REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 9 OF 2013

DISHON MWANJE AMINI .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(An Appeal from the Judgment of the Resident Magistrate Honourable B.J Bartoo

in Eldoret Criminal Case No. 3397 of 2013 dated 10th January, 2013)

JUDGMENT

DISHONE MWANJE AMINI was charged in the lower court, in the main count, with an offence of defilement contrary to *Section 8(1)* as read with *Section 8(2)* of the *Sexual offences Act No. 3 of 2006.*

The particulars of this offence are that on the 10th day of August 2012 in Likuyani District within Western province, the appellant intentionally and unlawfully caused his genital organ (penis) to penetrate into the genital organ (vagina) of *M L O*, a girl aged 4 years.

To the foregoing count there was an alternative count of indecent act, contrary to *Section 11(1)* of the *Sexual Offences Act No. 3 of 2006 Laws of Kenya.*

The particulars hereof are that on the 10th day of August 2012 in Likuyani District within Western province, the appellant intentionally and unlawfully caused his genital organ (penis) to come into contact with the genital organ (vagina) of *M L O* a girl child aged 4 years.

In the second count the appellant was charged with the offence of being in possession of Narcotic drugs (bhang) contrary to *Section 3(1)* as read with *Section 3(2) (a)* of the *Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994.*

The particulars of this offence being that on the 10th day of August, 2012 at Kipsangui village, Sango sub-location, Kongoni location in Likuyani District within Western Province, the appellant was found in possession of a narcotic drug (bhang) to wit one roll, which was not in a medicinal preparation.

The prosecution case is that *M L O*, the complainant herein was at the time of the alleged offence, on 10th day of August 2012 aged 4 years, having been born on 14th July, 2007. She has an older sister called *J*, the PW-2 in this case, who at the time was aged 7 years. Their mother is the PW-1 in this case. They live in Likuyani District.

On the material day, that is 10th August, 2012 at noon, PW-4 was at home washing a child. PW-2 and the complainant were playing in Mapera. The appellant herein went to where the children were. He picked the complainant and took her into a maize plantation. PW-2 followed them. The appellant put grass in the complainant's mouth. He then removed her clothes. He had two knives and threatened that if she cried he will kill her. PW-2 went back and called her mother (PW-1). The mother was led to the scene. She found the complainant with some grass on her mouth and without a pant. She also had a white discharge. Members of the public informed the police about the incident, at Kogo police post. The police visited the scene and started looking for the suspect. On 11th August, 2012 as PW-5 was going to the shops he noticed a man who was following him. Some boys who were along the road told PW-5 that the man is the one who had defiled a girl. PW-5 looked for a neighbor and they apprehended the suspect. He was taken to Assistant Chief's office at Sango. PW-3, the village elder was there. He called a Sergeant from Kogo Patrol Base. They went to the scene at [particulars withheld] where they found the grass had been cut and disturbed where the complainant had been laid on. There was a path to the place. The suspect was searched by PW-6. He was in a Jeans short and in the pocket the girl's pant was recovered. He also had one roll of bhang, some raw leaves and assortment of papers. All were kept as exhibits. He was taken to Turbo police station. Exhibit memo form was prepared and the one roll of bhang forwarded to

Government Chemist in Kisumu for examination.

On 13th August, 2012 the complainant was examined at Turbo Health centre by PW-4 who filled her P-3 form. It was noted that there was redness of the vagina and there was a discharge. Urinalysis was done which revealed presence of epithelial cells, showing friction. STDI and HIV were negative. It was concluded that she had been penetrated.

The report from Government Analyst was obtained which reveals that the plant material which the appellant had was cannabis, which falls under the first schedule of the Narcotic Drugs and Psychotropic Substances (Control) Act 1994.

The appellant was then charged with the offences.

The appellant gave unsworn testimony in his defence and called no witness. He alleged that on 11th August, 2012 he was at home. Two motorbikes arrived with 5 people. They arrested him. Among them was a lady who confirmed that the appellant was the one. He was assaulted and taken to Kogo police station. He was taken to the hospital and examined but nothing was found. He was however charged. He denied the charge because he did not commit the offence.

The trial court evaluated the evidence and found both counts proved beyond reasonable doubt. The appellant was convicted of the offences. He was however only sentenced to life imprisonment on the first count. On the second count the court observed that it will not make a finding.

The appellant dissatisfied with the conviction and sentence appealed to this court on the grounds that:-

(1) He pleaded not guilty.

(2) The prosecution did not prove their case beyond reasonable doubt.

(3) Essential witnesses did not offer evidence.

(4) The investigations were shoddy.

(5) He was denied the right to express himself.

The appellant in his written submissions challenged the way he was identified as the culprit given that the complainant did not testify and PW-2 did not describe him. On allegation that the pant was recovered from him, he challenged the doctrine of recent possession in that the said pant was not subjected to forensic examination to connect it to the complainant. The appellant further challenges the evidence of PW-2 of which he alleges is contradicted by the evidence of other witnesses and she was also not subjected to cross examination. He as well challenges the age of the complainant given that what was produced was a clinic card rather than a Birth Certificate.

The state opposed the appeal on the grounds that the age of the victim was established through the clinic card of which was produced by her mother, showing she was 4 years old. The assailant was described by the children and was traced and arrested. Upon his arrest the complainant's pant was recovered from his pocket which shows he was the real culprit. The evidence of the clinical officer revealed there was penetration and the appellant was therefore rightly convicted and sentenced.

As the first appellate court I have evaluated the entire evidence in the file, considered the judgment entered by the lower court, the sentence passed, grounds of appeal and submissions by each side. What I have found is that there are various procedural anomalies occasioned at various points in the course of the trial. To start with the trial magistrate indicated before taking the evidence of PW-1 that the minor's mother is to testify on behalf of the minor under *Section 31* of the *Sexual offences Act.* The section is about vulnerable witnesses. *Section 31(1) (a) (b)* reads: -

"A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is –

(a) the alleged victim in the proceedings pending before the court;

(b) a child;

The court under this section should have started by declaring the complainant by the virtue of her age, a vulnerable witness. This did not happen. The court should then have considered provisions of *Section 31(4)* which reads: -

"Upon declaration of a witness as a vulnerable witness in terms of this section, the court shall, subject to the provisions of subsection (5) direct that such witness be protected by one or more of the following measures –

(a) allowing such witness to give evidence under the protective cover of a witness box;

(b) directing that the witness shall give evidence through an intermediary

(c) directing that the proceedings may not take place in open court;

(d) prohibiting the publication of the identity of the complainant or of the complainant's family, including the publication of information that may lead to the identification of complainant or the complainant's family; or

(e) any other measure which the court deems just and appropriate.

The role of an intermediary if appointed under *Section 31(5),* is given under *Section 31 (7)* as:-

(a) convey the general purport of any question to the relevant witness.

(b) Inform the court at any time that witness is fatigued or stressed; and

(c) Request the court for recess.

From the foregoing provisions it is clear that an intermediary does not offer evidence on behalf of a declared vulnerable witness, but assists such witness to give evidence. The trial court was therefore wrong in declaring that the mother of the minor was to give evidence on her behalf under *Section 31* of the *Sexual offences Act.* Such a procedure is not provided for under the said section or any other which I am aware of. The evidence PW-1 gave is her own evidence and not that of the complainant.

The second error is on the way the voir dire was conducted on PW-2. What was recorded was only the answers the child gave to the questions purportedly put to her by the court. The questions were not recorded. The court finding at the end of it is also not correct. The court found that, ***"the child knows the meaning of truth and however she is of tender years. She will not be sworn".*** By conducting the voir dire the court must have found that the child was of tender years; that's below 14 years old. Voir dire couldn't have been done to establish whether the child was of tender years.

It is done to establish:-

(1) Whether the child is intelligent enough to offer evidence.

(2) Whether the child understands the nature and meaning of oath.

The first consideration determines whether the child will give evidence or not. While the second one determines whether the child will give sworn or unsworn evidence. The procedure of taking and recording voir dire was well stipulated in the case of ***Johnshon Mwiruri versus Republic (1983) KLR 447*** and was later on reiterated in the case of ***Kivevelo Mboloi versus Republic, Criminal Appeal number 34 of 2013***. Voir dire is a crucial procedure and the court should take its time to take it meticulously. It was wrong for the trial magistrate not to record questions which the court put to the minor, and also to hold that she was to give unsworn evidence because she was a child of tender years.

While one may argue that the errors pointed out so far did not prejudice the appellant in any way, and are curable under *Article 159 (2) (d)* of the *Constitution* which reads that:-

"justice shall be administered without undue regard to procedural technicalities;"

What followed after PW-2 gave evidence prejudiced the appellant to a great extent. PW-2 was not subjected to cross examination by the appellant. Probably the trial court thought that was the right procedure given that she gave unsworn evidence. *Section 145 (1) (2)* and *(3)* of the *Evidence Act* shows without exemption that a witness shall offer evidence-in-chief, be cross examined and then re-examined. The veracity of PW-2's evidence was not tested by the appellant by way of cross examination which prejudiced him in the trial.

Lastly, the appellant was found guilty of the offence in court 1 and 2. The trial court however upon convicting him on both, passed sentence in the main count and not in the 2nd count. This is wrong for even where two sentences cannot be served either concurrently or consecutively, the sentences are pronounced but one is held in abeyance in subsistence of the other. This is so as an appeal may succeed in one and not the other.

Given the foregoing considerations it is clear that the conviction in count No. 1 is unsafe and therefore unsustainable. The procedural defects heavily undermines the quality of the evidence relied on to arrive at the conviction. I accordingly quash the conviction and the sentence of life imprisonment imposed against the appellant in the said count. However, the evidence that he had one roll of cannabis sativa is not subject to the said procedural defects. The appellant did not challenge that evidence at all. He was rightly convicted of that offence but erroneously not sentenced. I do sentence him for the offence to 5 years and 7 months imprisonment of which is equivalent to the period already served as he was sentenced on 10/1/2013. He should therefore be released forthwith unless otherwise lawfully held.

S. M GITHINJI

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this **26th** day of **July,** 2018

In the presence of:-

(1) The appellant

(2) Ms Kagali for State

(3) Mr. Mwelem Court clerk