REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 17 OF 2016

THOMAS MANOTI MUNIA …….... APPELLANT

VERSUS

REPUBLIC…… RESPONDENT

(From original conviction and sentence in Criminal Case Number 187 of 2015 in the Senior Resident Court at Taveta delivered by Hon W. K. Kitur (RM) on 16th September 2015)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Thomas Manoti Mumina, was tried and convicted by Hon W. K. Kitur, Resident Magistrate for the offences of defilement and committing an indecent act with a child contrary to Sections 8 (2) and 11(1) of the Sexual Offences Act No 3 of 2006.The Learned Trial Magistrate found that the main charge not to have been proven. He convicted the Appellant of the offence of committing an indecent act with a child and sentenced him to ten (10) years imprisonment.

2. The particulars of the main Charge was as follows:-

> **"On 6th day of May 2015 at around 1000 hrs at *[particulars withheld]* Taita Taveta unlawfully and intentionally caused your penis to penetrate the vagina of A J a child aged 9 years."**

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

> **"On 6th day of May 2015 at around 1000 hrs at *[particulars withheld]* Taita Taveta unlawfully and intentionally touched the vagina of A J a child aged 9 years with your penis."**

4. Being dissatisfied with the judgment therein, on 9th June 2016, the Appellant filed a Petition of Appeal. The Grounds of Appeal were as follows:-

> **1. THAT the Honourable Principal Magistrate erred in law and facts by finding that the prosecution had established the appellant guilty beyond reasonable doubt as to warrant his conviction.**
>
> **2. THAT the Honourable Magistrate erred in law and fact by believing on the alleged medical evidence relating to the penetration**(sic)**.**

3. THAT the Trial Magistrate erred in law and fact by relying on circumstantial evidence which did not meet the threshold of proof beyond reasonable doubt to convict him.

4. THAT the Learned Principal Magistrate erred in both law and fact in that he did not take into account on (sic) **the submission that he made.**

5. On 13thJuly 2016, the court directed him to file his Written Submissions. He filed the said Written Submissions on 27th August 2016. When he was granted leave to respond to the State's Written Submissions that were dated and filed on 24thAugust 2016, on 29th September 2016, he filed further Written Submissions and Supplementary Grounds of Appeal. The grounds were as follows:-

1. THAT the Learned Trial Magistrate erred in law and facts by convicting and sentencing him without considering some crucial witnesses who were not compelled or summoned during trial to clear the allegations made by Prosecution witnesses contrary to Section 144 and 150 of the C.P.C.

2. THAT the Learned Trial Magistrate erred in law and fact by convicting and sentencing him depending on the age of the Complainant without considering that no Age Assessment or Birth Certificate was availed before court to ascertain the age of the Complainant(sic)**.**

6. When the matter came up on 29th September 2016, both the Appellant and the State requested this court to rely on their respective Written Submissions in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

7. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held 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".**

8. Having looked at the aforesaid Grounds of Appeal and the respective parties' Written Submissions, it was apparent that the issues for determination by this court were:-

a. Whether the *voire dire* examination as conducted rendered the proceedings herein defective and if so, whether this court should order a Re-trial of the case herein or quash the sentence and set aside the Appellant's conviction;

b. Whether or not the Charge Sheet was defective;

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

9. The court therefore addressed the said issues under the different heads shown hereinbelow.

***I. VOIRE DIRE* EXAMINATION**

10. The Appellant argued that no proper *voire dire* examination was conducted in the Trial Court and that what was conducted was unprocedural as it did not comply with the law. He referred this court to the case of **Johnson Muiruri vs Republic [2013] eKLR** in which he stated that the Court of Appeal rendered itself as follows:-

"It is a trite law (sic) that where a minor's evidence is to be admitted in accordance (sic), then the voire dire examination should be conducted and for it to be sufficient, the magistrate should put out questions and answers to test whether he or she is mindful if speaking the truth and knows the meaning of taking an oath."

11. On its part, the State relied on the case of **DWM vs Republic [2016] eKLR** where the Court of Appeal stated that it was best, though not mandatory.that questions be asked and answers be given by a child during a *voire dire* examination. It argued that failure by the Learned Trial Magistrate to indicate the questions which were put forth to A J (hereinafter referred to as "PW 1") was not a fundamental error to warrant the trial being declared a nullity.

12. In the case of **Johnson Muiruri vs Republic**(Supra), the Court of Appeal had also stated as follows:-

"We once again wish to draw attention of our courts as to the proper procedure to be followed when children are tendered as witnesses. In Peter Kariga Kiune, Criminal Appeal No 77 of 1982(unreported) we said:

"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 even his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if it is the opinion of the court he is possessed of sufficient intelligence and understands the duty of talking 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 (sec.19, Oaths and Statutory Declarations Act, cap 15. The Evidence Act (section 124, cap 80). It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided, and not be forced to make assumptions."…"

13. Although the aforesaid case emphasised that actual questions and answers during the *voire dire*enquiry ought to be recorded, it was the view of this court that it is a strongly recommended practise or procedure to avoid an appellate court making assumptions of the questions asked by a trial court and answers given to it by a minor as was observed in the case of **Peter Kariga Kiune, Criminal Appeal No 77 of 1982** (Supra) cited in the case of **Johnson Muiruri vs Republic** (Supra). There is, however, no legal requirement that the same must be done in the said manner or that if the same is not done, it will prejudice an accused person during trial, unless of course the same causes actual prejudice to an appellant.

14. Where a minor has no knowledge of what an oath is, the trial magistrate must clearly set the same out. In both instances, the trial magistrate must also clearly record that the child is possessed of sufficient intelligence to adduce the evidence before giving his opinion of how the evidence shall be adduced, that is, whether the same shall be sworn or unsworn. Additionally, the trial magistrate must record the minor's answer of the consequences of not telling the truth to enable the appellate court determine whether or not the *voire dire* enquiry was properly conducted.

15. Where a trial court opts to record answers only, then it is incumbent upon it to record the questions asked as well. If the above steps are followed, then the *voire dire* enquiry will be deemed to have been in compliance of the provisions of Section 19 of the Oaths and Statutory Declarations Act failing which the trial can only be deemed to have been defective and a nullity.

16. Bearing in mind that the recommendations in the said case of **Johnson Muiruri vs Republic**(Supra) were made prior to the promulgation of the Constitution of Kenya, 2010 and that the provisions of Article 159(2)(d) of the Constitution mandates courts to administer justice without undue regard to technicalities, in the mind of this court, it is sufficient if from the way the proceedings have been recorded in a narrative form, it is abundantly clear that a child witness testifies that he understands the importance of saying the truth and his knowledge of what an oath is before the oath is administered.

17. In any event, this matter of question and answer format has now been settled in the Court of Appeal decision of **DWM vs Republic (Supra)** that the State reliedupon in this matter that a question and answer format, though best, it is not mandatory while conducting a *voire dire* examination.

18. A perusal of the proceedings shows that the Learned Trial Magistrate indicated that he conducted the *voire dire* examination. The proceedings were as follows:-

> **"COURT- Court conducts voire dire examination on complainant aged 9 years.**
>
> **COMPLAIANT- A J and am in *[particulars withheld]* School attending nursery. Our church is in *[particulars withheld]*.**
>
> **COURT- The complainant is of fair intelligence and has tried to answer some of the questions. She will give unsworn evidence."**

19. From the way evidence was taken and recorded, it was not clear what questions PW 1 was unable to answer. There was also no indication whether or not the Learned Trial Magistrate enquired from PW 1 if she knew the meaning of taking an oath or if she knew the consequences of not being truthful. The opinion formed by a trial court must be discernible from the proceedings. It is not intended to be subjective but rather objective and easily established from the proceedings that come before an appellate court.

20. In this regard, this court concurred wholly with the Appellant that the threshold of a *voire dire* enquiry fell short of the required standard. Bearing in mind that the Appellant's liberty could be curtailed for a long period, the procedure for the *voire dire* enquiry herein could not be allowed to stand.

21. Having said so, it was also evident from the said case of **Alex Mungai Waweru vs Republic** (Supra) that before ordering a re-trial, an appellate court is called upon to consider several pertinent issues which include whether after a proper consideration of the evidence that was adduced, a conviction might result, the length of time between arrest and arraignment of the accused person or whether the error was by the prosecution.

22. A re-trial should only be ordered if the nullity of the proceedings is so great as to prejudice a convicted person or the complainant. It must be noted that a re-trial is not intended to give a second bite of the cherry to the prosecution if a conviction might not result based on the evidence on record. Additionally, a re-trial will not be ordered where the evidence on record cannot sustain a conviction against an appellant despite there being an irregularity in the *voire dire* examination or if an accused person is seeking to remedy his or her blunders during the first trial and thus hope to get an acquittal after the matter is referred for re-trial.

23. This court had at the back of its mind the fact that reviewing evidence where there was a possibility of a re-trial ought not to be done whatsoever as doing so would greatly embarrass a court to whom a case has been sent for re-trial because such re-trial court has the right to come up with an independent conclusion after re-hearing such a case.

24. For an accused person to be found liable based on the evidence of sole witness in sexual offences as provided for in proviso of Section 124 of the Evidence Act, then the evidence adduced must be sworn. Where the evidence is unsworn, an accused person cannot be found liable unless it is corroborated by other oral and/or documentary evidence.

25. Clearly, the Appellant herein could not be convicted on the sole unsworn evidence of PW1. However, this court could revert to the evidence of other witnesses who testified herein to determine whether or not their evidence that was already on record could sustain the conviction against him or if the conviction could be quashed.

26. As a re-trial is not intended to give any of the parties a second bite of the cherry based on insufficient

evidence, this court found it prudent to address its mind to the issues that had been raised by the parties herein with a view to establishing whether or not an offence had been committed by the Appellant herein as had been contended by the Prosecution.

II. **DEFECTIVENESS OR OTHERWISE OF THE CHARGE**

27. The Appellant argued that the Charge was defective because it did not disclose the offence of committing an indecent act with a child, which he argued was in breach of Sections 214(1), (2), (3), 89(5), 275(1) and 276(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) and that failure to amend the said Charge Sheet was at variance with the evidence that was adduced by the Prosecution witnesses. This submission did not form part of the Grounds of Appeal or the Amended Grounds of Appeal.

28. He referred the court to the case of **Yongo vs Republic** whose citation was incomplete.

29. The State stated that the offence of indecent with a child was not before the court. It referred the court to Section 186 of the Criminal Procedure Code that stipulates as follows:-

> **"When a person is charged with the defilement of a girl under the age of fourteen and the Court if of the opinion that he is not guilty of that offence but that he is guilty of an offence under the sexual offences Act, he may be convicted of an offence even though he was not originally charged with it."**

30. This court carefully considered the parties' submissions on this issue and was lost because it was evident that the Appellant had been charged with an alternative charge of committing an indecent act with a child and he pleaded not guilty to the same. Based on the evidence that was placed before him, the Learned Trial Magistrate was mandated to convict the Appellant only for the offence that had been proven.

31. Notably, the Clinical Officer, Rueben Mwawasi (hereinafter referred to as "PW 4") had already found that there was no evidence of defilement which entailed actual penetration. In that case, the charge for defilement could not therefore be sustained.

32. This court did not find any relevance of the provisions of Sections 214(1), (2), (3), 89(5), 275(1) and 276(2) of the Criminal Procedure Code that he relied upon in support of his submissionas he did not demonstrate how the said sections were contravened. This court found no merit in the said submission and thus paid no more attention to it.

III.**RELEVANCE OF PW 1'S AGE IN SENTENCING**

33. The Appellant argued that the Learned Trial Magistrate erred when he convicted him without ascertaining PW 1's age. He placed reliance on the case of **Alfayo Gombe Okello vs Republic [2010] eKLR** in this regard.

34. The State argued that for the offence of indecent act to be sustained, all that needed to be proved was that there was:-

> **a. Contact between any part of the body of a person with the genital organs, breasts or buttocks of another but does not include an act that causes penetration.**
>
> **b. Exposure or display of any pornographic material to any person against his or her will.**

35. It argued that the offence was proven as the evidence of PW 4 and J M (hereinafter referred to as "PW 5"), PW 1 was aged eight (8) years old at the material time. Notably, the Appellant did not dispute the fact that PW 1 was a minor. In fact as can be seen hereinabove, he had insisted that a proper *voire dire* examination had to be conducted because she was a child of tender years.

36. The penalty for committing an indecent act with a child is to be found in Section 11(2) of the Sexual Offences Act Cap 62A (Laws of Kenya). It provides as follows:-

> **"Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years**.

37. It was evident that the Learned Trial Magistrate was correct in not considering PW 3's age as the penalty provides shows that a trial court must only be satisfied that the victim is a child. The penalty is different from that of actual defilement found in Section 8 (2), (3) and (4) of the Sexual Offences Act that imposes a duty on the prosecution to adduce evidence proving a child victim's age and for the trial court to be satisfied that the age has been proven before sentencing an accused person. This is because the penalty prescribed therein is dependent on the age of the child victim.

38. Notably, once a trial court convicts an accused person of the offence of attempted defilement, it is mandated to impose on such person a **minimum** (emphasis court) sentence of ten (10) years imprisonment. Evidently, such trial court can exercise its discretion judiciously and mete such upon convicted person, a more severe sentence.

39. In that respect, Ground of Appeal No 2 in the Supplementary Grounds of Appeal was not merited and the same is hereby dismissed.

IV. EVIDENCE OF THE PROSECUTION WITNESSES

40. The Appellant had argued that there was no photographic evidence of the house he was allegedly found in with PW 1. As was rightly pointed out by the State, the Appellant did not Cross-examine witnesses on this house and the same can only be deemed to have been an afterthought and had no bearing on the issues that were before this court as he never contested its existence during trial. This court found the submission to have been a red-herring and disregarded it right at the outset.

41. The Appellant was emphatic that PW 1 was not telling the truth. He analysed the evidence of the Prosecution witnesses but did not demonstrate how the same was contradictory. As no proper *voire dire* examination was conducted, this court could not rely solely on PW 1's evidence in finding the Appellant hereinliable as it had to be corroborated by other material evidence.

42. PW 1 testified that the Appellant called her to his house and after removing her skirt, he inserted his penis in her. F W (hereinafter referred to as "PW 2") and Z A (hereinafter referred to as "PW 5") both testified that they peeped into the Appellant's house and saw him inserting his penis into PW 1's vagina. They both kicked the door whereupon the Appellant was arrested.

43. The Appellant adduced unsworn evidence. It had little or no probative value. It was evident that PW 2's and PW 5's evidence remained uncontroverted as they corroborated what PW 1 had said the Appellant did to her, though under unsworn evidence. In this regard, there were no contradictions in the evidence that was adduced by the Prosecution witnesses as it appeared cogent and consistent.

44. For this reason, this court found Ground of Appeal No (1) of his Supplementary Grounds of Appeal not to have been merited and the same is hereby dismissed.

CONCLUSION

45. Accordingly, having perused the evidence that was adduced, the Written Submissions by both the Appellant and the State and the case law they relied upon, this court came to the firm conclusion that if the evidence that was on record was to be adduced in a re-trial court without adding any more to it, it would most probably result in a conviction against the Appellant herein. Notwithstanding that no proper *voire dire* examination was conducted by the Learned Trial Magistrate, there was overwhelming evidence on record to show that the Appellant did in fact commit the offence he was convicted for.

46. The Learned Trial Magistrate acted correctly when he convicted the Appellant and sentenced him to ten (10) years imprisonment as the Prosecution had proved its case beyond reasonable doubt.

DISPOSITION

47. Accordingly, as the Appellant's guilt was unequivocal, this court found that he had not advanced any sufficient reason to persuade it to interfere with the decision of the Trial Court. This court hereby declines to quash and/or set aside the conviction and sentence that was meted upon the Appellant by the Trial Court. This court instead affirms the said conviction and the sentence that was imposed on himas the same was lawful and fitting.

48. The upshot of this court's judgment, therefore, is that the Appellant's Appeal that was lodged on9th June 2016 was not merited and the same is hereby dismissed.

49. It is so ordered.

DATED and **DELIVERED** at **VOI** this **22ND**day of **NOVEMBER**2016

J. KAMAU

JUDGE

In the presence of:-

Thomas Manoti Munina…… Appellant

Miss Anyumba…….…… for State

Josphat Mavu– Court Clerk