REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 145 OF 2016

YUSUF AHMED YUSUF.............APPELLANT

VERSUS

REPUBLIC..................................RESPONDENT

(An appeal from the conviction and sentence meted out by Hon. R. Odenyo, Senior Principal Magistrate on 29th April, 2016 in Mombasa Chief Magistrate's Court Criminal Case No. 400 of 2015).

JUDGMENT

1. The appellant, Yusuf Ahmed Yusuf, filed a petition of appeal on 22nd August, 2016 challenging his conviction and sentence that was meted out against him in the lower court. He had been arraigned before the said court on 2nd March, 2015 where he was charged with the offence of defilement of a boy contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 1st of March, 2015 in Changamwe Sub-County within Mombasa County, he intentionally and unlawfully caused his penis to penetrate the anus of SA [name withheld] a boy aged 9 years.

2. The appellant was also charged with the alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 1st March, 2015 in Changamwe Sub-County within Mombasa County he intentionally and unlawfully caused his penis to rub the anus of SA [name withheld] a boy aged 9 years.

3. The appellant was convicted and sentenced for main charge of defilement. He was aggrieved by the Judgment of the lower court and brought this appeal. He filed grounds of appeal which were expounded by way of written submissions that were filed on 19th September, 2018.

4. The appellant amended his grounds of appeal and urged this court to consider that the voire dire examination of PW1 was not carried out properly. He also indicated that the trial court failed to consider the circumstantial evidence surrounding the case and that the evidence adduced did not support the charge.

5. On the issue of voire dire examination, the appellant submitted that the Hon. Magistrate did not record the questions that he put to PW1 but only wrote the answers. He made reference to the case of **Ben Maina Mwangi vs Republic**, Nairobi High Court Criminal appeal No. 471 of 2001. He further submitted that the evidence of PW1 was not recorded properly thereby occasioning a miscarriage of justice. It was the view of the appellant that PW3 testified to implicate him.

6. The appellant also submitted that the evidence adduced did not support the charge. He stated that the same could be deduced from the evidence of PW1 who testified that he was defiled on 1st March, 2015 yet the PRC Form indicates that the perpetrator had been luring the PW1 into the mosque where he used to insert his penis into his anus. To this end, he cited the case of **Yongo vs Republic**, Criminal Appeal No. 1 of 1993 to show that a charge was defective under the provisions of Section 24(1) of the Criminal Procedure Code if it does not accord with the evidence in the committal proceedings or if the prosecution fails to charge for an offence which is disclosed in committal proceedings and if it does not accord with the evidence given at the trial.

7. Ms Marindah, Prosecution Counsel submitted that PW1's evidence was not shaken on cross-examination. She further stated that the voire dire examination of PW1 was properly done and that the said evidence could be relied upon for a sexual offence.

8. It was the submission of the said Prosecution Counsel that PW3 found the appellant sodomising PW1 and that medical evidence and the P3 form for the appellant corroborated the evidence of PW1.

ANALYSIS AND DETERMINATION

9. The duty of the 1st appellate court is to analyze the evidence adduced in the lower court and come to its own conclusion, bearing in mind that it neither saw nor heard the witnesses testify. In **Okeno vs Republic,** [1972] EA 32 it was held that:-

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."***

10. The issues for determination are:-

(i) If voire dire examination was properly conducted;

(ii) if there was evidence of penetration of the victim's anus;

(iii) If the age of the victim was proved; and

(iv) If there was corroboration of the evidence tendered by the prosecution.

11. PW1, SA [name withheld] testified that he used to attend Madrassa. He pointed out the appellant in court as the Madrassa Teacher, whose name is Ustadh Yusuf. He narrated that on 1st March, 2015 he went to the Madrassa in the morning. The appellant herein told him to wash his hands, legs and face, which he did. The appellant then told PW1 to go with him behind the mosque. He ordered him to remove his clothes and sit on him. PW1 stated that the appellant inserted his penis into his anus. It was his evidence that Ustadh Salim then appeared and saw them. The appellant stopped. He dressed up and also dressed PW1. PW1 stated that he did not cry because he feared the appellant would cane him.

12. PW1 further testified that Salim then took him to the Village Elder. In the first instance, they did not find him but they went back later and found him. PW1 indicated that was not the first time the appellant had sodomised him. He later went to the Police Station wherein he was issued with a P3 form. He was escorted to Coast Province General Hospital (CPGH) where he was examined and treated.

13. PW2, ZN is PW1's mother. She testified that her son is 9 years old. She had his clinic card with her in court. She indicated that she knew the appellant as PW1's Madrassa Teacher. She recounted how on 1st March, 2015 at noon, she was informed by one Amir who went home with PW1 that the latter had been defiled in the anus by the appellant. This was after the appellant made PW1 to sit on him. On checking PW1's anus she found out that he had some bruises. She reported to the village Elder and the matter was referred to the Police. PW1 was later taken to hospital for examination.

14. PW3, Hasan Bill testified that on 1st March, 2015 he went to his house to pick some chalk and on going back to the mosque where he worked as a Madrassa Teacher, he found PW1 who was naked, squatting. On moving closer, he saw a naked boy seated on the lap of the appellant. PW3 testified that the place was secluded.

15. On PW3 approaching them, they got up. He saw that the appellant was wearing a condom and realized that he had been sodomising the boy. It was his evidence that he knew the appellant as a Madrassa Teacher and the boy he was sodomising was his student. PW3 narrated that the appellant followed PW3 and asked him to let the matter end at that point.

16. On the way to the Village Elder's house, he met Hamir to whom he narrated the ordeal. Hamir offered to take the boy (PW1) home to his parents. They reported the matter to Assistant Village Elder. PW1 went back with his mother and Hamir and the matter was reported to the Village Elder who took them to Changamwe Police Station.

17. Doctor, Khadija Mahani testified as PW4. She produced the P3 form for PW1, which showed that he was sodomised. His anal sphincter was loose and had healed with lacerations. She produced the P3 form as exhibit 1. She also produced a Post Rape Care Report Form (PRC) as exhibit 2 after PW1 had been examined at the gender clinic on 2nd March, 2015. PW4 also produced an age assessment report for PW1 as exhibit 3, which gave his age as 9 years.

18. PW5, Mohamed Mohamed Mwakiroho confirmed that a report was made to the Village Elder on 1st March, 2015 that her son had been sodomised by an Islamic Teacher. PW5 was sent by the Village Elder to call the Imam who had witnessed the incident. After that, PW5 was sent to call the Ustadh who was said to have sodomised the boy. PW5 indicated that he knew the said Ustadh (appellant) as he had taught him. PW5 testified that he heard the boy (PW1) narrate how the appellant took him outside the mosque to a side room to commit the act. He also heard the Imam (PW3) say that he found the appellant in the act. PW5 further stated that they referred the matter to Changamwe Police Station.

19. PW6 No. 76742 PC Harrison Oseka, was the Investigating Officer. He was attached to Ongata Rongai Police Station. He was formerly based in Changawme Police Station. He testified that while at the said Police Station on 1st March, 2015, he was asked by the OC Crime, Inspector Tangai to investigate this case. He took PW1 to CPGH where he was examined and found to have been defiled. The PRC was filled.

20. It was the evidence of PW6, that investigations revealed that the complainant (PW1) was sodomised by his Madrassa Teacher (appellant) and that another Madrassa Teacher (PW3) had seen the appellant sodomising PW1 and he reported the incident to the Village Elder. PW6

further testified that a P3 form was filled for the complainant and his age assessment was done.

21. When put on his defence, the appellant denied the charge. He stated that he was an Islamic Teacher at a Madrassa in Changamwe. He further stated that on 1st March, 2015, he went to the toilet to answer a call of nature and he saw a child who was cleaning inside. The appellant stated that on going out of the toilet, he met the Imam of the mosque who accused him of having defiled the boy. The appellant denied the said allegation but the Imam instigated his arrest.

22. The Hon. Magistrate considered the evidence adduced and found it to be overwhelming against the appellant. The Hon. Magistrate also considered the defence put forth by the appellant and found it wanting as it put the appellant at the scene of crime and in light of the well corroborated prosecution case, the said defence could not assist him.

23. On the issue raised by the appellant about the failure by the Hon. Magistrate to record the questions and answers put to PW1, he cited the case of **Ben Maina Mwangi vs Republic**, HCC Cr. Appeal No. 471 of 2001 where the court stated that it is important to set out the questions and answers when deciding whether the 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.

24. This court has looked at several authorities in order to determine if there was a miscarriage of justice or failure on the part of the Hon. Magistrate to record the voire dire examination in a question and answer format. The Court of Appeal in **James Mwangi Muriithi vs Republic** [2016] eKLR cited the case of **Sula vs Uganda** [2001] 2 EA 556, where the Supreme Court of Uganda approved two formats of recording of voire dire examination. The first one is where the trial court writes down the questions put to the witness and the answer of the witness in the first person in the words spoken by the witness in dialogue form and then makes its conclusion after the dialogue. In the second format the court may omit to record the questions put to the witness but record the answers verbatim in the first person and then make his conclusion thereafter.

25. In the case of **Patrick Kathurima vs Republic**, Nyeri Criminal Appeal No. 137 of 2014, the Court of Appeal stated as follows:

> ***"It is best though not mandatory in our context that the questions put and the answers given by the child during voire dire examination be recorded verbatim as opined in the English Court of Appeal in Regina versus Compell (Times) December 20 1982 and Republic versus Lalkhan [1981] 73 CA 190 for the benefit of the appellate court which must satisfy itself on whether that important procedure was properly followed."***

26. Following the above Court of Appeal decision, it is evident that the manner in which the voire dire examination was recorded by the trial Magistrate in this case, was not procedurally wrong. As such, no prejudice was occasioned to the appellant herein.

27. On the issue raised in the appellant's submissions that PW3 implicated him in this offence, during his defence, the appellant did not elaborate on the reasons why PW3 framed him for such a serious offence. When adducing evidence, PW3 stated that he had no grudge against the appellant. In light of the evidence adduced whereby the appellant was found by PW3 red-handed sodomising PW1, and also in the totality of the evidence of PW1, the appellant cannot be said to have been implicated for the offence herein.

28. The appellant challenged his conviction on what he deems to be a defective charge, for the reason that PW1 testified that the appellant had previously sodomised him. It matters not that the appellant was charged with a singular count of defilement. What matters is that on 1st March, 2015 he was found sodomising PW1 and ample evidence was adduced to support the charge. Although PW1 made mention of having previously been sodomised by the appellant, the charge and evidence adduced before the lower court was in regard to the offence that occurred on 1st March, 2015.

29. I do agree with Ms Marindah, Prosecution Counsel that the evidence of PW1 was corroborated by that of PW3. Prior to PW1 being examined by a Doctor on 13th March, 2015 he had been examined at the CPGH on 2nd March, 2015 and the PRC form was filled on the said date. The said report indicates that PW1's anal sphincter had loosened, there were fresh abrasions and healed lacerations. The comments made thereon was that anal abrasions were visible and sphincter muscle had loosened probably due to forced penetration by a blunt object. The P3 form produced by PW5 supported the above medical findings. Penetration of the PW1's anus by the appellant was therefore proved.

30. The appellant was sentenced to life imprisonment. Section 8(2) of the Sexual Offences Act No. 3 of 2006 provides that a person who commits an offence of defilement with a child aged 11 years or less shall upon conviction be sentenced to imprisonment for life. PW1 was 9 years old when the offence was committed. An age assessment report was produced by PW5 to prove PW1's age.

31. There was ample corroboration of PW1's evidence that he was sodomised by the appellant from PW3 who was an eyewitness. Medical evidence proved that the offence the appellant was charged with had been committed.

32. It is my finding that the appellant was properly convicted and I uphold the said conviction. The sentence that was meted out against the appellant was lawful. The appeal herein is without merit. It is dismissed in its entirety.

DELIVERED, **DATED** and **SIGNED** at **MOMBASA** on this **20th** day of **December, 2018.**

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Ms Ogweno prosecution Counsel for the respondent

Mr. Beja