REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 20 OF 2015

RAYMOND MWADOMU……..……..... APPELLANT

VERSUS

REPUBLIC……..…..... RESPONDENT

(From original conviction and sentence in Criminal Case Number 468of 2014 in the Senior Principal Magistrate's Court at Voi delivered by Hon E. M. Kadima (RM) on 8th January 2015)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Raymond Mwadomu, was tried and convicted by E.M. Kadima, Resident Magistrate for the offence of attempted defilement of a girl contrary to Section 9 (1) as read with Section 9 (2) of the Sexual Offences Act No 3 of 2006.He was sentenced to serve ten (10) years imprisonment.

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

> **"On the 8th day of June 2014 at *[particulars withheld]* area within Taita Taveta County, intentionally and unlawfully attempted to cause his penis to penetrate the anus of G K a boy aged 10 years."**

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

> **"On the 8th day of June 2014 at *[particulars withheld]* area within Taita Taveta County, intentionally and unlawfully touched the anus of G K a child aged 10 years with his penis."**

4. Being dissatisfied with the judgment therein, on 20th March 2015, the Appellant filed a Petition of Appeal. The Grounds of Appeal were as follows:-

> **1. THAT despite not pleading guilty to the charge, he was satisfied with the sentence that was meted upon by the sitting court.**
>
> **2. THAT he was very remorseful for the offence and was asking for leniency from this court.**
>
> **3. THAT he was a "formerly" tuberculosis patient and being of ill-health, being behind bars was not favourable to him.**
>
> **4. THAT he was an orphan and the sole bread winner to his wife, child and siblings.**

5. On 13th July 2016, the court directed him to file his Written Submissions. He filed the said Written Submissions along with fresh Grounds of Appeal which were as follows:-

> **1. THAT the Learned Trial Magistrate erred in law and facts by failing to consider no formal assessment report or a copy of the Birth Certificate was prepared, processed and produced as an exhibit before the court to prove PW 1's age for purposes of sentencing.**
>
> **2. THAT the Learned Trial Magistrate erred in law and facts by failing to consider that the evidence tendered by the Prosecution and the documentary evidence did not support the charge in that it was c/s 163(1)(e) of the Evidence Act.**
>
> **3. THAT the Learned Trial Magistrate erred in law and facts by failing to consider that the alleged offence was instituted out of malice and originated from a grudge.**
>
> **4. THAT the Pundit Trial Magistrate erred in law and facts by failing to adequately consider his evidence which was firm to cast doubt on the Prosecution's case.**

6. When he was granted leave to respond to the State's Written Submissions that were dated 22nd August 2016 and filed on 24th August 2016, he filed further Written Submissions and added the following Grounds of Appeal:-

> **1. THAT the Learned Trial Magistrate erred in law and facts by failing to consider that no language was written when the Complainant PW 3 was testifying and there was no interpreter to interpret his evidence.**
>
> **2. THAT the Learned Trial Magistrate erred in law and facts by failing to consider that no *voire dire* examination was not properly conducted to the minor PW 3** (sic)**c/Section 19 of the Oaths and Statutory Declarations Act.**

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

LEGAL ANALYSIS

8. 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".**

9. Having looked at the aforesaid Grounds of Appeal and the respective parties' Written Submissions, it was apparent that the issues that was placed for determination before 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 the language and interpretation of the Complainant's evidence was indicated and if not, whether the same rendered the proceedings in the Trial Court defective;**
>
> **c. Whether or not the failure by the Learned Trial Magistrate to address his mind to the**

Complainant's age at the time of sentencing the Appellant herein was fatal;

d. Whether or not the evidence that was adduced by the Prosecution witnesses supported the Charge against the Appellant herein;

e. Whether or not the Learned Trail Magistrate considered the Appellant's defence.

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

I. VOIRE DIRE **EXAMINATION**

11. It is important to point out right at the outset that the State conceded to the Appeal herein on the ground that the *voire dire* examination was not conducted by the Learned Trial Magistrate as is required by the law but was instead conducted by the Prosecutor.

12. It, however, urged this court to order a Re-trial because despite the manner in the which the *voire dire* examination that was conducted by both the Prosecutor and the Trial Court, it was evident that the medical evidence that was adduced in the Trial Court showed that G K (hereinafter referred to as "PW 3") had been defiled by the Appellant herein.

13. It placed reliance on the case of **Alex Mungai Waweru vs Republic [2014] eKLR** where the Court of Appeal allowed a Re-trial as it was not clear if the trial court therein had indicated if it had been satisfied that the minor witness' therein was possessed of sufficient intelligence to appreciate his duty to tell the court the truth.

14. On his part, the Appellant tendered lengthy submissions on this issue which essentially was that the Learned Trial Magistrate did not conduct a proper *voire dire* examination as he did not assess the intelligence of the child but merely directed that he adduce unsworn evidence. This latter submission was incorrect as the correct position was that the Learned Trial Magistrate directed that PW 3 adduce sworn evidence.

15. In the case of **Johnson Muiruri vs Republic [2013] eKLR,** the Court of Appeal rendered itself 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."…"**

16. 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 courtand answers given to it by a minor. This was an observation that was made by the Court of Appeal in the case of **Peter Kariga Kiune, Criminal Appeal No 77 of 1982** (Supra) cited in the case of **Johnson Muiruri vs Republic** (Supra).

17. 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.

18. Bearing in mind that the recommendations in the said case 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. Where a minor has no knowledge of what an oath is, the trial magistrate must clearly set the same out.

19. 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*examination was properly conducted.

20. 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* examination 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.

21. A perusal of the proceedings shows that the Learned Trial Magistrate did not conduct the *voire dire* examinationbut that the same was conducted by the Prosecutor with the Learned Trial Magistrate recording his opinion. The proceedings were as follows:-

> **"Prosecutor- I wish to put a few questions to test his understanding of proceeding.**
>
> **Court- Proceed.**
>
> **Child victim**
>
> **K**
>
> **10 years**
>
> **Class 5**
>
> ***[particulars withheld]* School**
>
> **We are taught to say the truth in Sunday School**
>
> **I understanding the meaning of an oath.**
>
> **Court**
>
> **The child witness though with a speech problem may be sworn as he appears to understand proceedings in court and why he should take an oath."**

22. From the way evidence was taken and recorded, it was not clear what the questions were, as only statements appeared to have been recorded. Most importantly, it was not clear whether what was recorded were really the answers of PW 1 or they were merely statements or observations by the Prosecutor given on her own motion.

23. There was also no indication what role Gaston Mwashila Mwanzighe, said to have the Interpreter and

teacher as special unit and speech therapist at ***[particulars withheld]*** School of the deaf played. This was particularly critical because the Learned Trial Magistrate observed that PW 3 had a speech problem and R M M (hereinafter referred to as "PW 4") had in his evidence also stated that PW 3 had a speech problem and was mentally challenged.

24. In this regard, this court concurred wholly with the State and the Appellant that the threshold of a *voire dire* examinationfell short of the required standard. Bearing in mind that the Appellant's liberty could be curtailed for a long period, the procedure for conducting the *voire dire* examination herein could not be allowed to stand. In this respect, this court found the State's concession of the appeal was reasonable.

25. Notably, the anomaly of the *voire dire* examination issue was first raised by the State and was picked up as a Ground of Appeal in the Appellant's Reply to its Written Submissions. In view of the nullity and irregularity of proceedings, ordering that the matter proceed for a Re-trial would be a reasonable outcome in line with the holding in the case of **Alex Mungai Waweru vs Republic** (Supra).

26. Appreciably, the Appellant was apprehensive that a Re-trial could prejudice him and vehemently argued against it. He wished that he be acquitted altogether. His argument was that if a Re-trial of this matter was allowed as had been sought by the State herein, it would give it time to take its "evidence to the garage for repair."

27. He referred this court to the case of **Ahmed Ali Dharamshi vs Republic (1964) 1A 481** but did not furnish it with a copy. He indicated that the holding therein was that:-

> **"where a conviction is quashed, a re-trial will not be ordered due to insufficient evidence from the prosecution witnesses to fill in the gaps."**

28. Evidently, a perusal of the holdings in the case of **Alex Mungai Waweru vs Republic** (Supra)shows that 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 in a trial court, a conviction might result, the length of time between arrest and arraignment of the accused person or whether the error was by the prosecution.

29. As was rightly submitted by the Appellant, 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. A Re-trial also ought not to give a convicted person an opportunity to poke holes into the prosecution's case if he had not done so at the trial stage.

30. While an appellate court must be very cautious not to consider the merits of a case if it has decided that it will order a Re-trial for the reason that this could embarrass the court that would hear the case on re-trail, it must nonetheless address its mind to the question of the sufficiency of the evidence already before it and determine if the same would result conviction or acquittal at the appeal stage.

31. In the premises foregoing, against the backdrop of that holding in the case of**Alex Mungai Waweru vs Republic** (Supra), it was the opinion of this court that although the State did not submit on the Grounds of Appeal that the Appellant had filed, there were several issues in the proceedings in the Trial Court that it had noted and needed to address before it could conclusively make a determination on the suitability or otherwise of a re-trial.

II. RELEVANCE OF PW 3'S AGE IN APPELLANT'S SENTENCING

32. This court found it necessary to clarity the correct position of the law as the Appellant appeared to have misapprehended the relevance of PW 3's age in his sentencing. Notably, he was charged with the offence of attempted defilement of PW 3 who was said to have been aged ten (10) years at the material time. The penalty for such an offence is to be found in Section 9(2) of the Sexual Offences Act Cap 62A (Laws of Kenya). It 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."

33. It is evident that the Learned Trial Magistrate was correct in not considering PW 3's age as the penalty provides that the only consideration that a trial court must make is that the victim must be a child. Under the law, a child is any person who is under the age of eighteen (18) years. The penalty under this section is thus different from that of actual defilement found in Section 8 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 for the reason that the penalty prescribed therein is dependent on the age of the child victim.

34. It therefore follows that 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 on such person, a more severe sentence.

35. In that respect, Ground of Appeal No 1 in the Grounds of Appeal that were filed on 27th July 2016 was not merited and the same is hereby dismissed.

III. EVIDENCE OF THE PROSECUTION WITNESSES

36. The Appellant submitted that the evidence by the Prosecution witnesses was contradictory. It pointed out that the P3 Form clearly stated that there no bruises or cuts on the PW 3's anus and no pain was discovered despite the examination being done very close to the date of the alleged offence. He persuaded this court not to trust PW 3's evidence because he was mentally challenged. It was his further testimony that PW 4 and PW 5, with whom he had had an altercation with regarding splitting of some monies a day before the alleged incident, were not credible witnesses and their evidence ought not to be considered.

37. It is important to point out that although medical evidence from the local clinic would have assisted this court in establishing whether PW 3had complained of pain in the anus after being allegedly defiled by the Appellant, it was not very critical in a case of attempted defilement. This is because in such a charge, actual penetration need not be proved. It is sufficient if it is proved that a person has attempted to defile a child. This court did not therefore pay too much attention to the non-availability of medical proof.

38. If was to be assumed that there had been penetration, then this court would be considering if the Appellant had actually defiled PW 3 and if found guilty, he would have been liable to serve life imprisonment in accordance to Section 8(1) of the Sexual Offences Act, which this court believes would have been to the Appellant's detriment.

39. In the mind of this court, what was most critical, however, was the sequence of events and the date and time of the alleged offence. The Charge indicated that the alleged offence was committed on 8th June 2014. PW 3 who was said to have been mentally challenged did not give the date when he was almost defiled by the Appellant herein. He only stated that it was on a Sunday. This court took judicial notice of the fact that 8th June 2014 actually fell on a Sunday.

40. Indeed, this date was confirmed by PW 4 and D M N (hereinafter referred to as "PW 5") who stated that the alleged offence occurred on 8th June 2014. For the purposes of the proceedings herein, this court thus accepted that the offence was alleged to have been committed on 8th June 2014.

41. Having said so, this court noted that that day was, however, materiallycontradicted the date given in the P3 Form which showed that the date of the alleged offence was 9th June 2014. No 81699 Corporal Linet Ombogo (hereinafter referred to as "PW 6") also stated that she was at work on 9th June 2014 when together with her colleague officers, she went to Sagalla AP Camp and found the Appellant had already been arrested.

42. Appreciably, the Prosecution did not lead evidence, re-examine witnesses or amend the Charge Sheet to clarify this material contradiction to make it consistent with the evidence that was adduced by PW 3 and PW 4.

43. Going further, there was material contradiction as to the exact time the alleged offence was said to have been committed. In the P3 Form, the time of the alleged offence was given as 1100 hours. PW 5 was also clear in his evidence that he woke up early and went to herd his animals and that "even before he had finished," PW 4 called him and told him that the Appellant had gone to the bush with PW 3. Together with PW 4, theyrushed to a place where there was a big tree where they found the Appellant half naked on top of PW 3 who did not have his trousers. PW 3 then told them that the Appellant had given him a five (5) shilling coin. Evidently, the sequence of events herein by both PW 4 and PW 5 implied that the alleged offence occurred in the morning hours.

44. This, however, contradicted PW 3's evidence who testified that on that Sunday, he went to Church then passed by the shamba belonging to his grandfather where he stayed until 4.00 pm. In his Cross-examination, he repeated that he was going to the shamba when the Appellant forced him to lie in a shamba that that that shamba did not belong to them.

45. It appeared from PW 3's evidence that the Appellant attempted to defile him on that Sunday, which was way after 1100 hours. He testified that the Appellant gave him money and a ball gum and took him to a place under the trees where he inserted his penis into his anus where Rafa found them.

46. It was not clear to this court why PW 4 got suspicious of the Appellant when he saw him with PW 3 as he followed him immediately. He said he lost track of where the Appellant and PW 3 disappeared to but that on looking again, he saw a yellow sweater. On reaching the spot, he stated that he found the Appellant and PW 3 not fully clothed. He asked the Appellant what he was doing with PW 3 in the wilderness. Appreciably, he did nothing to assist PW 3 but instead went to call PW 5 whom he came back with and still found the Appellant with PW 3 still not fully clothed.

47. PW 3, PW 4 and PW 5 were unanimous that after the Appellant was accosted by PW 4 and PW 5, he was taken to the Social Hall. A mob had already gathered there to lynch him. Several questions that arose in the mind of this court. One of these questions was, who informed this mob of what had transpired as no evidence was adduced to that effect?

48. The other question was, how far was PW 5's house from the scene where the Appellant was said to have been found with PW 3? This would have gone a long way in assisting this court determine whether or not the Appellant actually had sufficient time to defile PW 3 as he said was said to have had bruises and cuts observed when he was initially taken to the local centre or if the time was also only sufficient for the Appellant to have merely attempted to defile PW 3.

49. Further, this court asked itself if PW 3 could had been manipulated by PW 4 and PW 5 and coached on what to say in court because as PW 4 said, PW 3 was mentally challenged. Although no particular number of witnesses is required to prove a case, it was strange that PW 3's mother was not called as a witness in this matter, his father having been not "there."

50. Was there more than met the eye because the Appellant testified that PW 4 and PW 5 were cousins to his uncle? Were they related to the Appellant because PW 4 only said he was from Terri.The Appellant had also testified that he ran with George to their grandmother's place where their uncle stayed, a fact that the Learned Trial Magistrate also picked up in his Judgment.

51. Was George, who the Appellant suggested was his brother, in fact PW 3, because he said he met George at the shop where he was with other boys? This was baffling as PW 3 had testified that he had never met the Appellant before and he only met him for the first time when he defiled him.

52. Notably, the Appellant had early in the trial while Cross-examining PW 4, raised the issue of there having been an argument regarding splitting money between him, his uncle and PW 4 in a bar the

previous night. This court was therefore hesitant to consider this assertion to have been merely afterthought as he did in fact reiterate it in his evidence and the fact that the evidence by PW 3, PW 4 and PW 5 was so disjointed and inconsistent.

53. Accordingly, having perused the evidence that was adduced, the Written Submissions by both the Appellant and the State and the case law by the former, this court came to the conclusion that if the same evidence was to be adduced in a trial court without adding any more to it, it would most probably not result in a conviction of the Appellant herein. There were just too many answered questions in the mind of this court. In fact, a perusal of the proceedings from the Trial Court shows that the evidence that was adduced had too many gaps. It was haphazard and made no sense at all.

54. Most importantly, the material contradictions on the date and time of the alleged offence were so diametrically opposite to each other and could not be reconciled to make sense of what really transpired making this case unfit for a Re-trial.

55. In this respect, the Appellant's Grounds of Appeal No (2) and (4) that were filed on 27th July 2016 were successful. This court was hesitant to make a determination as to whether or not the charges that were preferred against him were accentuated by malice as he had contended in Ground of Appeal No (3) of his Grounds of Appeal filed on the same date but only formed the opinion that the whole truth was not told to the Trial Court.

CONCLUSION

56. As an obiter, the court wishes to point out that the duty of an appellate court is to uphold the rule of law and not cause miscarriage of justice irrespective of whether or not a particular offence is prevalent in a particular area. In this regard, the court wishes to emphasise that the Prosecution ought to present cases on Sexual Offences Act after thorough investigations and present water tight evidence. Indeed, perpetrators of defilement ought not to be allowedto get away with serious crimes if they are guilty merely because the Prosecution has not conducted its case diligently.

DISPOSITION

57. For the foregoing reasons, in view of the fact that the evidence that was adduced before the trial created doubt in mind of this court, it found that the Appellant had succeeded on his Appeal that was lodged on 20th March 2015.

58. That benefit of doubt lent this court to quash the conviction and set aside the sentence that was meted upon the Appellant by the trial court as it would be clearly unsafe to confirm the same.

59. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

60. It is so ordered.

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

J. KAMAU

JUDGE

In the presence of:-

Raymond Mwadomu…..…….. Appellant

Miss Anyumba……. for State

Josphat Mavu– Court Clerk