REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 83 OF 2014

JOSAM OKONDA OYOMBO..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

[Being an appeal from the conviction and sentence of the Principal Magistrate's Court at Maseno (Hon. M.C. Nyigei RM) dated the 29th August 2014 in Maseno PMCCRC No. 46 of 2013]

JUDGMENT

The appellant was found guilty, convicted and sentenced to a consecutive twenty years imprisonment on two counts of defilement contrary to section 8(1) as read with 8(3) of the Sexual Offences Act and Section 8(1) as read with Section 8(2) of the Sexual Offences Act respectively. Being aggrieved he has appealed against the conviction and sentences.

According to the charge sheet on Count 1 he was charged with Defilement contrary to section 8(1)(3) of the Sexual Offences Act and the particulars were that on 5th January 2013 in Emuhaya District, Vihiga County he intentionally caused his penis to penetrate the vagina of M A C a child aged 12 years.

On Count 2 the charge was defilement contrary to section 8(1)(2) of the Sexual Offences Act the particulars being that on 5th January 2013, Emuhaya in Vihiga County he caused his penis to penetrate the vagina of D A, a child aged 10 years. There were two alternative counts of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.

He pleaded not guilty on both counts. In the ensuing trial the prosecution called seven witnesses. The appellant made an unsworn statement.

Briefly the prosecution's case was that on the material day the two children went to the accused's home to call one A so that they could go for firewood in the bush. The said A was not home but the appellant who is their father's brother was home. He called them to him on the pretext he was going to tell them where A was. When they did he took them to his house and after tying one (D – victim in count 2) he threw the first (M – victim on the bed), removed her under pant and using his palm to cover her mouth so she would not scream proceeded to penetrate her. While he was at it his father came and while outside asked him what the children were doing in his house. He denied they were there and went ahead to have carnal knowledge of the second child. Once he was done he ordered them to run to their house and not to tell anybody what had happened. He threatened to go to their home when their father was not there and kill everybody if they told anybody. They ran to their house as ordered but did not keep quiet about it. They instead told their mother all that had happened. Their mother D O (PW3) took them to Emuhaya Sub-District Hospital where they were examined by John Shigali a Senior Clinical Officer (PW4). The Clinical Officer testified that for both children he established there was evidence of obvious penetration.

On 13th January 2013 their grandmother (PW5) reported the matter to the police. It was then that the appellant was arrested and subsequently charged with these offences.

In his defence the appellant narrated how he was arrested and taken to Luanda Police Station where he was shown two young girls and told he had defiled them. He denied doing so. He stated that he was an only child and that he had two children of his own who he was bringing up since the death of his wife. He stated that he was not a bad person and that he had not been examined by the doctor. He contended that the evidence of the girls was just allegations to destroy him and reiterated that he did not defile them. He contended that he could not have done so as the girls are HIV negative and he is HIV positive.

After evaluating the evidence by both sides the trial magistrate concluded that both charges against the accused person had been proved beyond reasonable doubt and convicted him. She then proceeded to impose a sentence of twenty years imprisonment on each count and ordered them to run consecutively.

In his Petition of Appeal, drawn by Balusi & Smart Advocates, the appellant faults the trial magistrate for relying on inadmissible hearsay evidence to convict him; for not making anything of the fact that the matter was not reported for 7 days; for not giving heed to material inconsistencies in the testimonies of the witnesses; for not taking into account that the evidence of PW4 and PW5 was hearsay; for believing in witnesses who had unquestionable and immense parental control on the children; for covering the standard of proof and for concluding that the case against him was proved beyond reasonable doubt. He urged this Court to quash the conviction and set aside the sentences.

At the hearing of the appeal however he acted in person and relied on his homegrown submissions wherein he introduces new grounds – defective and duplex charge; omission by the court to conduct a voire dire before receiving the evidence of the children and violation of his rights being :-

(a) Omission to comply with Section 200 of the Criminal Procedure Code;

(b) Failure to call crucial witnesses e.g. his father and also that the sentence ought to have been life imprisonment and not twenty years imprisonment.

On her part, Miss Chelengat, Prosecution Counsel submitted that the complainants gave a detailed account of what the appellant did to them. That they even identified the appellant and and that penetration was confirmed by the doctor.

She also submitted that the appellant's unsworn evidence did not refute or rebut that of the prosecution witnesses and urged this Court to dismiss the appeal.

In reply he wondered how he could defile two children in one day and contended that the witnesses were not credible. He also submitted that he too should have been examined by the doctor and reiterated that the sentence meted was unlawful as the law provides for life imprisonment. He told this Court he is an orphan and implored to come to his aid.

My duty as the first appellate Court is to reconsider and evaluate the evidence afresh while bearing in mind that I did not have the benefit of observing the demeanour of the witnesses as did the trial magistrate.

The victims in this case were children aged twelve and ten years respectively. Their ages were proved through an Immunization Card and a Baptism Card. The Immunization Card shows M (PW1) was born sometimes in May 2001 which would mean she was in fact twelve years when this offence is alleged to have been committed. For D A her baptism card indicates she was born on 20th March 2003 which would put her age as slightly below ten years when the offence was committed. Whereas Section 350(2) of the Criminal Procedure Code frowns upon amendment of a petition of appeal without leave I find that the appellant's submission that the trial magistrate erred for not conducting a voire dire, cannot be ignored. In **Samuel Warui Karimi V. Republic [2016]eKLR** the Court of Appeal stated:-

"[10] Another point of law which was not raised by the appellant (perhaps because he was not represented by Counsel) was the credibility of the evidence by the complainant, a child of 12 years whose competency to give evidence was not tested by the trial magistrate through voire dire examination …..... Subjecting a witness of tender age to voire dire examination is founded under Section 125(1) of the Evidence Act, which states; -

"All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether or body or mind) or any similar cause)".

[11] Also Section 19(1) of the Oaths and Statutory Declarations Act has something to do with receiving evidence of a child in the following:-

"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 given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth".

[12] Both statutes are silent on the definition of who is a child of tender years. In our own understanding of the above provisions of the law voire dire is an examination that serves two purposes; one, it is a test of the competency of the witness to give evidence and two, a means of testing whether the witness understands the solemnity of taking an oath. Thus under the Evidence Act, the test is one of competency as the court is supposed to consider whether the child witness is developmentally competent to comprehend the questions put to him or her and to offer reliable testimony in criminal proceedings, It, therefore follows if the child is not competent to comprehend the evidence, they cannot also give sworn evidence."

In the above case the Court of Appeal upheld a child of tender years for purposes of receiving evidence to be 14 years and below and stated that the definition of a child of tender years provided under the Children's Act has remained a guide in regard to criminal responsibilities. They agreed with another Court of Appeal decision in **Patrick Kathurima V. Repulic [2015]eKLR** which held:

"**We take the view that this 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".

As was held by the Court of Appeal the requirement for a voire dire is intended to protect the accused's guaranteed right to a fair trial and when it is not conducted that right is compromised. In the circumstances the conviction against the appellant cannot stand. Moreover even the sentence of twenty years imprisonment meted on Count 2 could not stand as Section 8(2) provides for life imprisonment. I am however satisfied that this is a good case for retrial. The appellant has only seved three years out of a term of forty years imprisonment and in my view the evidence is such as could amount to a conviction.

In the end, the appeal is allowed, the conviction quashed and sentences set aside and the accused is to be retried at the Maseno Court by a magistrate other than M.C. Nyigei. To that end he shall be escorted to Maseno Court on 6th June 2017. In the meantime he shall be remanded at Kisumu Main Prison.

Signed, dated and delivered at Kisumu this 30th day of May 2017

E. N. MAINA

JUDGE

In the presence of:-

Mr. Muia for the State

Appellant in person

Court Assistant – Serah Sidera