REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NUMBER 118 OF 2017

JOHN MAINA MARIGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Mombasa Chief Magistrate's Court Criminal Case No. 1491 of 2014, **Hon. S Shitubi CM** dated 19th November, 2015)

REPIBLIC.....PROSECUTOR

VERSUS

JOHN MAINA MARIGA.....ACCUSED

JUDGEMENT

1. The appellant herein, **John Maina Mariga**, was charged in the Mombasa Chief Magistrate's Court with the offence of defilement of a girl Contrary to section 8(1) as read with section 8(2) of the ***Sexual Offences Act***, No. 3 of 2006 the particulars being that the appellant on 2nd day of July, 2014 at [Particulars Withheld] Area in Mombasa District within Mombasa County, unlawfully and intentionally caused his fingers to penetrate the vagina of **LS**, a girl aged 12 years.

2. During the *voir dire* examination of the complainant, the following was recorded:

> ***Question: Where do you go to Church***
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> ***Answer: I attend Baptist Church***
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> ***Question: What are you taught about telling the truth***
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> ***Answer: That you should tell the truth. If you lie it is bad.***
>
> ***Question: If you lie what will happen***
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> ***Answer: I don't know. You will be sent to prison.***

3. The Court then found that the complainant understood the nature of an oath and the duty to tell the truth and directed that she gives sworn evidence.

4. The manner of conducting *voir dire* examination was explained by the Court of Appeal in **Johnson Muiruri vs. Republic [1983] KLR 447** at pages 448-450 as follows":-

> **"We once again wish to draw the attention of our courts as to the proper procedure to be followed when children are tendered as witnesses.**

In *Peter Kariga Kiune, Criminal Appeal No 77 of 1982 (unreported) we said:*

"Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a *voire dire* examination, whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him (section 19, Oaths and Statutory Declarations Act, cap 15. The Evidence Act (section 124, cap 80).

It is important to set out the questions and answers when deciding whether a 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, and not be forced to make assumptions."

A similar opinion was expressed by the Court of Appeal in England recently in *Regina v Campell* (Times, December 10, 1982):

"If the girl (ten years) had given unsworn evidence then corroboration of those issues was an essential requisite. If she gave sworn evidence there was no requirement that her evidence had to be corroborated but the jury had to be directed that it would not be safe to convict unless there was corroboration.

Dealing with the question of the girl taking the oath it should be borne in mind that where there was an inquiry as to the understanding of a child witness of the nature and solemnity of an oath, the Court of Appeal in *R v Lal Khan* [1981] 73 Cr App R 190 made it quite clear that the questions put to a child must appear on the shorthand note so that the course the procedure took in the court below could be seen....

There Lord Justice Bridge said:

'The important consideration... when a judge has to decide whether a child should properly be sworn, is whether the child has sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct.'

There were therefore two aspects when considering whether a child should properly be sworn: first that the child had sufficient appreciation of the particular nature of the case and, second a realization that taking the oath did involve more than the ordinary duty of telling the truth in ordinary day-to-day life."

It is fortunate that we can reinforce some of the foregoing views by the decisions of our own former perceptive Court of Appeal. As long ago as in *Oloo s/o Gai v R* [1960] EA 86 the Court of Appeal said that it would have been better for the trial judge to record in terms that he had satisfied himself that the child understood the nature of an oath; since the judge had failed to direct himself or the assessors on the danger of relying on the uncorroborated evidence of a child of tender years and had also overlooked significant items of evidence bearing on the reliability of her evidence the conviction could not stand.

In *Gabriel s/o Maholi v R* [1960] EA p 159, again our former Court of Appeal said that even in the absence of express statutory provision it is always the duty of the court to ascertain the competence of a child to give evidence; it is not sufficient to ascertain that the child has enough intelligence to justify the reception of the evidence, but also that the child understands the difference between the truth and falsehood.

In *Kibangeny Arap Kolil* [1959] EA 92 the Court of Appeal held (i) that since the evidence of the two boys (12-14 years and 9-10 years) was of so vital a nature the court could not say that the trial judge's failure to comply with the requirements of section 19(1) of the Oaths and Statutory Declarations Ordinance was one which could have occasioned no miscarriage of justice; (ii) the failure of the trial judge to warn himself or the assessors of the danger of convicting upon the evidence of the two boys in view of the absence of corroboration and any admission by the appellant was an additional ground for allowing the appeal."

5. It is therefore clear as was held in **Peter Kariga Kiune, Criminal Appeal No 77 of 1982** (unreported) the purpose of *voir dire* examination is to enable the Court to form an opinion whether the child understands the nature of an oath in which event his sworn evidence may be received. In my view if a child does not understand the nature of and the reason for giving sworn testimony, then he or she ought not to be sworn.

6. In **Macharia vs. Republic [1976] KLR 209**, **Kneller & Platt, JJ** (as they then were) held that:

"It [*voir dire*] must be a preliminary examination of a witness by the magistrate in which the witness is required "to speak the truth" with respect to questions put to him, or her, so that the magistrate can discover if he, or she, is competent (e.g. she is not too young, or she is not insane) to give evidence and should be sworn or affirmed (according to whether or not she is a Christian, or of any other, or no, faith, and understands the nature and obligation of an oath to tell only the truth). A finding on these points after the person of tender years has testified will not do. The irregularity is not fatal. These girls were aged thirteen and twelve years, attending a primary school and in standard VII. Their answers to questions were coherent and revealed that they were intelligent. They were competent."

7. From what I have reproduced above, I am not satisfied that the complainant understood the nature of the oath.

8. That said, it is however now settled that failure to observe the provisions as to *voir dire* does not automatically vitiate the conviction. See Court of Appeal decision in **Maripett Loonkomok vs. Republic [2016] eKLR** where it was held as follows:

> **"We turn to consider the effect of failure by the trial court to administer voir dire on the complainant. It is firmly settled that not in all cases that voir dire is not administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has recently reiterate what has been said many times before that that question will depend on the peculiar circumstances and particular facts of each case. See James Mwangi Muriithi v R, Criminal Appeal No.10 of 2014. Section 19 of the Oaths and Statutory Declarations Act is concerned with the reception and admissibility of evidence of a child of tender years. The section starts by declaring that where the child does not, in the opinion of the court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath. But that evidence shall only be received if, again in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth. So long as that evidence, though not on oath, is taken down in writing, it amounts to a deposition under section 233 of the Criminal Procedure Code. The Code does not prescribe the precise manner of ascertaining and determining whether the child witness understands the nature of the oath or is possessed of sufficient intelligence or even his or her ability to understand the duty of speaking the truth. Voir dire, a latin phrase (verum dicere) for saying "what is true", "what is objectively accurate or honest" has been used in most Commonwealth jurisdictions and in some instances in the United States of America, as "a trial within a trial", a hearing to determine the admissibility of evidence or the competency or qualification of a witness or juror See Duhaime, Lloyd. "Voir Dire definition" Duhaime's Legal Dictionary. But the origin of the rule on voir dire examination of a child witness as we know it today was first applied in the ancient yet landmark English case of R v Braisier (1779) 1 Leach Vol. I, case XC VIII, PP 199 – 200, which incidentally was a case involving sexual assault on a girl under 7 years of age. The twelve Judges in that case stated, in part, that; ".. an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath… for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence" (our emphasis)**
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> **Although this decision, through section 19 of Oaths and Statutory Declarations Act underpinned the legal practice in relation to children's testimony in Kenya, we reiterate that the format and procedure of testing the intelligence, and sufficient knowledge and nature of the oath has been varied. For instance, in the past the courts insisted that voir dire examination must be in the form of a dialogue, with the trial court recording questions posed to the child and the child's answers nearly verbatim in the first person before drawing its conclusion on the question of suitability of the child. See Johnson Muiruri v R (1983) KLR 447. The courts today accept both the question and answer format and the recording of the child's answers only. See James Mwangi Muriithi (supra). What is constant is that, whatever format the court adopts it must be on record. It is equally settled that by dint of sections 208 and 302 of the Criminal Procedure Code, the law allows cross-examination of a witness who does not give evidence on oath. See Nicholas Mutua Wambua and another v Msa Criminal Appeal No.373 of 2006.**
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> **It is clear to us from the record that the trial Magistrate deliberately did not conduct voir dire examination for he believed, erroneously, that the complainant was not a child of tender years. The record reads thus;**
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> **"PW1 F/c (Female child) not of tender years sworn states in Kiswahili." The question therefore is, who is a child of tender years? The Sexual Offences Act and the Oaths and Statutory Declarations Act are silent on this question. However way back in 1959 in the celebrated case of Kibageny Arap Kolil v R (1959) EA 82 the Court of Appeal for Eastern Africa held that the phrase "a child of tender years" meant a child under the age of 14 years. The only statutory definition of a "child of tender years" is section 2 of the Children Act where it is defined to mean a child under the age of 10 years. This Court has recently in Patrick Kathurima v R,Criminal Appeal No.137 of 2014 and in Samuel Warui Karimi v R Criminal Appeal No.16 of 2014 stated categorically that the definition in the Children Act is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination. 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;**
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> **"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."**
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> **See Athumani Ali Mwinyi v R Cr. Appeal No.11 of 2015**
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> **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 cogent; 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.**

9. However, strictly speaking the complainant was not a child of tender years. As was held by the Court of Appeal sitting in Mombasa in **Sahali Omar vs. Republic [2017] eKLR**:

"The definition of a child of 'tender years' differs; for under section 2 of the Children Act No. 8 of 2001, a child of tender years is defined as a child under the age of 10 years. However, for purposes of criminal trial and practice, a child of tender years is a matter determined on a case by case basis, the essential element being that the trial court must satisfy itself that the child understands the meaning of oath. If not, voir dire must be conducted regardless of whether the child is as young as 10 years old or as old as 14 years (see. In Kibangeny Arap Kolil v. Republic [1959] EA 92 where this Court held that the term 'tender years' could include a child as old as 14 years. See also Patrick Kathurima v Republic [2015] eKLR) where the term 'tender years was also given a wide berth and not limited to the 10 years stipulated under the Children Act)."

10. When this appeal came up for hearing the Learned Prosecution Counsel, **Miss Ogega** conceded the appeal on the ground that the charge sheet was defective as it did not disclose the particulars of the offence with which the appellant was charged but instead disclosed the offence of assault contrary to section 5(1)(a) of the ***Sexual Offences Act***. She therefore sought that the Court orders a retrial.

11. The appellant did not object to the proposal by the Learned Prosecution Counsel.

12. However, the mere fact that the State concedes the appeal does not automatically follow that that this court must in those circumstances allow the appeal since the court has the duty to put the evidence to afresh scrutiny and arrive at its own determination. In **Odhiambo vs. Republic (2008) KLR 565,** the court said:

"the court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence."

13. Section 8(1) and 8(2) of the ***Sexual Offences Act***, No. 3 of 2006 states as follows:

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

14. Therefore for an offence under section 8 to have been committed, it must be proved that there was penetration and penetration is defined in section 2 of the Act as:

the partial or complete insertion of the genital organs of a person into the genital organs of another person.

15. In this case the facts were that the appellant used his fingers to penetrate the vagina of the complainant. Fingers, in my view do not amount to genital organs which are defined in section 2 aforesaid to include the whole or part of male or female genital organs and for purposes of this Act includes the anus.

16. I therefore agree with **Miss Ogega** that the particulars of the facts in the charge sheet could not support the offence under section 8 of the ***Sexual Offences Act***.

17. Section 134 of the ***Criminal Procedure Code*** requires in mandatory terms that every charge should be precise and abundantly clear to the accused. It provides that:

"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."

18. Interpreting this provision in the case of **Isaac Omambia vs. R, [1995] eKLR** this Court held that:

"the particulars of a charge [form] an integral part of the charge."

19. The Court of Appeal in **Henry O. Edwin vs. Republic [2005] eKLR** held that:

"It is trite law that an accused person must be charged with an offence that is known to law. Particularizing the charge enables the accused person know the offence with which he is charged and the likely sentence that he would get should he be convicted. This is information that enables the accused person to adequately prepare his defense. We adopt with approval the sentiments of the High Court in Sigilani –vs Republic [2004] 2 KLR 480 where it was held that:_ 'The Principle of the law governing charge sheets is that an accused person 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 specific charge that he can understand. It will also enable the accused to prepare his defense'."

20. In **Juma vs. Republic [2003] eKLR** the Court of Appeal held that:

"The appellant was charged with the offence of robbery with violence contrary to *Section 296(2)* of the Penal Code in that on 18th September, 1997 at Shimanzi area of Makupa within Mombasa District of the Coast Province jointly with others not

before court, while armed with knives robbed Daniel Muli Musyoka of one sack of tea leaves valued at Kshs.7,500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Daniel Muli Musyoka. He was tried by the learned Ag. Senior Resident Magistrate who convicted and sentenced him to death. His appeal to the superior court was dismissed. He comes to this Court by way of second appeal. Mr. Bosire for the appellant has raised the issue of the charge. In his view, the charge was defective. We have considered the particulars of the charge and it cannot be denied that the charge refers to the appellant having been armed with knives. The particulars of the charge do not clearly state whether the knife was a dangerous weapon. Under *Section 296(2)* of the Penal Code the charge must state that the accused was armed with a dangerous or offensive weapon or instrument, or was in the company of one or more other person or persons or at or immediately before or immediately after the time of the robbery the accused wounds beats or strikes or uses any other personal violence to any person. In this appeal the charge as laid was defective as it did not clearly specify the essential ingredients of the offence under *Section 296(2)* of the Penal Code. We wish to point out that in charging a person under Section 296(2) of the Penal Code the prosecution must be extremely careful as the consequence of a conviction are serious. Care must be taken when dealing with drafting of charges as it is the life of an individual that is at stake. We have carefully considered the charge as laid and the evidence adduced in support thereof. We agree with Mr. Bosire, counsel for the appellant that the charge as laid was incurably defective. That being our view of this appeal we order that the appeal be allowed, conviction quashed and death sentence set aside. The appellant is to be set at liberty forthwith unless otherwise lawfully held."

21. It is similarly my view that the charge as laid was incurably defective as it did not clearly specify the essential ingredients of the offence under section 8 of the ***Sexual Offences Act*** and this appeal, in my view, was therefore properly conceded by **Miss Ogega**.

22. Should this Court order a retrial? The Court of Appeal in the case of **Ahmed Sumar vs. R (1964) EALR 483** offered the following guidance:

"...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 purposes 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... In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person."

23. The Court of Appeal likewise, while relying on **Lolimo Ekimat vs. R, Criminal Appeal No. 151 of 2004 (unreported)** had the following to say in the case of **Samuel Wahini Ngugi vs. R [2012] eKLR**:

"…the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it."

24. In **Muiruri –vs- Republic (2003), KLR, 552** and **Mwangi –Vs- Republic (1983) KLR 522 and Fatehali Maji –vs- Republic (1966) EA, 343** the view expressed was that:-

"Although some factors may be considered, such as illegalities or defects in the original trial, the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether on a proper consideration of the admissible or potentially admissible evidence a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for a retrial should only be made where the interests of justice requires it."

25. **Makhandia J.** (as he then was) in the case of **Issa Abdi Mohammed –vs – Republic [2006] eKLR** opined that:-

"An order for retrial would have been most appropriate in the circumstances of this case. To do so however, in the circumstances of this case would cause irreparable prejudice to the appellant since the prosecution may have become wiser and would wish to plug the loopholes already alluded to in this judgment. In the result there is only one channel left to this court and that is to allow the appeal, quash the conviction and set aside the sentence. The appellant may be set at liberty forthwith unless otherwise held on a lawful warrant."

26. In this case I presume that the prosecution wants the court to order a retrial so that it may amend the charge sheet and charge the appellant with the proper offence. To allow that in my view would amount to permitting the prosecution to in effect plug the loopholes and blunders in the charge sheet. In **Juma vs. Republic [2003] eKLR** the Court of Appeal having found that the charge as laid was incurably defective proceeded to allow the appeal, quashed the conviction and set aside the death sentence. It then directed that the appellant be set at liberty forthwith unless otherwise lawfully held.

27. In this case the appellant was convicted and sentenced on 19th November, 2015. He however arrested on 17th August, 2014 and though he was admitted to bail, there is no indication that he was in fact released on bail. Accordingly, he has been in custody for slightly more than 4 years. In my view it would not serve the interest of justice in the circumstances of this case to order a retrial.

28. In the premises, the appeal succeeds, the appellant's conviction is hereby set aside, his sentence quashed and it is directed that he set at liberty forthwith unless otherwise lawfully held.

29. It is so ordered.

30. Right of appeal 14 days.

Judgement read, signed and delivered in open Court at Mombasa this 18th day of December, 2018.

G V ODUNGA

JUDGE

In the presence of:

Appellant in person

Miss Ogega for the Respondent

CA Lavender