REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 94 OF 2013

ATIELI SIKUNYA OFIRA …..... APPELLANT

VERSUS

REPUBLIC …..... RESPONDENT

[Being an appeal from the conviction and sentence of Senior Principal Magistrate's Court at Maseno

(Hon. M.C. Nyigei RM) dated 1st August 2013 in Maseno SPMCCRC No. 947 of 2012]

JUDGMENT

On 1st August 2013 the appellant was sentenced to life imprisonment after being found guilty and convicted on a charge of defilement Contrary to Section 8(1)(2) of the Sexual Offences Act. He has appealed against the conviction and sentence.

His grounds of appeal are that:-

> ***"1. That the learned trial magistrate erred in law and facts when relying and basing his conviction sole evidence of complainant witness.***
>
> ***2. That the learned trial magistrate more marked erred in law and facts when failed to evaluate that the forensic examination report was necessary in this case.***
>
> ***3. The learned magistrate erred in law and facts when failed to comply with the provision 324 as read 329 cpc not achieved.***
>
> ***4. The trial magistrate erred in both law and facts not considering that there was a grudge between PW2 who was the father.***
>
> ***5. That your lordship I apply for retrial."***

During the hearing of the appeal he introduced new grounds as follows:-

> ***"1. That the trial magistrate erred in law by failing to note that the prosecution did not disclose to me the evidence it was going to use against me in the trial.***
>
> ***2. That the trial magistrate misevaluated the evidence tendered before him and hence arrived at the wrong conclusion.***
>
> ***3. That the evidence adduced by the prosecution was shroud in contractions.***

4. That the trial magistrate convicted me based on a defective charge sheet.

5. That my trial was unfairly conducted from the onset."

He canvassed the appeal by way of written submissions wherein he stated that firstly the evidence of the prosecution was not disclosed to him prior to the hearing thereby prejudicing his right to a fair trial under Article 50(2)(c) and (j) of the Constitution. He also faulted the trial magistrate for what he refers to as failure to properly evaluate the prosecution evidence. He wondered how a child who had been threatened could keep going back to his house and contended that it beat logic that she was able to run after the ordeal. He contended that evidence that the child went missing from home for three days without the matter being reported was suspicious. He stated that the evidence of the prosecution witnesses was inconsistent and contradictory and should not have been relied on. He submitted that the charge was defective as it did not state the time of the offence and further that the trial was conducted in a language he did not understand. Further that no voire dire was conducted yet the complainant was a child and that moreover her age was not proved. He urged this Court to allow the appeal.

Mr. Muia – Prosecution Counsel in opposing the appeal submitted that penetration was proved by the victim and corroborated by A K (PW2) who was a classmate of the victim and by the evidence of M A (PW5); On the age he stated that it was proved through a baptism card. Regarding the language he conceded there was an anomality but stated that the worst case scenario should be a retrial but not an acquittal.

In reply the appellant expressed the desire for a retrial.

I have as the first appellate court re-evaluated the evidence in the lower court while bearing in mind that I did not have the benefit of seeing the witnesses as did the trial magistrate. My finding is that the prosecution made out a strong case against the accused person. However as the Court of Appeal stated in **Samuel Warui Karimi Versus Republic [2016]eKLR "**the credibility of the evidence of a child whose competency to give evidence was not tested by the trial magistrate through voire dire examination is an issue of law." Previously the courts relied on the definition of a child of tender years in the Children's Act to absolve children above ten years from voire dire examination. See **M K Versus Republic [2015]eKLR** and **Ayieyo Versus Republic [2008]1 KLR (G & F) 684** where the Court of Appeal held that a child of 12 years was not a child of tender years and it was not necessary to have a voire dire in respect of that child. However in **Samuel Warui Karimi Versus Republic** (Suppra) the Court of Appeal held that voire dire examination is mandatory for all children under the age of 14 years. The Court stated:-

> ***"[16]*** **Which definition should guide the courts in determining who is a child of tender years, is it the *Children Act*, or the precedents set by the Court of Appeal'' The requirement by the aforementioned provisions of the Evidence Act and the Oaths and Statutory Declarations Act of voire dire examination of a witness of tender years in a criminal trial is meant to guarantee an accused person a fair trial. A fair trial is guaranteed by the Constitution. We have done the aforementioned review of the law and decided cases in an attempt to ascertain in this case whether failure by the trial magistrate to conduct voire dire examination on the complainant a child aged 12 years affected the credibility of her evidence. We are persuaded the definition of a child of tender years under the Children Act cannot globally be imported for offences under the criminal law. This is because children develop and mature differently depending on their social economic and other factors such that, some children of 11, 12 or 13 years can be very sharp and intelligent witnesses whereas others in the same age bracket may not at all comprehend what is a court of law. This explains why the Courts have held on the age at 14 years and sometimes even a higher age as the age below which a child is of tender years for purposes of criminal trials and insisted the competency be tested through questions that must be put to the child and answers given by the child be recorded verbatim. The definition of a child of tender years provided under the Children's Act has remained a guide in regard to criminal responsibility.**

***[17]* In a recent decision of the Court of Appeal sitting in Nyeri the case of; *Patrick Kathurima v Republic, [2015]eKLR*; it held:**

"We take the view that the approach resonates with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of Section 19 of Cap 15. We are aware that Section 2 of the Children's Act defines a child of tender years to be one under the age of ten years. The definition has not been applied to the Oaths and Statutory Declaration Act, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes".

***[18]* The above decision supported the definition of a child of tender years to be 14 years and below and contextualized that definition within the *Oaths and Statutory Act* (sic)and under the *Children's Act*. On our part, we have no good reason to depart from this well-trodden path, as 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 the essential step was not taken in a criminal trial, the 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."**

Following that decision the complainant here being a child of eleven years the trial magistrate ought to have performed a voire dire examination so as to test her competency. As she did not do so the appellant's right to a fair trial was breached.
Regarding the language used at the trial the appellant submitted that he did not understand Kiswahili. However the record shows that he cross-examined almost all the witnesses and considering his unsworn statement which was in Kinyore he clearly understood all that was going on. The record also indicates that he was fairly well informed of the case before him and was not prejudiced by the omission if any to avail him the witness statements. His cross-examination of the witnesses was quite thorough meaning he was well versed with the language and knew what case he was answering to. On this issue therefore I can only echo the Court of Appeal in **Mwendwa Kilonzo & Another V. Republic [2013]eKLR** where it stated:-

"We appreciate that the aspect of language and ensuring that an accused person is given the facility of interpretation when he requires it is central in ensuring that the accused person is not prejudiced because he could not follow proceedings due to language barrier. In fact such trial will end in an injustice particularly if the accused is found guilty. Courts therefore have a duty to ensure that an accused person is able to follow its proceedings in a language he understands. That is the law and the case of Bishar Abdi vs Republic Cr.A.57/2008 emphasizes it. In the present appeal however, we have come to the conclusion that the appellants did follow the proceedings before the learned trial magistrate conducted in a language they understood, though that was not noted on the record. As we have stated, they did not complain to that court; they cross-examined witnesses and their statements in defence were taken down. They did not raise the issue of language as a challenge either in the trial court or in the High Court where one of them had a lawyer. And there was always a court clerk on hand, whose role is to provide interpretation if required. Accordingly, we do not find that the appellants herein were prejudiced in this case. This ground therefore fails."

The appellant was sentenced to life imprisonment and has only served three years of the sentence. I am of the view that this is a good case for retrial. Accordingly I quash the conviction and set aside the sentence of life imprisonment. The appellant shall be brought before the Senior Principal Magistrate's Court at Maseno for retrial by any magistrate other than M. C. Nyigei. Mention before that Court on 27th February 2017. In the meantime he shall be remanded at the GK Prison, Kisumu Main. It is so ordered.

Signed, dated and delivered at Kisumu this 23rd day of February 2017

E. N. MAINA

JUDGE

In the presence of

Ms Chelengat for the State

Appellant in person

Otieno – Court Assistant.