REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 161 OF 2014

EDWARD EVERSON MCHARO……..…….....…….... APPELLANT

VERSUS

REPUBLIC…… RESPONDENT

(From original conviction and sentence in Criminal Case Number 279of 2013 in the Senior Resident Magistrate's Court at Wundanyi delivered by Hon M. Chesang (Ag SRM) on 31st October 2013)

JUDGMENT

INTRODUCTION

1. The Appellant, Edward Everson Mcharo, was tried and convicted by Hon C. Chesang, Ag Resident Magistrate for the offences of incest and committing an indecent act with a child contrary to Section 20(1) and Section 11(1) respectively of the Sexual Offences Act No 3 of 2006.
2. The particulars of the main charge were as follows :-

"On the 28thday of July 2013 at Chawia Location Wusi sublocation (sic) **Ndawada Village within Taita Taveta County, being a male person caused his penis to penetrate the vagina of R M M a female person who was to his knowledge his daughter."**

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

"On the 28th day of July 2013 at Chawia Location Wusi sublocation (sic) **Ndawada Village within Taita Taveta County, intentionally touched the vagina of R M M a child aged 13 years with his penis."**

4. Being dissatisfied with the said judgment, on 3rd December 2013, the Appellant filed a Petition of Appeal in which he stated inter alia:-

1. **THAT he did not plead guilty to the charge of defilement.**
2. **THAT the Learned Trial Magistrate erred in law and fact in shifting the burden of proof to him to prove his innocence and therefore convicted him on the basis of weak evidence.**
3. **THAT the Learned Trial Magistrate erred in both law and fact in trying and convicting him upon** (sic) **information and a charge sheet that was incurasly** (sic) **defective in substance and invalid.**
4. **THAT the Learned Trial Magistrate erred in law and fact when she overlooked the gloring** (sic) **contradiction between the doctor and PW 2 pertaining to the age of the girl and degree**

of injuries sustained during the offence.

5. On 8th April 2016, the Appellant was directed to file his Written Submissions. Instead of doing so, on 7th April 2016, he filed fresh Amended Grounds of Appeal and Written Submissions. The Grounds of Appeal were generally as follows:-

1. **THAT the Learned Trial Magistrate erred in both law and fact by finding that the Prosecution had established his guilt beyond reasonable doubt to warrant his conviction.**
2. **THAT the Learned Trial Magistrate erred in law and fact in failing to appreciate his personal and social circumstances.**
3. **THAT the Learned Trial Magistrate erred in law and fact by believing the alleged medical evidence relating to a broken hymen and penetration.**
4. **THAT the Learned Trial Magistrate erred in law and fact by relying on the evidence of PW 2 which was merely uncorroborated and exaggeration** (sic)**.**
5. **THAT the Learned Trial Magistrate erred in law and fact by failing to appreciate the evidence of the Investigation Officer (PW 4).**
6. **THAT the Learned Trial Magistrate erred in law and fact by not appreciating his defence submission** (sic)**.**
7. **THAT the Learned Trial Magistrate erred in law and fact in not considering the importance of the arresting officers to testify.**
8. **THAT the Learned Trial Magistrate erred in law and fact by failing to appreciate the evidence of PW 1 which was merely unbelievable**(sic)**.**

LEGAL ANALYSIS

6. The State did not file its Written Submissions as had been directed by the court on 8th April 2016. On 16th April 2016, its counsel indicated that it was conceding to the appeal due to the manner in which the trial was conducted. It urged the court to order a Re-trial which the Appellant herein had no objection to.
7. The State submitted that the Prosecution ought to have recalled the Complainant herein (hereinafter referred to as "PW 1") for the *voire dire* enquiry to be conducted for the reason that once the Birth Certificate was produced, it became apparent that she was a minor.
8. Whereas this court would not ordinarily have been persuaded to nullify proceedings where a *voire dire* enquiry was not conducted in the case of a seventeen (17) year old witness as was PW I when she testified at the trial because at that age such children are nearing the age of majority and are expected to know the implications of lying under oath, it was its view that the Learned Trial Magistrate had no option but to have conducted the *voire dire* enquiry as she did in fact record in her proceedings that PW 1 appeared to have been mentally sick.
9. Notably, the said Learned Trial Magistrate made her observation about PW 1 after the latter completed adducing her evidence. However, the Learned Trial Magistrate made no indication as to whether or not in her view she was satisfied that PW 1 was possessed of such intelligence as to have known what an oath was, that she knew the importance of giving truthful evidence and also knew the implications of adducing false evidence.
10. In the absence of any record of the said Learned Magistrate having pronouncing herself on her satisfaction of such critical facts, the question that arose in the mind of this court was, on what basis did she then allow the evidence of PW 1 to stand when in fact she appeared not to have been mentally stable? This court took the view that a *voire dire* enquiry ought to be conducted where circumstances demand such as in this particular case. It ought not to be limited to cases of child witnesses only.
11. In the absence of a *voire dire* enquiry by the Learned Trial Magistrate to satisfy herself of the mental capacity of PW 1, the proceedings in the Trial Court lacked integrity and were sufficient to have the trial nullified.
12. Going further, the State correctly averred that there was no indication as to whether or not the Prosecution closed its case before the Appellant was put on his defence. The court also observed that it was unclear from the recorded proceedings as to whether or not the Appellant was given an opportunity to cross-examine Ali Mumbo, the Clinical Officer at Wundanyi (hereinafter referred

to as "PW 3").

13. In respect of this witness, the record shows that the Learned Trial Magistrate wrote that there was **"No Re-examination."**There was no indication whatsoever that the Appellant cross-examined the said witness. This recording may well have been an inadvertent error on the part of the said Learned Trial Magistrate as she may have intended to write **"No cross-examination."**
14. However, as neither the State nor this court were present at the material time the proceedings were being recorded by the said Learned Trial Magistrate, the only inference that this court can make is that the Appellant did not cross-examine PW 3.
15. As the error in the manner the trial appeared to have been conducted and/or recorded could not be attributed to the Prosecution but was rather it was due to the omissions of the Learned Trial Magistrate, this court was persuaded by the holding in the case of the **Alex Mungai Waweru vs Republic [2014] eKLR** that was relied upon by the State herein Re-Trial should be ordered as was directed in that case.
16. Indeed in the case of **Muthami Munguti vs Republic [2016] eKLR**, this very court did point out the importance of conducting a proper *voire dire* enquiry. In that case, this court ordered that a Re-trial be conducted as it had found the proceedings therein to have been a nullity.
17. Accordingly, having considered the facts of this case, this court was persuaded to find and hold that this was a good case for Re-trial, a position that was acceded to by the Appellant herein.
18. The Appellant did raise several grounds to demonstrate that he had good grounds of appeal. On the other hand, the State was adamant that it did not concede to the appeal on account of the Appellant's Grounds of Appeal but rather it was due to the manner in which the trial was conducted.
19. Having made a finding that the matter facing the Appellant herein ought to be referred to the lower court for a Re-Trial, this court will say nothing about the merits of the Appellant's case as the same could prejudice the case in the new trial court.

DISPOSITION

20. For the foregoing reasons, it would be unsafe to allow the Appellant's conviction and sentence to stand undisturbed due to the manner in which the Learned Trial Magistrate appeared to have conducted the trial and/or recorded her proceedings. The Appellant's conviction is therefore hereby quashed and the sentence that was meted against him set aside.
21. However, in view of the fact that an offence was alleged to have been committed, it is hereby directed and ordered that the Appellant's Appeal that was lodged on 3rd December 2013 shall be allowed only to the extent that there shall be a Re-trial of the Appellant herein so that the matter can be heard on its own merits by any other magistrate other than the Learned Trial Magistrate herein.
22. In this regard, it is hereby directed and ordered that the Appellant remain in custody for production before the Senior Resident Magistrate Wundanyi Law Courts on 4th July 2016 for purposes of taking a plea and further hearing of this matter. It is the expectation of this court that the new trial court will hear this matter expeditiously as the Appellant was incarcerated on 31st October 2013 and he is presumed innocent until proven guilty.
23. It is so ordered.

DATED and **DELIVERED** at **VOI** this **30th** day of **JUNE** 2016

J. KAMAU

JUDGE

In the presence of:-

Edward Everson Mcharo …….. Appellant

Sirima…….. State

Simon Tsehlo– Court Clerk