th November, 2015. In summary, they are; that the offence of incest was not proved, that the prosecution evidence was contradictory and unclear, that penetration was not proved, and that the sentence was too harsh in the circumstances.

Submissions.

3. The appeal was canvassed before on 21st May, 2018 with learned counsel, Mr. Mogikuyu representing the Appellant and Ms. Sigei acting for the Respondent. Both counsel made oral submissions. Mr. Mogikuyu underscored the fact that the relationship between the complainant and the Appellant, daughter and father respectively, was not in dispute. That what was in dispute was the proof of penetration. He submitted that the date when the offence occurred was not clear from the complainant's evidence and that the evidence of PW2 and PW3 was inconsistent. He pointed to the inconsistency about the amount of times the act was done which implied that the minor was not truthful. He submitted that the evidence of PW2 and PW3 differed with regards to whether the child's private parts were examined at the police station. He submitted that had the two witnesses been consistent it would have been concluded that there was penetration. But the contrary being the case was a testimony that penetration was not proved. He submitted that the evidence of the clinical officer and the doctor was that they did not find any physical injuries on the complainant. Further, that swabs were taken that did not indicate the presence of sperms.

4. Counsel questioned the failure of the officer who received the complainant at Industrial Area Police Station. He urged the court to note that the initial report was never adduced. He submitted that the Appellant's submission that his daughter was born with some abnormalities, including in her private parts, was not considered, and accordingly, his defence could not be deemed to be an afterthought.

5. He questioned the failure of either of the complainant's sisters, who were privy to the circumstances of the offence, to testify. He submitted that bearing in mind the young age of the complainant, was a possibility that she was telling stories or fantasizing the issue. That this being a serious offence it had to be proved beyond a reasonable doubt but that the evidence on record fell far below this requirement. He therefore urged the court to re-evaluate the evidence and allow the appeal.

6. Ms. Sigei opposed the appeal. She submitted that the minor told the truth, a fact that was attested by the trauma she exhibited during her

testimony. Further, PW1 was examined by a clinical officer who found bruises on the labia minora and that the hymen was also hyperemic with irregular margins with a conclusion that there was defilement. That Dr. Maundu also noted that the hymen was broken. As such, penetration was proved.

7. With regards to the discrepancy on the date of birth of the victim, she submitted that this was curable under Section 382 of the Criminal Procedure Code. That the complainant gave her age as 7 years and the P3 form gave her age as 8 years which clearly meant that she was a child of tender years.

8. On identification, she submitted that the same was established as the Appellant was the child's father. On sentence she submitted that Section 20(1) of the Sexual Offences Act provides for life imprisonment and the sentence was therefore legal. She submitted that the Appellant breached the duty of trust against the complainant who trusted him to take care of her and he should therefore be punished accordingly. Further, that the complainant had to go through counseling to try and recover her mental sanity. She therefore urged the court to dismiss the appeal on both the conviction and sentence.

9. Mr. Mogikuyu in reply, maintained that the evidence on record was not consistent or reliable. That even if PW1's sister was young she should have been called to testify as to what happened in the house. He urged the court to draw a negative inference from the failure to call her. He pointed out that there was no evidence on record to show that PW1 was counseled and that while the prosecution applied for an adjournment to allow for counseling no evidence was adduced to show that the same was done. He submitted that the prosecution painted a picture that PW2 and PW3 were concerned about the complainant but their evidence was very disjointed and that the failure to call the officer who received the initial report further weakened it. He added that it was not disclosed who took the child to the hospital. Counsel urged the court to note that the evidence of PW4 was to the effect that it was normal for the hymen to be red or pink. He submitted that the offence was not proved and he urged the court to allow the appeal.

Determination.

10. Before I entirely reevaluate the evidence on record, it has captured my attention that I should first determine whether the *voire dire* examination was properly conducted. The requirement to conduct a *Voire dire* examination is provided under Section 19(1) of the Oaths and Statutory Declarations Act. The same reads as follows;

> ***"Where, in any 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."***

11. Its purpose was explained in the case of **Nyasani s/o Bichana *v.* Regina[1958] EA 190**, where it was held that:

> ***"It is clearly the duty of the court under that section to ascertain, first, whether a child tendered as a witness understands the nature of an oath, and, if the finding on this question is in the negative, to satisfy itself that the child***
>
> > ***"is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth."***
> >
> > > ***This is a condition precedent to the proper reception of unsworn evidence from a child, and it should appear upon the face of the record that there was due compliance with the section."***

12. The examination must ensure that it meets two tests. First, the court must ascertain whether the child understands the nature of an oath. If it finds that the child understands the nature of the oath then the child may give sworn testimony. However, where the child does not understand the nature of the oath the court must proceed to the second stage which is to ascertaining the intelligence of the child to appreciate the duty of telling the truth.

13. In the present case, a *voire dire* examination was carried out on the complainant in the following manner.

> ***"PW1 Voire Dire Examination***
>
> ***Question-What is your name?***
>
> ***P.O***
>
> ***Question-How old are you?***
>
> ***6 years old***
>
> ***Question-Do you go to school?***

___ Academy in Class 1.

Question-Do you go to church?

Yes

Question-Often or once a weak?

I go and at times I don't.

Question-Do you remember the name of the church?

I can't remember

Question-What are you told in church about telling the truth or lies?

We are to tell the truthful

Question-What happens to those who lie as per the church reading?

They go to satan

Question-In court are you to tell the truth or to lie?

To tell the truthful

Question-If you lie to the court what will happen?

I don't know

Question-Do you know which case brought you to court?

The accused did bad manners to me

<u>Court</u>

Voire Dire Examination conducted. The minor understands the importance of telling the truth as per the church teachings and the truth not to lie to court. Therefore to give sworn evidence."

14. It is clear from the above that the trial court did not undertake to accomplish the first test, that is; whether the child understood the nature of an oath. This court also noted that the trial court asked the child whether she understood the consequences of lying to the court which may appear to be a question that pertains to the nature of an oath. However, it is clear that this question was answered in the negative. Only the second test of the examination was therefore undertaken, which is ascertaining whether the child understood the importance of telling the truth. In view therefore, the examination done could not be a basis of ruling that the child would give a sworn statement of evidence. This then rendered the entire proceedings a mistrial in the sense that the minor was subjected to taking an oath when she did not understand its meaning.

15. It is trite that where an Appellant has not had a satisfactory trial an order for retrial is the proper order to be made. See: **Vashanjee Liladhan *v.* Rex[1946] EACA 150**. The considerations to be taken into account before ordering a retrial were enunciated in **Opicho *v.*Republic[2009]KLR 369**, that:

> "***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."***

16. The prosecution's case was that the Appellant was the complainant's father and after a quarrel with her mother he brought her to Nairobi to live with him. During that period he had carnal knowledge of her. This was discovered by hairdressers who noticed the child had difficulties walking and took her to Industrial Area Police Station.

17. This court has considered the evidence adduced at the trial and without going into details found that the age of the complainant, as a minor, and her relationship to the Appellant, she was his daughter, were not in dispute. The final element of the offence of defilement is penetration, which I find was proved by the complainant's evidence and the medical evidence adduced by **PW4** and **PW6** which indicated that there was bruising to the complainant's genital areas and that her hymen was interfered with in a manner that pointed to the allegations.

18. While the Appellant testified that the child had a deformed genitalia which left it open. However, this was countered by the evidence of PW4 who testified that the hymen was still there but irregular and irritated. This court is therefore satisfied that there is sufficient evidence to found a conviction and so a good basis for a retrial is laid.

19. On whether a retrial would prejudice the Appellant, he has been in custody since 21st September, 2015, when his surety withdrew, which means he remained in custody for a period of 2 years, 8 months and 22 days. Given that if convicted he would be liable to life imprisonment, the interests of justice demand that a retrial be conducted. Also noteworthy is the fact that the offence of defilement is a serious offence which must be accorded the attention it deserves so that justice is served both to the accused and the victim. Again, the period spent in custody shall be mitigated by the fact that the Appellant shall be entitled to bail once he returns to the trial court.

20. In the end, I quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held. He shall be escorted to the Industrial Area Police Station for purposes of preparing him to go to court for plea taking not later than21st June, 2018. It is so ordered.

DATED and DELIVERED this 13th day of June, 2018

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Mogikiyu for the Appellant.

2. Miss Atina for the Respondent.