REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 28 OF 2016

M M..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case No.1102 of 2010 of the Chief Magistrate's Court at Meru by Hon. B Ochieng – Principal Magistrate)

JUDGMENT

The appellant, **M M**, was charged with an offence of incest contrary to section 20 (1) of the Sexual Offences Act No. 3 of 2006.

The particulars of the offence were that on 30th August 2010 at *particulars withheld* in Meru Central District of the Eastern Province, the appellant intentionally touched the vagina of **D.G** with his penis a girl who to his knowledge was his niece.

The appellant was convicted and sentenced to life imprisonment. He now appeals against both conviction and sentence.

The appellant was in person. He raised five grounds of appeal that can be summarized as follows:

1.That the learned trial magistrate erred in law and fact by finding convicting him on a defective charge.

2.That the learned trial magistrate erred in law and fact by not making a finding that he was not taken for D.N.A examination.

3. That the learned trial magistrate erred in law and facts by convicting him on insufficient evidence.

The state opposed the appeal and was represented by Mr. Odhiambo, the learned counsel.

The facts of the prosecution case are briefly as follows:

The appellant lured the complainant aged 4 years into his house with sweets. When she went in, he defiled her.

In his defence the appellant contended he was framed up for the complainant's mother had a grudge with

him.

This is a first appellate court as expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO Vs. REPUBLIC 1972 EA 32.**

The charge of incest was not supported by the particulars therein. The Particulars were those indecent act. Indeed the particulars in the substantive charge were the same as those in the alternative charge of indecent act with a child. However, this defect was cured by the evidence that was adduced. It supported the charge. The appellant was adequately informed of the charge facing him. The court of appeal in **PETER SABEM LEITU V REPUBLIC [2013] eKLR** while addressing a similar situation observed as follows:

> **The question therefore is, whether the aforesaid defect in the charge sheet caused any prejudice to the appellant as to occasion a miscarriage of justice or a violation of his fundamental right to a fair trial. We think not. Having pleaded to the charge, which contained a clear statement of a specific offence, we are satisfied he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet gave further details as to the description of the property stolen, the date, place and the manner of the alleged offence.**

In the instant case I am satisfied that the appellant was not prejudiced nor his fundamental right to fair hearing breached.

The appellant faulted the failure to take samples from him for DNA testing. In **GEOFFREY KIONJI VS REPUBLIC CR. APPEAL NO 270 OF 2010** the court of appeal observed as follows:

> **Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person.**

I therefore find that the medical examination of the appellant was not necessary in this case.

Though the appellant did not raise the issue of voir dire, I noticed that the learned trial magistrate was too casual on this procedural requirement. In respect of PW2, a minor aged 4 years only one question was put to her. This was whether she was going to school. With due respect this is not voir dire examination. PW3 another minor was not at all examined. The learned magistrate remarked:

> **"PW3 is also a minor aged 4 years to give unsworn evidence."**

The court of appeal in the case of **KINYUA V. R [2004] I KLR 256** at page **265** said:-

> **"There are two steps to be borne in mind. The first step is for the court to ascertain whether the child understands the nature of an oath. An investigation to this effect must be done by the court immediately the child – witness appears in court. The investigation need not be a long one but it has to be done and has to be directed to the particular question whether the child understands the nature of an oath. If the answer to this question is in the affirmative, then, the court proceeds to swear or affirm the child and to take his or her evidence upon oath. On the other hand, if the child – witness does not understand the nature of an oath, he or she is not necessarily disqualified from giving evidence. The second step then follows. The court may still receive his evidence if the court is satisfied, upon investigation, that he is possessed of sufficient intelligence and understands the duty of speaking the truth. Again investigation in this respect need not be a long one but it must be done and when done, it must**

> **appear on record. Some basic but elementary questions may be asked of the child to assess the level of his intelligence and whether he understands the duty of speaking the truth or otherwise. Where the court is so satisfied, then, the court will proceed to record unsworn evidence from the child – witness"**

In the case of **ELPHAS MUGO V REPUBLIC [2016] eKLR.** the court of appeal at Nyeri held that failure to observe this procedure was a mistrial. This is what the court said:

> **"The effect of these procedural errors is that the appellant's trial was vitiated and was a mistrial."**

In the instant case I must find that this was a mistrial.

I will not address the issue of sufficiency of evidence for the order I am about to make.

Though time has lapsed and memories may have faded, the only fair recourse is to have a retrial. The appellant to be taken to the Chief Magistrates Court, Meru on 9.1 2017 for the process of retrial to commence. The trial should be before any other magistrate other than Bildad Ochieng.

DATED at Meru 20th day of December 2016

KIARIE WAWERU KIARIE

JUDGE