REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 138 of 2015.

SAIDI ALI MDOA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in the

Chief Magistrate's Court at Kibera Cr. Case No. 37 of 2014

delivered by Hon. Juma, SPM on 12th August, 2015).

JUDGMENT.

Background.

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual offences Act No. 3 of 2006. It was alleged that on 13th April, 2014 at [particulars withheld] within Nairobi County, unlawfully and intentionally caused his male organ namely penis to penetrate into the private parts namely anus of S.Y.A., a child aged 10 years, against the order of nature. The Appellant was found guilty, convicted and sentenced to life imprisonment. He proffered the present appeal against both the conviction and sentence.

2. The Appellant's grounds of appeal were set out in his supplementary memorandum of appeal filed 11th April, 2018. They were that; (i)the learned magistrate erred in failing to find that the prosecution had failed to prove the case of indecent assault, (ii)the trial magistrate erred when he failed to analyze and evaluate the entire evidence, (iii)the learned magistrate erred in failing to assess the complainant's evidence thoroughly, (iv)the honorable magistrate erred in failing to address the irreconcilable contradictions in the medical reports, (v)the trial magistrate erred in failing to consider his defence, and (vi)the sentence meted was manifestly harsh and excessive in the circumstances.

Determination.

3. Before I summarize the evidence, it is important to interrogate the manner in which the *voire dire* examination of the complainant was conducted. This is because the examination is a mandatory legal requirement and if the same is not conducted in the manner prescribed by the law, the entire trial is vitiated.

4. A look at the trial court record shows that the complainant who was eleven years old was examined as follows;

VOIRE DIRE EXAMINATION

"I am SYA. I am 11 years old. I attend Madrassa. I also attend school at [particulars withheld] ***in Kawangware. We stay at Riruta with my mother K, I also stay with my father Y who is in court with me. My mother is outside court. I stay with my two older brothers I and A. I also stay with one sister called H. She is younger than me.***

I attend Madrassa and I know that it is good to tell the truth always. I also go to Mosque to pray every Friday. It is not good to tell lies. Those who lie get curses and those who tell the truth are good. I do not want curses I always tell the truth.

I do not know the effect of telling the truth other than it is generally good and to avoid curses."

5. The purpose of a *voire dire* examination is first, to ensure that the child understands the nature of an oath and second, whether the child is intelligent enough to understand the meaning of an oath and of speaking the truth. This purpose was enunciated by the then **East African Court of Appeal in 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."***

6. Nothing in the conduct of the *voire dire* proceedings seems to indicate that the trial magistrate tried to ascertain that the child understood the nature of an oath. The examination seemed focused on the latter test, that is, whether the child was sufficiently intelligence to understand the duty to speak the truth. This is confirmed by the finding of the court that, ***"[t]he child is intelligent enough he can understand the meaning of oath let him give sworn evidence".*** It is clear that the trial court did not establish whether the child understood the nature of an oath before allowing him to give sworn evidence. This was a fatal error that rendered the trial a nullity.

7. Having found that the trial was a nullity, there are two remedies available; an acquittal or a retrial. With regards to a retrial the circumstances under which one can be ordered were set out by the Court of Appeal in **Opicho *v.* Republic [2009] KLR 369** which held 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."***

8. It is clear that the court must evaluate the facts and circumstances of the case before determining whether a retrial is the proper order to make. The Appellant's main submission during the course of the appeal was that the evidence at hand could not found a conviction. The contradiction in the medical evidence clearly stood out. The examining doctor at Nairobi Women's Hospital, Dr. Muhombe, did not testify and was represented by Dr. Nguku who produced a Post Rape Care Form. The Form clearly states that the complainant suffered an anal laceration. When questioned on this fact Dr. Nguku testified that the examination showed tears of the anus that could not be stitched but that the complainant's sphincter was still intact. Dr. Maundu on the other hand did not observe any injuries on the complainant. The examinations were carried out on the 13th and 14th April, 2014 respectively. Therefore, the short lapse of time between the two examinations could not explain the absence of similar evidence. This is noted against the backdrop of the fact that it was contested by the defence that the complainant suffered any injuries.

9. The criteria to be applied when evaluating expert evidence was set out in ***Davie v. Magistrates of Edinburgh [1953] SC 34, SLT 54*** as follows:

> ***"Expert witnesses, however skilled or eminent, can give no more than evidence … Their duty is to furnish the judge or jury with the necessary … criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved by evidence. The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole evidence in the case, but the decision is for the judge or jury."***

10. In the present case, the court cannot conclusively consider the evidence of either medical expert intelligible, convincing or tested owing to the divergent findings arrived at. They represent inherent material contradictions that go into the core of the case.

11. Further contradictions are glimpsed from the evidence of PW1. The complainant in cross-examination testified that he did not see the Appellant's wife in the house when he was being defiled. In re-examination he stated that he saw the Appellant's wife asleep in the bedroom while he was being defiled and that she never woke up. Further that he heard the Appellant talk to the wife as he left the house and he had not seen her. The matter is muddled further by the circumstances surrounding the incident set out in the Post Rape Care Form in which it is recorded that after the complainant was defiled he was told to go and call the Appellant's wife. The contradictions can be termed as material given that they call into question the circumstances prevailing at the *locus in quo* when the incident occurred. On the one hand, it appears that the Appellant's wife was present in the house and on the other hand, that she was not in the house and the complainant was actually sent to fetch her. These are statements apparent from someone who was coached what to say but forgot the actual version of the story to tell. That alone casts doubt in the mind of the court as to the guilt of the Appellant.

12. I am of the view that even if the Appellant was sent for retrial, the retrial may not likely yield a conviction. It follows that the second recourse is the only option available. I accordingly quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held. It is so ordered.

DATED and DELIVERED this 26th day of September, 2018

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Appellant in person.*

2. *Miss Atina for the Respondent.*