REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 4 OF 2016

ALFRED MUGENDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case Number 508 of 2014 in the Senior Principal Magistrate's Court at Voi delivered by Hon E. M. Kadima (RM) on 5th May 2015)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Alfred Mugendi, was tried and convicted by Hon E.M. Kadima, Resident Magistrate for the offence of defilement of idiots or imbeciles contrary to Section 146 Cap 63 (Laws of Kenya). He had initially been charged with the offence of attempted defilement contrary to Section 9 (1) (2) **(sic)**and committing an indecent act contrary to Section 11(1) of the Sexual Offences Act No 3 of 2006 respectively.

2. The particulars of the main charge were as follows :-

> **"On the 22nd day of June 2006 at [particulars withheld] Estate within Taita Taveta County, intentionally attempted to cause his penis to penetrate the vagina of J M a child aged 16 years."**

3. The particulars of the alternative charge were as follows:-

> **"On the 22nd day of June 2006 at [particulars withheld] Estate within Taita Taveta County, intentionally touched the vagina of J M a child aged 16 years with his penis."**

4. Being dissatisfied with the judgment therein, on 8th January 2016, the Appellant filed a Notice of Motion application seeking leave to file an appeal out of time. The said application was allowed and the Petition of Appeal was deemed to have been duly filed and served. His Mitigation Grounds of Appeal were as follows:-

> **1. THAT he was too remorseful with the offence that it was the first one in his life** (sic)**.**
>
> **2. THAT hence he was asking for leniency from the court to have mercy on him** (sic)**.**
>
> **3. THAT he was a truly reformed Christian and promised to stay in harmony in the free**

society if given a second chance(sic)**.**

4. THAT if given this chance he would build the nation and give support to his family through farming and full participation in business activities(sic)**.**

5. On 23rd November 2016, the court directed him to file his Written Submissions. On 20th December 2016, he filed Amended Grounds of Appeal along with his Written Submissions. The Amended Grounds of Appeal were as follows:-

1. THAT the learned hon trial magistrate erred in law and fact in convicting and sentencing him while relying on the Charge Sheet as drafted against him without humbly considering that the evidence on record did not support the charge itself.

2. THAT the learned hon trial magistrate erred in law and fact in relying on the evidence of PW 2, 3, (sic) **and PW 4 without humbly considering that this witness (**sic) **were minors who didn't know the meaning of oath and therefore the *voire dire* process was necessary.**

3. THAT the learned hon trial magistrate erred in law and fact in convicting and sentencing him while relying on the age of the victim as alleged without considering that the same was not proved beyond reasonable doubt.

4. THAT the learned hon trial magistrate erred in law and fact in convicting and sentencing him while relying on the prosecution evidence without considering that the same was full of contradictions regarding the clothes the victim was wearing during the incident.

5. THAT the learned hon trial magistrate erred in law and fact in not considering his defence evidence which he gave under oath and that created reasonable doubt whereby the benefit ought to have been given to him.

6. The State's Written Submissions were dated 15th February 2017 and filed on 16thFebruary 2017. The Appellant's Further Submissions in response to the said State's Written Submissions were filed on 7th March 2017.

7. When the matter was mentioned on 19th April 2017, both the Appellant and counsel for the State informed this court that they would not highlight their respective Written Submissions but that they would rely on the same in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

8. As can be seen from the initial Mitigation Grounds of Appeal, the Appellant appeared to have admitted to having committed the offence that he was charged with as he was pleading for leniency from this court. Ordinarily, no value then would be added in analysing the evidence that was adduced during trial. However, in the interests of justice, this court deemed it prudent to consider the Appellant's Amended Grounds of Appeal because he did not have any legal representation at the time of trial and at the appeal stage.

9. Accordingly, being the first appellate court, this court is under a duty to re-examine the evidence that was adduced in the lower court as was held by the Court of Appeal in the case of **Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR** where it was stated that:-

"**On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

10. It appeared from the respective parties' Written Submissions that the issues that had been placed before this court for determination were as follows:-

a. Whether or not the Charge Sheet was defective;

b. Whether or not the *voire dire* examination herein was properly conducted;

c. Whether or not the Prosecution had proved its case beyond reasonable doubt.

11. The court therefore dealt with the said issues under the separate headings shown hereinbelow.

I. CHARGE SHEET

12. Amended Grounds of Appeal No (1) was dealt with under this head.

13. The Appellant submitted that the evidence that was adduced by the witnesses did not support the charges that had been preferred against him. His argument was that the charge indicated that he had attempted to defile the Complainant, J M (hereinafter referred to as "PW 8") yet the Prosecution witnesses told the Trial Court that he had sex with her. He said that the Prosecution had an opportunity to amend the Charge Sheet but failed to do so thus rendering the trial a nullity.

14. On its part, the State referred this court to the definition of "**attempt"**in the Black's Law Dictionary 2nd edition where it was stated that :-

> **"in criminal law the word attempt is an effort or endeavour to accomplish a crime amounting to more than mere preparation or planning for it and which if not prevented would have resulted in the full consummation of the act attempted but which in fact does not bring to pass the party's ultimate design."**

15. It argued that Dr Maha Salim, a Medical Officer from Moi District Hospital (hereinafter referred to as "PW 7") was not able to establish whether penetration of PW 8 by the Appellant had taken place on 22nd June 2014 because although her hymen was broken, she was not bleeding from her genitalia and there was no presence of spermatozoa. It submitted that the only conclusion that could have been arrived at was that the Appellant had only attempted to defile PW 8 which it said was corroborated by E N (hereinafter referred to as "PW 2"), T M (hereinafter referred to as "PW 3") and S M (hereinafter referred to as "PW 4") who had seen him lying on her.

16. This court carefully analysed the evidence by the Prosecution witnesses and noted that the incident was said to have occurred at 9.00pm where the lighting conditions were not favourable to see exactly what happened to PW 8. Appreciably, apart from seeing the Appellant lying on top of PW 8 and running away, PW 2, PW 3, PW 4, the Matron Hannah Maki (hereinafter referred to as "PW 6") and the Caretaker, Jacob Okumu (hereinafter referred to as "PW 5") could not for a fact confirm that they saw the Appellant actually defile PW 8. Indeed, PW 5 testified that he only saw the Appellant running away.

17. In view of the aforesaid circumstances, this court therefore found itself in agreement with the State's submissions that since PW 8's hymen was broken but there was no bleeding or spermatozoa in her genitalia, the only logical conclusion that could be made was that the Appellant had tried to defile her.

18. The Charge Sheet could not therefore be said to have been defective. The fact that a charge is not proven by the evidence that is presented during trial does not in itself make the charge defective. In such a case, an acquittal would normally follow.

19. In the premises foregoing, this court did not see any merit in the Appellant's Amended Ground of Appeal No (1) and the same is hereby dismissed.

II. *VOIRE DIRE* EXAMINATION

20. Amended Ground of Appeal No (2) was dealt with under this head.

21. The Appellant argued that the Learned Trial Magistrate erred in accepting the evidence of PW 2, PW 3 and PW 4 under oath when they did not know the meaning of an oath which contravened the provision of Section 124 of the Evidence Act.

22. On its part, the State submitted that PW 2, PW 3 and PW 5 were aged fourteen (14) years and that since the Children Act provided that children of tender years were those who were aged ten (10) years and below, it was not necessary for the Learned Trial Magistrate to have conducted a *voire* d*ire* examination. It placed reliance on the case of **Criminal Appeal No 16 of 2014 Samuel Warui Karimi vs Republic.**

23. It also relied on Section 19 of the Oaths and Statutory Declarations Act Cap 15 (Laws of Kenya) which stipulates as follows:-

> **"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 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 into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section."**

24. In addressing what age would be appropriate for a trial court to conduct a *voire dire* examination, this court had due regard to the case of **Maripett Loonkomok v Republic [2016] eKLR** where the Court of Appeal sitting in Mombasafound and held that children under the age of fourteen (14) ought to be taken through a *voire dire* examination. It rendered itself as follows:-

> **"…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;**
>
> > ***"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.""***

25. Notably, the age at which a *voire dire* examination should be conducted depends on the circumstances of a particular case and is not cast in stone. Indeed, a child could be aged seventeen (17) years yet be of such mental incapacity that would require that a trial court to conduct a *voire dire* examination to determine if he or she should adduce sworn or unsworn evidence. The ascertainment of whether such a witness understands the meaning of taking an oath cannot be taken lightly as an accused person can be convicted on the basis of sworn evidence of such a witness.

26. Bearing the aforesaid holding in mind, this court was of the considered view that the Learned Trial Magistrate ought to have conducted a *voire dire* examination in respect of PW 2, PW 3 and PW 4 who were aged fourteen (14) years. As can be discerned hereinabove, ten (10) years is not necessarily the minimum threshold of the age of a child who should be considered a child of tender years for whom a *voire dire* examination could be conducted as had been contended by the State.

27. Having said so, it does not always follow that a convicted person will be acquitted merely because a *voire dire* examination has not been conducted or properly conducted. This is because an appellate court has the power to order that a matter be referred for re-trial. Even so, a re-trial is also not automatic.

28. A re-trial must only be ordered where no prejudice would be occasioned to an appellant or where it will not give a party seeking a re-trial a second bite at the cherry by panel beating its case to fill gaps in a fresh trial. Indeed, an appellate court will not order that a re-trial be conducted where it finds that a conviction cannot be sustained based on the evidence that is currently before it at the time of hearing and determination of an appeal.

29. In this regard, this court fully associated itself with the holdings in the cases of **Ahmedi Ali Dharamsi Sumar vs Republic [1964] E.A. 481** and re-stated in **Fatehaji Manji vs Republic [1966] E.A. 343** that Mutende and Thuranira Jaden JJ cited in the case of **Jackson Mutunga Matheka vs Republic [2015] eKLR** where it was stated as follows:-

> **"… a retrial will only be ordered when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence of for the purpose of enabling the prosecution 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, each case must depend on particular facts and circumstances and an order for retrial should only be made where the interest of justice required it and not ordered where it is likely to cause an injustice to the accused."**

30. It was on the basis of the above holding that this court deemed it prudent to analyse the evidence that was adduced in the Trial Court with a view to establishing whether or not this matter would be suitable for a Re-trial. The analysis of this evidence was also critical because there were other witnesses who testified and the Appellant's conviction was not merely based on the evidence of the said child witnesses.

31. In this respect, this court did not find merit in Amended Ground of Appeal No (2) and the same is hereby dismissed.

III. PROOF OF THE PROSECUTION CASE

A. AGE OF THE COMPLAINANT

32. Amended Ground of Appeal No (3) was dealt with under this head.

33. It was the Appellant's contention that PW 8's age was not proven. He pointed out that her Birth Certificate was not adduced in court and that the expert who prepared the Age Assessment Report was not called to produce the same.

34. The State contended that the Age Assessment Report was sufficient despite the doctor who prepared the same not having been called as a witness in the case herein. It referred this court to the case of **Criminal Appeal No 504 of 2010 Kaingu Elias Kasomo vs Republic Malindi**where the Court of Appeal stated that:-

> **"The age of the minor was an element of a charge of defilement which ought to be proved by medical evidence.Documents such as baptism cards, school leaving certificates in my view would also be useful in this regard…"**

35. PW 7adduced in evidence the P3 Form that showed PW 8's approximate age as sixteen (16) years. Her mother, P G (hereinafter referred to as "PW 1") testified that PW 8 was aged seventeen (17) years having been born in July 1996. No 74476 PC Patrick Mathenge (hereinafter referred to as "PW 9") adduced in evidence the Certificate of Dedication showing that PW 8 was born on 26th July 1996.

36. The fact that there was a discrepancy in PW 8's age which was given as fifteen (15) years and sixteen (16) years or that the doctor who prepared the Age Assessment Report was not called to testify in courtas had been contended by the Appellant was immaterial and irrelevant in the circumstances of the case. Indeed, the Certificate of Dedication was sufficient and the said Age Assessment Report merely corroborated her age.

37. As the Appellant did not adduce any evidence to rebut the documentary evidence of her age, this court found and held that the Learned Trial Magistrate was correct in having relied on the said Certificate of Dedication in respect of PW 8's age. Indeed, this Certificate of Dedication from Pentecostal Evangelistic Fellowship of Africa that showed PW 8's date of birth was 26th July 1996. This was equivalent to a Baptismal Card, Clinic Card or Birth Certificate that the Court of Appeal in the case of **Kaingu Elias Kasomo vs Republic** (Supra) had found to have been adequate documents to prove a child's age.

38. In the premises foregoing, this court found Amended Ground of Appeal No (3) not to have been merited and the same is hereby dismissed.

B. EVIDENCE OF THE PROSECUTION WITNESSES

39. Amended Grounds of Appeal Nos (4) and (5) were dealt with under this head.

40. The Appellant stated that PW 1, PW 3 and PW 4 had testified that PW 8 was wearing a dress and not a skirt as PW 6 had alleged. He also pointed out that the clothes that were alleged to have had blood were also not adduced in evidence. He submitted that the Learned Trial Magistrate ought to have considered his defence that he adduced on oath and given him benefit of doubt as his evidence far outweighed that of the Prosecution that was full of contradictions.

41. The State set out the evidence by the Prosecution witnesses which it said showed that PW 2, PW 3, PW4, PW 5 and PW 6 saw the Appellant running away and that he was arrested by members of public. It submitted that the Appellant was at the scene of crime at the material date and that he had not demonstrated why the Prosecution witnesses would have wanted to frame him. It urged this court to disregard his defence as he had also not demonstrated that any grudge existed between him and the Prosecution witnesses.

42. A perusal of the proceedings from the Trial Court showed that PW 2, PW 3, PW 4, PW 5 and PW 6 saw the Appellant running from the scene of the incident. Indeed, he had been caught red-handed by PW 2, PW 3, PW 4 and PW 6 lying on top of PW 8.

43. According to PW 2, on 22nd June 2014 at about 9.00 pm, he was watching television when he heard noises coming from a nearby bush. He went and called PW 3 and PW 4 so that they could check what was going on. On reaching there, he saw "Aboo," the Appellant herein lying on top of PW 8 telling her to keep quiet. His further evidence was that the Appellant had removed his trousers to the knees while PW 8's dress was pulled up and that they had already had sex. They then called PW 6 who found the Appellant still continuing with the act.

44. PW 3 testified that he was going to the hostels after watching television on the material date at about 9.00pm when PW 2 called them back and asked them to accompany him to check on screams he had heard emanating from a nearby bush. When they reached there they found "Aboo", the Appellant herein lying on top of PW 8. He corroborated PW 2's evidence of the state of the Appellant's and PW 8's dressing and that the Appellant was having sex with her. They then started shouting "mwizi mwizi" translated in English as "Thief thief" whereupon members of public came to their assistance and arrested the Appellant.

45. PW 4 also corroborated PW 3's evidence and confirmed that together with PW 2 and PW 3, they went to investigate the cause of noises when they found " Aboo", the Appellant herein lying on PW 8. He also spoke of the Appellant's trousers being at the knee level while PW 8's dress was pulled up. PW 6 also confirmed that he saw the Appellant raping PW 8. It was her evidence that PW 8 was wearing a skirt and

blouse.

46. It was clear that the evidence that was adduced by the Prosecution witnesses was consistent and cogent and demonstrated the Appellant's role during the incident on the material date. His assertions that some witnesses had referred to PW 8 wearing a dress while others referred to a skirt was not a material contradiction that would have persuaded this court to find that the Prosecution evidence was contradictory or inconsistent. What was of concern to this court was that he was seen in a compromising position with PW 8.

47. There was no logical explanation why **"boys"**referred to by the Appellant in his testimony would have started to shout **"mwizi huyu"** translated in English **"this thief"**and throwing stones on the roof without any provocation or why members of public would have wanted to beat him for no reason at all. Indeed, as the State pointed out, he was squarely at the scene of the incident as he stated that he was saved by PW 5 from being lynched by the members of public.

48. Accordingly, having analysed the evidence that was adduced in the Trial Court and having taken into consideration the Written Submissions by the Appellant and counsel for the State, this court was satisfied that the Learned Trial Magistrate acted correctly in finding and holding that the Appellant attempted to defile PW 8 on the material date. Similar to what the Learned Trial Magistrate found and held, this court came to the firm conclusion that the Prosecution proved its case to the required standard, which was, proof beyond reasonable doubt.

49. In the circumstances foregoing, this court found Amended Grounds of Appeal Nos (4) and (5) were not merited and the same are hereby dismissed.

IV. <u>SENTENCE</u>

50. The child the Appellant was alleged to have attempted to defile was aged sixteen (16) years. The penalty for such an offence is to be found in Section 9(2) of the Sexual Offences Act that provides as follows:-

> **"A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years."**

51. Against that backdrop, while sentencing him, the Learned Trial Magistrate rendered himself as follows:-

> **"This court had a solemn duty to protect the most vulnerable members of society against those placed in a position of guardianship or authority over such vulnerable persons. The Sexual Offences Act Section 8 (4) and Section 146 of the Penal Code provide only one sentence.**
>
> **The evidence so tendered discloses that the offence committed is punishable under Section 147 of Cap 63. I therefore sentence the accused to serve 14 years imprisonment with hard labour."**

52. Appreciably, there was blood on PW 8's clothes. However, these clothes were not adduced as evidence in court and there was no evidence of where the said blood came from. It was therefore difficult for this court to make a definite conclusion that there were aggravating circumstances that would have warranted the Appellant being given a very stiff sentence.

53. Under Section 9(1) of the Sexual Offences Act, the minimum sentence that could be imposed on the Appellant was ten (10) years imprisonment. The Learned Trial Magistrate had discretion of handing him a more severe sentence. However, he exercised his discretion judiciously and opted to impose fourteen (14) years imprisonment, a fact that was rightly pointed out by the State herein. Indeed, the Appellant admitted in his sworn defence that PW 8 was mentally challenged. This court thus saw no reason in

interfering with the Learned Trial Magistrate's conclusion that the Appellant should serve fourteen (14) years.

54. Turning to the penalty under Section 146 of the Penal Code, the same provides as follows:-

> **"Any person who, knowing a person to be an idiot or imbecile, has or attempts to have unlawful carnal connection with him or her under circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the person was an idiot or imbecile, is guilty of a felony and is liable to imprisonment with hard labour for fourteen years."**

55. This court was, however, of the view that there was no justification for the Learned Trial Magistrate to have convicted the Appellant guilty under the Penal Code. Indeed, the charges that were preferred against the Appellant could easily have been proven under the Sexual Offences Act. As the State conceded, no evidence was adduced before the Trial Court to prove that PW 8 was an idiot or imbecile.

56. The extent of mental incapacity or a person's intelligence quotient (IQ) can only be ascertained by a medical officer or a person who has expertise in that area. A physical observation of PW 8 could not and was not a proper way to determine that she was an idiot. The fact that someone is mentally challenged does not mean that he or she is an idiot or an imbecile.

57. It was therefore the considered view of this court that the Learned Trial Magistrate proceeded on the wrong principles when he concluded that PW 8 was an idiot. Indeed, he had no expertise to determine the state of her mental incapacity or determine the extent of her Intelligence Quotient which is what would have determined whether or not she could be deemed to have been an idiot or imbecile.

58. It was therefore the view of this court that the addition of imprisonment with hard labour was manifestly excessive in the circumstances as there was no scientific evidence that was adduced before the Trial Court to demonstrate that PW 8 was an idiot or imbecile.

DISPOSITION

59. As this court found the Appellant to have been guilty of the offence of attempted defilement, it made no determination of the alternative charge. It found that the Appellant had not advanced any sufficient reason to persuade it to interfere with the decision of the Trial Court and therefore declined to quash the conviction.

60. However, this court was persuaded to set aside the sentence that was meted upon the Appellant by the Trial Court as the same was manifestly excessive. It is hereby directed that the sentence that the Appellant shall serve fourteen (14) years imprisonment with hard labour be and is hereby set aside and the same be replaced with imprisonment for fourteen (14) years only.

61. The upshot of this court's judgment, therefore, was that the Appellant's Appeal filed on 8th January 2016 was not merited and the same is hereby dismissed.

It is so ordered.

DATED and **DELIVERED** at **VOI** this **20TH** day of **JUNE** 2017

J. KAMAU

JUDGE

In the presence of:-

Alfred Mugendi- Appellant

Miss Karani-for State

Josephat Mavu– Court Clerk