REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO 1 OF 2018

SALIM HAMISI KISWERE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

***(*An appeal against the judgment and conviction of Hon. P.K. Mutai RM, delivered on 29th December 2017 in Sexual Offences Case No. No. 49 of 2017 in the Chief Magistrate's Court at Kwale)**

JUDGMENT

The Appeal

1. The Appellant was convicted and sentenced to serve fifteen (15) years imprisonment for the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, and convicted and sentenced to serve five (5) years imprisonment for a second count of abuse of position of authority, contrary to section 24(4) of the Sexual Offences Act. The Appellant had also been charged with an alternative offence of indecent act with a child, contrary to section 11(1) of the Sexual Offences Act.

2. The particulars of the offence of defilement he was convicted of were that on diverse dates between the month of December 2016 and February 2017 at unknown times in Mkongani location of Kwale County within Coast region, he intentionally caused his penis to penetrate the vagina of MO, a girl aged 15 years. The particulars of the second count were that on diverse dates between the month of December 2016 and February 2017 at unknown times in Mkongani location of Kwale County within Coast region, he took advantage of his official position as a madrassa teacher at Madrassa [Particulars Withheld] in [Particulars Withheld] mosque to induce MO, a child aged 15 years of the said Madrassa [Particulars Withheld] to have sexual intercourse with her.

3. The Appellant pleaded not guilty to the charges in the trial court and was convicted and sentenced after a full trial. He is aggrieved by the judgment of the trial magistrate, and has preferred this appeal against the conviction and sentence. The Appellant's grounds of appeal as stated in a Petition of Appeal dated and filed in Court on 4th January 2018 by his Advocates, A.A. Mazrui & Co. Advocates

4. The grounds of appeal are as follows:

a) That the learned trial magistrate erred in law by failing to conduct a *voire dire* examination to the complainant PW1 and hence failed to form and record his opinion as to whether PW1 understood the nature of an oath before receiving her sworn testimony.

b) The learned trial magistrate erred in law and facts by totally disregarding evidence of coercion and undue influence imposed upon the complainant PW1 by PW2 and PW3.

c) The learned trial magistrate erred in law and fact despite warning himself that it was unsafe to convict on the evidence of a child unless there was corroboration and sentencing the Appellant to 20 years.

d) That the learned trial magistrate dismissed the Appellant's defence as a mere denial even after the Appellant's readiness to undertake DNA in the course of the proceedings after delivery of PW1 and as recommended by PW6.

e) The learned trial magistrate erred in law and fact by disregarding material contradiction of the testimony of PW2 and PW3

f) That the learned trial magistrate erred in law and fact by failing to recall PW1, PW2 and PW3 after the amendment of the charge sheet on 14th September 2017.

g) That the learned trial magistrate erred in law in sentencing the Appellant on defective charge sheet, with inconsistencies in the

complainant's name and drafted in an omnibus manner.

5. This appeal proceeded for hearing on 10th December 2018, and Mr. Mwadzogo, the Appellant's counsel, submitted that he would rely on written submissions dated 20th May 2018 filed in Court, as well as on Prosecution's written submissions dated 18th October 2012. He orally highlighted the issues arising in the submissions.. The Prosecution counsel, Mr. Masila, also made oral highlights of his submissions.

6. The Appellant in his submissions contended that it is clear from the record of the trail court that no *voire dire* examination was conducted, which is conceded by the Prosecution in its submissions, and the only issue is the effect thereof. According to Mr. Mwadzogo the effect is that failure to conduct a *voire dire* examination will make the evidence of a minor insufficient on its own as a basis for conviction, as held in the cases of **JGK vs Republic (2015) e KLR** and **Maripett Loonkomok v Republic [2016] eKLR**. In addition, that the trial Court acknowledged that it relied on the sole evidence of the minor to convict the Appellant, unlike the situation in **Maripett Loonkomok v Republic [supra]** where there was collaborating evidence**.**

7. Mr. Masila on his part submitted that failure to conduct a *voire dire* examination does not automatically vitiate a conviction as held in **Maripett Loonkomok v Republic (supra).** Further, that the evidence of a single identifying witness is allowed to be given in section 124 of the Evidence Act, and the trial Court warned itself of the danger and found the witness to be truthful.

8. On the second issue of coercion, Mr. Mwadzogo cited the decision in **B.O.O. vs Republic (2016) eKLR,** where it was held that coercion makes the evidence of a complainant unbelievable. Mr. Masila on the other hand submitted that the complainant was not declared a hostile witness and was cross-examined on her evidence, and the Appellant had the option of recalling PW2 and PW3 for cross-examination on the issue of coercion.

9. The arguments made by Mr. Mwadzogo on the DNA test were that the record showed that the Appellant was willing to go for the DNA test after the complainant gave birth during the pendency of the trial proceedings, and relied on the decision in **Albert Wambua vs Republic (2016) e KLR** that after the complainant gave birth, it was necessary for the Court to call for a DNA test to prove the offence of defilement conclusively. According to Mr. Masila, a DNA test is not mandatory and is not an ingredient in proving defilement.

10. On the failure to recall PW1, PW2 and PW3 after amendment of the charge sheet, Mr. Mwadzogo submitted that the said amendment added a second count after the said three witnesses had testified, and the record is clear that the said witnesses were not recalled to testify, yet the trial magistrate proceeded to convict the Appellant on the said second count. The counsel distinguished the decision in **Josephat Karanja Muna vs Republic (2009) eKLR** on the ground that in that case no additional count was added to the charge sheet.

11. Mr. Masila's reply was that the Defence did not make an application to recall the witnesses, and that the failure to recall the witnesses was not fatal, as the said witness had already testified to the Appellant's office of being a madrassa teacher.

12. On the last ground of appeal, the Appellant submitted that the evidence on record did not support the particulars of the charge sheet, as none of the witnesses made a reference to any offence being committed in December 2016. Mr. Masila contended that the Appellant had not demonstrated any injustice committed by the alleged defects , which are thus curable under section 382 of the Criminal Procedure Code

The Evidence

13. My duty as the first Appellate court is to re-evaluate the evidence and draw independent conclusions as held in **Okeno v Republic (1972) E.A. 32**. However, I am alive to the fact that I did not have the advantages enjoyed by the trial court of seeing and hearing the witnesses, as was observed in **Soki v Republic (2004) 2 KLR** 21 and **Kimeu v/s Republic (2003) 1 KLR 756.**

14. A brief summary of the evidence adduced before the trial court is as follows. The prosecution called six witnesses. The complainant (MO) was PW1, and she testified that on 7th January 2017 and 5th February 2017, the Appellant, who was her madrassa teacher, persuaded her to have sex with him and they had sexual intercourse as a result of which she conceived. Further, that she then informed her mother and school headteacher of the pregnancy.

15. PW2 and PW3 were MC and OH, who were the complainant's mother and father respectively, and largely testified on how they came to know of PW1's pregnancy, and were informed by PW1 that the Appellant was responsible. Further, that they reported the matter to the police.

16. Mohammed Ganzalla, a clinical officer at Kwale Hospital testified as PW4, and stated that he examined the complainant on 8th June 2017 and found that she was 16 weeks pregnant and her hymen was absent. He produced the filled P3 form as an exhibit. PW5 was Sura Mwanasati, the headteacher of [Particulars Withheld] Primary School, who testified that he received a letter from the complainant's parent which indicated that she was pregnant, and that after interrogating the complainant, she implicated the Appellant.

17. The last witness (PW6) was Corporal Dominic Kimeli Limo, who was the investigating officer, and testified on the report he got of the alleged offence, and that he recommended the prosecution of the Appellant. He also produced the complainant's birth certificate as an exhibit.

18. The Appellant was put on his defence and he gave sworn testimony and did not call any witnesses. He confirmed that he was a madrassa teacher and knew the complainant who was his student. He denied having committed the offences and claimed that he was being framed for an offence committed by a herder at the complainant's home who disappeared after the offence, and that it was a scheme to chase him away because of his farming ventures.

The Determination

19. I have considered the arguments made by the Appellant and the Prosecution, as well as the evidence before the trial court. I have considered the grounds of appeal and the arguments made thereon, and I note that the three issues for determination are firstly, whether the charge sheet pursuant to which the Appellant was convicted was defective; secondly, what was the effect of the failure by the trial Court to conduct a *voire dire* examination of the complainant; and lastly, whether the Appellant's conviction was on the basis of sufficient and satisfactory evidence.

20. On the first issue, the Appellant alleges that the charge sheet was defective as it was not supported by the evidence, particularly as no evidence was adduced of the offence having been committed in December 2016. The issue of when a charge is defective is to be examined in light of the requirements of the law as regards the framing of charges as stated in section 134 of the Criminal Procedure Code which provides as follows:

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

21. In addition it was held in **Sigilani vs Republic, (2004) 2 KLR, 480** that:

> ***"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."***

22. The charge sheet in the trial Court in this regard stated the sections creating the offence of defilement and penalty which were sections 8(1) and (2) of the Sexual Offences Act, as well as the section creating the offence and penalty for the offence of abuse of position of authority, being section 24(4) of the Sexual Offences Act. The particulars of the offences, which included the names of the accused person, the date of the offence, the place of the offence, the act constituting the offence and the name and age of the victim were also provided.

23. The Court of Appeal in **Yongo vs Republic** ***[1983] KLR, 319*** did hold that a charge that is not disclosed by evidence is defective and stated as follows in this regard:

> **"In our opinion a charge is defective under Section 214(1) of the Criminal Procedure Code where:**
>
> **(a) it does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or**
>
> **(b) it does not, for such reasons, accord with the evidence given at the trial; or**
>
> **(c) it gives a misdescription of the alleged offence in its particulars."**

24. This holding was explaining the circumstances when a charge is considered to be defective in substance, so as to guide a court when it is altering the said charge. However, section 214(2) of the Criminal Procedure Code further provides as follows:

> **"(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof."**

25. It is therefore not necessary to amend the charge on account of a contestation by the Appellant as to the time when the offence was committed as alleged in this appeal, and to this extent the charge sheet was therefore not defective on account of the particulars being at variance with evidence adduced as to the date of the commission of the offence.

26. However, and this finding notwithstanding, upon perusal of the charge sheet, the Court noted that there was a defect of multiplicity of charges, as the Appellant was charged with the offences of defilement and abuse of position of authority based on the same set of facts which were that he had a sexual relationship with the complainant. Multiplicity in a charge sheet arises from the charging of a single criminal act or offence as multiple separate counts, and raises the risk of violating the double jeopardy principle against receiving multiple sentences for a single offence, that is enshrined in Article 50 (2) (o) of the Constitution.

27. The first count of defilement is in this regard defined in section 8(1) of the Sexual Offences Act as follows:

> **"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement".**

28. The second count on sexual offences relating to position of authority and persons in position of trust is defined under section 24(4) of the Sexual Offences Act follows:

> **"(4) Any person who being the head-teacher, teacher or employee in a primary or secondary school or special institution of learning whether formal or informal, takes advantage of his or her official position and induces or seduces a pupil or student to have sexual intercourse with him or her or commits any other offence under this Act, such sexual intercourse not amounting to the offence of rape or defilement, shall be guilty of an offence of abuse of position of authority and shall be**

liable upon conviction to imprisonment for a term of not less than ten years."

29. It is thus evident that the offence of abuse of position of authority under section 24(4) can only be an alternative to defilement, and not a second count to defilement, and there was thus an error in the charge sheet in charging and convicting the Appellant with the said offence as a second count. While multiplicity in a charge sheet can be cured on appeal under section 382 of the Criminal Procedure Code where it is shown that no prejudice has been occasioned thereby, in the present appeal that defect is not curable as there was obvious jeopardy caused to the Appellant by the sentence imposed on account of conviction of the second count.

30. On the second issue, the Appellant alleges that the evidence of the complainant was given without a *voire dire* examination. Section 19 of the Oaths and Statutory Declarations Act provides as follows in this regard:-

"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 on oath, if in the opinion of the court or such a 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 in writing in accordance with Section 233 of the Criminal Procedure Code shall be deemed to be a deposition within the meaning of that Section."

31. In the case of **Julius Kiunga M'rithia vs. Republic, [2011] eKLR**, the court held as follows as to the purpose of the said section -

"Under Section 19 of the Oaths and Statutory Declarations Act, (Cap. 15, Laws of Kenya), where a child of tender years is called as a witness in a proceeding there are two things the trial court must be severally satisfied about -

(1). whether the child understands the nature of an oath; or

(2) if the child in the opinion of the court does not understand the nature of an oath, whether the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth."

32. Various decisions of the Court of Appeal have also held that the age of fourteen years is a reasonable indicative age of competency to testify for purposes of Section 19 of the Oaths and Statutory Declarations Act. In this respect see **Maripett Loonkomok v Republic, [2016] eKLR , Patrick Kathurima vs Republic, Criminal Appeal No.137 of 2014,** and **Samuel Warui Karimi vs R, [2016] eKLR**.

33. The effect of this non-compliance with section 19 of the Oaths and Statutory Declarations Act was enunciated by the Court of Appeal in **Samuel Warui Karimi v Republic [2016] eKLR** as follows

"…we are in agreement the purpose of undertaking *voire dire* examination in a criminal trial is to protect the guaranteed right of a fair trial. Where the witness as in this case was aged 12 years and that essential step was not taken in a criminal trial, that trial becomes problematic. In the circumstances we find the evidence by the complainant was not properly received thus, the conviction of the appellant becomes unsafe to sustain as she was the complainant and not any other witness."

34. In **Maripett Loonkomok v Republic [2016] eKLR** a different bench of the Court of Appeal was of a slightly different view of the effect of non-compliance with the said section and held as follows:

" It follows from a long line of decisions that *voir dire* examination on children of tender years must be conducted and that failure to do so does not *per se* vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that;

"In appropriate case where voir dire is not conducted, but there is sufficient independent evidence to support the charge… the court may still be able to uphold the conviction."

See Athumani Ali Mwinyi v R Cr.Appeal No.11 of 2015

On the peculiar facts and circumstances of this case, it is our considered view that the trial was not vitiated by the failure to conduct *voir dire* examination. The complainant's evidence was congent; she was cross-examined and medical evidence confirmed penetration. But of utmost significance is the admitted fact that the appellant took the complainant and lived with her as his wife after paying dowry. So that even without the complainant's evidence the offence of defilement of a child was proved from the totality of both the prosecution and defence evidence, especially the medical evidence which corroborated the fact of defilement."

35. From the said decisions, it is evident that while the evidence of a witness of tender years who is not subjected to a *voire dire* examination is not reliable evidence, the other evidence adduced in a criminal trial can still be relied upon to determine the guilt or otherwise of an accused person.

36. In the present appeal, the complainant who was PW1 testified that she was 15 years old, and a birth certificate produced as an exhibit by

PW6 showed that she was born on 18th May 2002. She had therefore attained the age of competency for purposes of giving evidence on oath at the time of her testimony on 1st August 2017, and was therefore not a child of tender years for purposes of *voire dire* examination. There was thus no error committed by the trial magistrate in not subjecting PW1 to a *voire dire* examination, and her evidence can therefore be considered in determining the guilt or otherwise of the Appellant.

37. As to whether PW1's evidence was sufficient and satisfactory to sustain the conviction of the Appellant, which is the last issue for determination, the ingredients of the offence of defilement were highlighted in **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013** as follows**:**

> **"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."**

Section 2 of the Sexual Offences Act in addition provides that penetration entails the partial or complete insertion of the genital organs of a person into the genital organs of another person.

38. Various concerns were raised by the Appellant in this regard. Firstly, it was submitted that the evidence was not reliable by virtue of PW1 having been coerced to implicate the Appellant. PW2, PW3 and PW5 did testify that they subjected the complainant to interrogation, as a result of which she disclosed that the Appellant was responsible for her pregnancy. PW3 in addition testified that PW2 was "harsh" with the complainant, and this evidence supported the finding by the trial Court that PW1 was threatened to implicate the Appellant.

39. In light of this evidence, the trial magistrate erred in relying on the evidence of PW1 as a single identifying witness, as the said intimidation affected the reliability of her evidence, which therefore required corroboration under section 124 of the Evidence Act. Section 124 provides as follows:

> **"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.**
>
> **Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."**

40. The evidence by PW1 in this regard is that she had sex with the Appellant in a bush between the madrassa and her home on two occasions. There was no specific evidence given by the said witness as to any penetration by the Appellant of his genital organ in any part of the complainant's genital organ, which is key to a determination as to whether defilement occurred or not.

41. Evidence of having sex does not necessarily entail penetration and is not conclusive proof of penetration. Sex is defined in **Black's Law Dictionary , Ninth Edition** at pages 1498-1499 as the structures and functions that distinguish a male from a female; sexual intercourse; or sexual relations. In addition, sexual relations is defined either to be sexual intercourse or physical sexual activity that does not necessarily culminate in sexual intercourse.

42. Therefore, it is not always the case that sex is synonymous with penetration, hence the definition of penetration that is set by section 2 of the Sexual Offences Act, which is required to be proved beyond reasonable doubt. This Court in **Julius Kioko Kivuva v Republic [2015] eKLR** held as follows as regards specificity required in the proof of penetration:

> **"Evidence of sensory details, such as what a victim heard, saw, felt, and even smelled, is highly relevant evidence to prove the element of penetration, as a victim's testimony is the best way to establish this element in most cases. The specificity of this category of evidence, even though it may be traumatic, strengthens the credibility of any witness's testimony, and is particularly powerful when the ability to prove a charge rests with the victim's testimony and credibility as it does in this appeal".**

43. The evidence by PW4 that PW1's hymen was broken at the time of her medical examination on 8th June 2017, and that she was 16 weeks pregnant was corroboration of penetration, however it did not identify the person responsible, and was therefore not corroboration as to penetration by the Appellant. There was no other corroborating evidence adduced that placed the Appellant with the complainant at the time of the alleged defilement. In addition, in the absence of a DNA test, there was no evidence linking the Appellant to the child born out of the pregnancy.

44. These findings also mean that the second count of abuse of position of authority by having sexual relationship with the complainant, and the alternative count of indecent act with a child were also not sufficiently proved. This Court also finds that the defence did cast doubt on the prosecution's case, as both PW1 and PW3 was cross-examined on one Hamisi, the herder the Appellant alleges was responsible for the offence, and did admit that the said herder used to work for them and he left service after the pregnancy. This doubt can only be construed in the Appellant's favour, as it is the Prosecution's duty to prove its case beyond reasonable doubt.

45. Lastly, the Appellant also alleged that the witnesses were not recalled to testify after amendment of the charge sheet. The record of the trial Court proceedings shows that indeed the charge sheet was amended to introduced a second count, and the Appellant was asked to plead to the amended charge sheet. Section 214(1) of the Criminal Procedure Code in this regard provides for the procedure to be followed upon amendment of a charge sheet as follows:

"(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that—

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination."

46. It was held by the Court of Appeal in **Joseph Kamau Gichuki vs Republic (2013) e KLR** that once a charge is amended, the trial Court has a duty to inform the accused person of the right to answer to the substituted charge and to cross examine witnesses who had already testified, Further, in **Yongo vs Republic (supra)** the Court of Appeal also held that the Court must not only comply with these conditions, but must also record that it has so complied. There was no record of such compliance by the trial Court, and to this extent there was thus an error made during the trial proceedings.

47. I accordingly quash the conviction of the Appellant for the offence of defilement contrary to section 8(1) and (4) of the Sexual Offences Act, and for the offence of abuse of position of authority, contrary to section 24(4) of the Sexual Offences Act for the foregoing reasons. I also set aside the sentences of fifteen (15) years imprisonment and five (5) years imprisonment imposed upon the Appellant for these convictions, and order that he be, and is hereby set at liberty forthwith unless otherwise lawfully held.

48. It is so ordered.

DATED AND SIGNED THIS 19TH DAY OF DECEMBER 2018

P. NYAMWEYA

JUDGE