REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT CRIMINAL APPEAL NO. 33 OF 2013

MOSES MUNENE NGURANI …….APPELLANT

VERSUS

REPUBLIC……..…... RESPONDENT

JUDGMENT

(Appeal against the conviction and sentence in Nyeri CMCRC no. 54 of 2012

Hon. J.O Aringo Resident Magistrate)

Moses Munene Nguraini (the appellant) was charged before the Nyeri Cm's court in Cr case no 34 of 2012 with the offence of Defilement of a girl c/s 8(1) as read with 8(2) of the Sexual Offences Act no. 3 of 2006.

The particulars of the charge were that on the 15th day of August 2012 at [Particulars withheld] village in Nyeri County within the Republic of Kenya he intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of EWM a girls aged 8 years.

In the alternative he was charged with Indecent Act with a girl c/s 11(1) of the same Act.

That on the 15th day of August 2012 at [Particulars withheld] village in Nyeri County within the Republic of Kenya he intentionally and unlawfully caused his genital organ namely penis to touch the genital organ namely vagina of EWM a girls aged 8 years.

Section 8 of the Sexual Offences Act provides;

> (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.

Plea was taken on the 21st August 2012, he denied the charge and a plea on not guilty was entered.

The trial commenced on the 3rd of October 2012.

Four witnesses testified for the prosecution.

The case for the prosecution is that the accused was an employee of the complainant's mother since September 2011. He worked as herdsman and general worker including fetching firewood. The complainant was in class two at [Particulars withheld] school. On the 17th August 2012, the complainant refused to go to school. That evening her mother LWW PW2 found her in her bedroom. She had wrapped a piece of cloth between her thighs and was putting on a biker. When her mother asked her what was wrong. She examined the child and found a rash and whitish stuff which she concluded was pus, coming from her private parts. She wiped her. The whitish stuff was till oozing out. It was like mucus and was smelly. She asked the child what was wrong. The child told that Munene had entered her. She went to confront Munene but he denied anything. The following morning the child's mother confronted Munene in the presence of the child. The child stated in his presence what he had done to her. Her mother decided to take her to Mweiga police station from where they were referred to hospital.

According to the child the accused person had been doing tabia mbaya to her for a long time. On the 15th of August 2012 she came home from school. Her mother was away and she fell asleep on the chair. The accused came, removed her pants, stockings and clothes, his belt and trousers, applied oil on his thing and on her private parts and did tabia mbaya to her while asking her if she could feel what he was doing. He told her if she told anyone he would do it again. She complained that she was feeling pain and asked him not to do it forcefully but he still did. Her private parts were itchy and scratchy.

She felt that the wound was not healing. The place was swollen. She went to her mother's room to tie it a cloth and that is when her mother found her. She told her that Munene had had defiled her.

The accused person cross examined her. She testified that the accused would do tabia mbaya to her when she came from school and her mother was away. One time he did it to her when she was sleeping and she woke up and found him on top of her. Sometimes they would go somewhere. She said she did not see him apply the oil but realised she had oil on her private parts.

PW3 was Dr. Kinuthia from Mary Immaculate Hospital. She testified that the 8-year-old child had history of sexual assault by known person for five months. That the child was brought to hospital three says after the last incident, on the 18th August 2012. She was examined and put on treatment. The P3 was completed on the 20th August 2012.

Upon examination, her underwear was stained with 'PV' discharge.

Her external genitalia were normal but had lacerations in the posterior vaginal wall and some bruising. There was a whitish greenish discharge from her vagina. Her hymen was absent. The high vaginal swab revealed a yellowish discharge with slight odor, viscous pus cells, sperm cells. The urinalysis also revealed sperm cells.

She confirmed that the appellant was not examined.

PW4 PC Beloet Kibet received the report at Mweiga Police Station on the 18th August 2012. The child narrated how the accused had defiled her on the sofa in the kitchen. The child was issued with a P3 form which was duly filled. On the 20th August 2012, he visited the complainant's home and was shown the sofa where it had happened. The accused person was arrested and charged.

When cross examined he stated that his investigations confirmed that the child had been defiled, she identified the accused as the one who had done this to her. He was not a stranger as he was employed in her home. She identified him by name to her mother, the him as the I.O and to the doctor. He believed her. Her story was confirmed by the medical evidence.

The trial court found that the accused had a case to answer and put him on his defence.

He made an unsworn statement and did not call any witness.

He denied the offence. He confirmed that he was employed by the mother to the complainant from August 2011, up till August 2012 when he was arrested. His testimony was that this case was trumped up against him because the mother to the complainant did not want to pay him his salary for 7 months. Hence on 20th August 2012, he was arrested while going on with his duties in the home waiting for his salary.

He said that there were many other people in the home, yet there was no witness to the offence. That he did not have any close contact with the child. He was surprised when he was charged on the 21st August 2012.

In his judgment the trial magistrate found that the ingredients of the charge were proved.

There was penile penetration of the child's vagina by the accused person. That the child knew the accused, it happened during the day, she referred to the accused by name, and the medical evidence corroborated hers.

He did not believe the defence by the accused, as it did not challenge the complainant's testimony.

He found the accused guilty of the charge and sentenced him to life imprisonment as provided by law.

It is against this conviction and sentence that the appellant has filed this appeal.

The amended grounds of appeal as filed on the 6th March 2017 are reproduced here below

> 1. "The trial magistrate erred in law and fact while basing my conviction on the evidence of PW1 that she was defiled by the appellant without considering as she stated she was being done bad things (tabia mbaya) but never mentioned the appellant's penis in her evidence.
>
> 2. That the trial magistrate erred in law and fact in relying on the evidence of PW2, PW3 PW4 without considering that none of these witnesses was sworn before giving their testimonies while the medical evidence section 34 B (2) and section 77 of the Evidence Act Cap 80 Laws of Kenya was not complied with.
>
> 3. The trial magistrate erred in law while convicting the appellant on the evidence of PW1, a single witness without warning himself of the danger of relying on it and therefore rejected my alibi defence which was not displaced by the prosecution side while also section 169(1)(2) of the CPC was not complied in my judgement."

The appellant was not represented by counsel. He relied on his written submissions. The state was represented by Ms. Jebet state counsel who made oral response to the appellant's written submissions.

On the first ground the appellant urged the court to find that the prosecution had not proved penetration as defined by law- insertion of one's genital organ into the genital organ of the child.

His argument was that in this case his genital organ was the penis. That the child did not mention his penis anywhere in her testimony but instead "made reference to 'his thing' without describing what this thing was, or how it was inserted into her genital organ". He argued, that not every penetration of a complainant's genital organ gives rise to the offence of defilement. That for the offence of defilement to be proved, there must be evidence of the partial or complete insertion of the genital organ of one into the genital organ of the child. That the court misdirected itself by presuming that the 'thing' referred to by the complainant was indeed the accused's penis. That in so doing the court relied on speculation instead of proof that the appellant defiled the complainant. Secondly that even the mother's testimony did not help. That she told the court that the child told her, she had been done tabia mbaya. Prodded further she said "Munene had entered her", and the court speculated that this meant 'penetration'. That by so doing the trial magistrate erred.

Following the above argument, the appellant's position was that there was no proof that the findings made by the medical examination were the result of only penetration by a genital organ. That the *'tabia mbaya'* referred to by the complainant was not specific to a penis. That it could have been by the insertion of a finger, and that would not amount to defilement as defined by law. That his conviction by the trial magistrate was unsafe.

On the second ground the appellant faulted the trial court for believing the testimony of PW2. He also faulted the trial court for stating that it was impossible to conceive how medical evidence could be fabricated to frame somebody. He wondered how PW2 could explain not ever noticing anything yet she lived in the same house with the complainant?

To him this gap in her testimony was proof that she made up this case because she did not want to pay him his salary for 7 months. He submitted that the trial court misdirected itself when it posed the question to itself: - how possible was it that the appellant could work for 7 months without pay? That this was an issue of his word against hers and the court did not have reasons for not believing him.

With reference sections of the Evidence Act as to the production of the P3 by PW3, he submitted that Dr. Kinuthia did not show how she arrived at the conclusion that the complainant been defiled for five months yet her testimony was that she had been done *'tabia mbaya'* several times.

On the third ground the appellant drew the court's attention to the record where it was indicated that PW2 PW3 and PW4 had testified without being sworn. That the court was under the misconception that just like the minor complainant the other witnesses required to be protected from cross examination by the accused person. That by allowing the witnesses to testify without being sworn the trial court had denied the appellant the opportunity to cross examine them and hence his right to a fair trial had been violated though protected by Article 50(1) and (2) of the Constitution of Kenya.

Finally, he submitted that the judgment failed to comply with the clear provisions of section 169(2) of the CPC requiring that in the case of a conviction, the statement of the specific offence and section of the law under which, the accused person is convicted, and the punishment to which he is sentenced.

The state opposed the appeal.

On the issue of the complainant not identifying 'the thing' that was used to defile her the state's response was that she was merely an innocent minor in class 2 who had not received sex education which in any case is taught at class six in our school curriculum, and hence could not be expected to know the word penis. That she was described the incident according to her level of understanding and her testimony and that of her mother were sufficient that she had been defiled.

That the trial court upon conducting the *voire dire* examination arrived at the conclusion that though the complainant did not understand the nature of an oath she was intelligent enough to testify. That it was true the record did not show that the mother PW2 was sworn. However, that she gave factual evidence of what happened. PW3 the doctor was sworn. That the presence of sperm cells following a urinalysis was proof of defilement.

That the court did consider the defence by the accused and proceeded to reject the same.

In response the appellant submitted that the fact the he was allowed to cross examine the complainant means that she knew what she was talking about and she stated she did not see him apply the oil. That the mother was not truthful. That the evidence of PW2, PW3 and PW4 should not stand because they were not sworn. That the P3 was filled in a private hospital so the doctor must have been bribed, that is why she said it was filled on 2nd August before the alleged incident. There was no explanation why tough he was under arrest he was not also examined.

He concluded by submitting that just like the story of Naboth and king Ahab in the Bible at 1 Kings 21:5-10 a person could easily and successfully plan a case against another.

As a first appellate court I have a duty to consider and re -evaluate the evidence placed before the trial magistrate and draw my own conclusions always bearing in mind that I did not see or hear the witnesses testify in the first place. This principle of law was stated by the Court of Appeal in **Okeno v. Republic [1972] E.A. 32** as follows: -

> **"**An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination **(Pandya v. R., [1957] E.A. 336)** and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. **(Shantilal M. Ruwala v. R., [1957] E.A. 570)**. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see **Peters v. Sunday Post, [1958] E.A. 424**.

However, the appellant raised a legal issue central to this appeal which must be determined first before I can analyse the evidence and come to my own conclusion, t**he implications of the unsworn testimonies of PW1, PW2 and PW4.**

Section **151 of the Criminal Procedure Code** provides that evidence is to be given on oath Every witness in a criminal cause or matter **shall be examined upon oath**, and the court before which any witness shall appear shall have full power and authority to administer the usual oath. (emphasis mine).

The trial court determined that the complainant was not capable of understanding the nature of an oath but was intelligent enough to give unsworn testimony. This was in order. The Court of Appeal in **Johnson Muiruri v. R.** (1983) KLR 445 held as follows:

> "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 [case] 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."

The exception for the evidence of a child of tender years is provided for in statute as was pointed out by the Court of Appeal in dealing with the same issue in **Samwel Muriithi Mwangi v Republic [2006] eKLR** discussed the provisions of the Oaths and Statutory Declaration Act Cap 15**.**

> **Section 19** of the Act provides for reception of evidence by children of tender years. So that the question of the witness taking an oath or an affirmation before being allowed to give evidence in a criminal trial or cause is not a matter for the discretion of the trial court. Excepting evidence received under **section 19** above the evidence of witnesses in such cases can only be received on oath or affirmation. No other method is available to witnesses or even interpreters.

With regard to PW2 the record simply shows;

> **"PW2 LWW** Lives in Talani. I am a farmer. 17/8/12 I remember very well. The child had to go to school but she said she would not go……"

There is no evidence that the witness was sworn or the language she used.

The record also shows that the witness was cross examined by the appellant.

With regard to PW3 it states;

"PW3 DR KINIUTHIA from Mary Immaculate Hospital (sworn)

P3 was filled on 2/8/2012. Ref No. 3136/12….."

For PW4 the record shows

"PW4 NO.67204 DC BELOET KIBET

Am at Mweiga Police Station. On 18/8/12 I was at police. One lady called LW reported with her daughter of 8years….."

The record also shows that the appellant cross examined PW4.

And for the appellant;

"MOSES MUNENE NGURAINI (UNSWORN)"

It is not in doubt that there is no evidence that the two witnesses were examined under oath as is provided for under the mandatory provisions of the law.

The Court of Appeal dealt with this issue in **Samwel Muriithi Mwangi v Republic [2006] eKLR** had this to say on the issue;

The appellant put it thus: -

> ***"3. That the high court judges erred in law in upholding a death sentence on the weight of the prosecution witnesses whereas their testimony was obtained in absence of oath contrary to section 151 c.p.c.***

The starting point is of course ***section 151*** of the Criminal Procedure Code and as is abundantly clear from that section all witnesses in a criminal trial or cause must be examined on oath. The issue is put in this way in **ARCHBOLD, CRIMINAL PLEADING EVIDENCE & PRACTICE**, 2002 Edition: -

> ***"II. swearing of witnesses.***
>
> ***A. INTRODUCTION:***
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> ***Common Law***
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> ***8-25. This topic is closely related to that of competence and compellability of witnesses. This is particularly so in the case of children and young persons and persons of unsound mind. ……***
>
> ***B. OATH:***
>
> ***(1) General.***
>
> ***The general common law rule is that the testimony of a witness to be examined*** *viva voce* ***in a criminal trial is not admissible unless he has previously been sworn to speak the truth. Counsel has no privilege from being sworn, even if he acts only as an interpreter: R v. Kelly (1848) 3 Cox 75. This general common law rule is subject to important statutory exceptions (post., §§ 8 – 31 et seq.) The witness must be sworn in open court; R v Tew (1855) Dears 429."***

The general common law rule is what has received statutory backing in ***section 151*** of the Criminal Procedure Code and the other relevant legislation touching on the matter is the Oaths and Statutory Declarations Act, ***Chapter 15*** Laws of Kenya. ***Section 14*** of that Act gives all courts and persons having

by law or consent of the party's authority to receive evidence the power to administer oaths. **Section 15** provides for the affirmation of persons who object to the taking of an oath while **section 16** sets out the form of an affirmation to be administered….

How do these principles apply in the present appeal?

We have already said that the record of the trial magistrate does not show whether or not the witnesses who testified before him were sworn before doing so. The appellant and his counsel appeared to us to contend that the witnesses were in fact not sworn. Mr. Kaigai, the learned Senior State Counsel, submitted that it was inconceivable that a senior magistrate like Mr. Nyamweya would have received the evidence of all the prosecution witnesses without having sworn them first. The usual practice of all the courts in Kenya is, of course, to show in the record that a witness has taken an oath before testifying. In the record before us, there is no way in which we can determine, one way or the other, that the witnesses were or were not sworn before they gave their evidence. Most likely, they took the oath before giving evidence. But there is also the probability that they might not have taken the oath and if that be the position, it would mean that the appellant was convicted on evidence which was not sworn. That would be in violation of section 151 of the Criminal Procedure Code and the other provisions we have set out herein. That, in our view, cannot be a matter curable under section 382 of the Criminal Procedure Code. To be convicted and sentenced to death on evidence which is not sworn must of necessity, be prejudicial to an accused person. In the event, we are satisfied that the trial of the appellant was a nullity because we are unable to exclude the probability of his having been convicted on unsworn evidence. It does not matter that the issue is being raised for the first time in this appeal. If the trial was a nullity, then it does not matter at what stage that issue is raised.

It apparent from the record of the trial court that appellant herein was convicted on the evidence of three unsworn witnesses, the complainant, her mother and the investigating officer.

I find help in E Muriithi J's judgment in **Rashid Wachilu Kasheka v Republic [2015] eKLR** where, citing from other authorities' states;

13. Section 151 appears to impose a total bar to unsworn evidence. The Court of Appeal in **May v. R.** (1981) held with respect to the unsworn testimony of an accused person that:

> *"An unsworn statement is not, strictly speaking, evidence and the rules of evidence cannot be applied to an unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential value is persuasive rather than evidential. For it to have any value it must be supported by the evidence recorded in the case."*

14. In **Odongo v. Republic** (1983) KLR 301, the Court held that the unsworn statement of an accused is not evidence and could therefore not be used against his co-accused. If the statement of an accused made on oath is consistently rejected by the courts as being 'not evidence' as in **Odongo**, supra, and **May** before it and others after it, it must follow that the consequences of unsworn evidence given by a prosecution witness who should have been sworn is equally worthless and cannot be relied upon to found a conviction. Moreover, in permitting the receipt of unsworn evidence, whether by mistake or otherwise, is an illegality that renders the trial defective and a 'nullity' as in **R. v. Marsham ex. parte Pethick Lawrence** [1912] 2 K.B 362 DC.

What do you do with a trial that is essentially a nullity?

The appellant was charged with a very grave offence attracting a mandatory life sentence.

The Court of Appeal asked itself the question "What orders should we make?" in **Samwel Muriithi Mwangi v Republic [2006]** and put down the following answer;

There is no doubt that the crime alleged against the appellant was a grave one; the victim of the alleged robbery lost his life in the process and apart from the issue that witnesses might have given unsworn

evidence before the magistrate, such evidence, if it had been received according to law, was substantial and a conviction might well be had upon it. We are, in the circumstances, inclined to order a retrial. We accordingly allow the appellant's appeal, quash the conviction recorded against him, set aside the sentence of death and order that he be tried de novo before a different magistrate. Those shall be our final orders in the appeal.

Should a retrial be ordered in the present case?

Section 354 (3) (a) (i) of the CPC provides that where after hearing an appeal from a conviction the court considers that there is no sufficient ground for interfering may order that the appellant be tried by a court of competent Jurisdiction.

In determining a similar question E Muriithi J in **Rashid Wachilu Kasheka v Republic [2015] eKLR** relied on the holding in **Opicho v R** (2009) KLR 369 which I also find helpful, where the court stated;

> "We must first discuss whether, in view of the transgression of procedure evident in the trial, the appellant ought to be retried before another court. If so, any analysis of the evidence on record may well prejudice the retrial. Should we order one?
>
> "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 purpose 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. Each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it**.**
>
> That was stated in **Fatehali Manji v. The Republic** [1966] EA 343. In many other decisions of this court it has been held 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 particular facts and circumstances and an order of retrial should only be made where the interests of justice require it. See **Muiruri v. Republic** [2003] KLR 552, **Mwangi v. Republic** [1983] KLR 522, and **Bernard Lolimo Ekimat v. Republic** Criminal Appeal No. 151 of 2004 (UR)." (emphasis added)

The Court of Appeal has spoken on the issue of unsworn testimony. It renders the trial a nullity, an illegality.

Though each case will depend on its particular facts and circumstances, a retrial will generally only be ordered where the original trial was illegal or defective and in the interests of justice. It is important to note that it is not just about justice for the appellant. It is also about justice for the victim. That is what Article 50(1) of the Constitution promises, the right to a fair trial, for every person, within the confines of the law.

That is why this case is so unfortunate. How could the trial court fail to simply record 'PW2/FEMALE/ADULT/CHRISTIAN/SWORN/STATES IN KISWAHILI' or similar format that captures the fact of the witness being sworn before giving his or her testimony?

It is also among the worst scenarios to require a retrial. The complainant was 8 years in 2012. This is 5 years later and she will be 13 years old if the matter goes back to retrial. I have, in my time in the children's court been faced with similar cases sent back for retrial. It is the most difficult thing getting a complainant who may have long buried in their subconscious the events that led to the case in court, the whole process, without any intention or desire to ever recall the same. It is not lost to me that a retrial is very hard, very hard on the victim of the offence. This victim is more often than not treated merely as a

state witness and his or her psycho- social welfare is sometimes not taken into consideration in getting them to come and testify once more.

In the circumstances of this case, the trial court's mistake is incurable under s. 382 of the CPC. Though any analysis of the evidence may well prejudice a retrial, in my view a retrial in this may result in a conviction. I find that it would be prejudicial to go into the merits of the appeal.

Hence, even though some time has passed, and the prosecution may have challenges in getting the victim to testify, the only way out for this case is a retrial.

The conviction and sentence are set aside. A retrial to be conducted by a magistrate other than Hon Aringo RM.

The trial magistrate to ensure compliance with the Criminal Procedure Code, and with regard to the victim, the provisions of the Children Act with regard to children in need of care and protection and the Victim Protection Act no 17 of 2014.

It is so ordered.

Dated, Delivered and signed in open court at Nyeri this 19th day of September 2017

Teresia Matheka

Judge

In the Presence of

Appellant

Ms Jebet

Harriet