REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CRIMINAL APPEAL NO. 149 OF 2014

RASHID WACHILU KASHEKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being appeal from original conviction and sentence in Criminal Case No. 141 of 2014 made on 16th September 2014 by the Principal Magistrate's Court at Taveta (the Hon. R. K. Ondieki, PM)]

JUDGMENT

INTRODUCTION

1. This is a judgment on first appeal from original conviction and sentence of Senior Principal Magistrate's Court at Taveta ***Criminal Case No. 141 of 2014.*** The appellant was convicted for the offence of defilement of a girl contrary to section 8 (1) as read with 8 (3) of the Sexual Offences Act No. 3 of 2006 and sentenced to imprisonment for twenty (20) years on ***16th September 2014***.

2. The particulars of the offence were that –

> ***"PARTICULARS OF OFFENCE: Rashid Wachilu Kasheka: Between 27th March and 29th March 2014 at unknown time within Taita Taveta County unlawfully and intentionally caused your penis to penetrate the vagina of S A a child aged 15 years."***

The appellant faced an alternative charge of indecent act with a child contrary to section 11 (1) of the sexual Offences Act No. 3 of 2006.

3. The prosecution called 5 witnesses in support of the charge and, when put on his defence, the appellant gave sworn evidence but called no witnesses in defence. In convicting the appellant, the Court found a connection of the accused to the offence on the evidence of the complainant and her mother as corroborated by medical evidence as follows:

> *"The third issue is the connection of the accused and the offence. It is in evidence by the Complainant [PW2] that the accused tricked to marry her and so led her to a guest [house] and played sex the whole night. Come in the morning, the two went to the accused home as husband and wife. As word went round that the complainant has gone missing, an informer disclosed [to the complainant's mother PW3] that she was being held by the accused at his home. This is when*

an ambush was laid and the accused together with the complainant were arrested and taken to the police station and then to hospital for examination. The two were examined and found to be infected. It was the finding of examination that the hymen was broken and of long standing."

The appellant was aggrieved by the decision of the court and he appealed against both the conviction and sentence.

THE APPEAL

4. The appellant set out his grounds of appeal in his Amended Grounds of Appeal filed in Court, as follows:

"AMENDED GROUNDS OF APPEAL

1. ***The trial magistrate erred in law and fact by failing to consider that PW 2 (Complainants) exact age was not assessed and proved beyond reasonable doubt thus the conviction was unsafe.***

a. ***No age assessment report of PW 2 (Complainant) was processed to correct the variance between the ages mentioned in evidence.***

2. ***The trial magistrate erred in law and fact by failing to consider that the particulars of the amended charge sheet were at various with the evidence tendered by the prosecution.***

a. ***The names of the complainant (PW 2), age and dates of the alleged offence in the particulars of the amended charge sheet differ with the adduced evidence by the prosecution on the record.***

3. ***The trial magistrate erred in law and fact by failing to consider sharp contradictions in the medical evidence which in itself require corroboration in order to sustain the conviction.***

a. ***Uncorroborated medical evidence adduced by both PW 1 and PW 4 (Medical Officer) and in the P3 Form which was amended unlawfully.***

4. ***The trial magistrate erred in law and in fact by failing to remind PW 2 (Complainant) and PW 3 (mother) if were under oath when recalled to proceed with their testimonies in breach of section (5) of the CPC Cap (75) Laws of Kenya.***

a. ***It is not clear in the records if both PW 2 and PW 3 evidence was recorded under oath by the trial magistrate during when they were recalled on different dates to testify as witnesses.***

5. ***The trial magistrate erred in law and fact by failing to consider or conduct a VOIRE DIRE INQUIRY prior to the admission of PW 2 (Complainant's) testimony as evidence in the legally expected manner in breach of section 19 of the Statutory Oaths and Declaration Act.***

a. ***PW 2 (Complainant) was a minor aged 13 years old. It was imperative for the trial magistrate to record both the questions and answers he put to the minor not the answers only.***

6. ***The trial magistrate erred in law and fact by shifting the burden of proof in the alibi defence upon the appellant. In breach of section 212 and 235 of the CPC (75) Laws of Kenya.***

a. ***The burden of proof in the ALIBI was shifted to the Appellant to explain the nature of the defence advanced at the trial."***

5. During the hearing of the appeals the appellant filed written submissions in Court, and counsel

appearing for him, Mr. Samwita, wholly relied on them while, Ms. Nyakoni, Counsel for the Director of Public Prosecution (DPP) made oral submissions in response thereto, and judgment was reserved.

THE ISSUE FOR DETERMINATION BEFORE THE COURT

6. The court appreciates its role as a first appellate court to independently analyze the evidence presented before the trial court and to make its own conclusions giving allowance that it did not, unlike the trial court, see or hear the witnesses giving their evidence. See ***Okeno v. R.*** (1972) EA 32.

7. However, in view of the grounds of appeal challenging the legality of the trial on the grounds of failure to re-swear witnesses who were stood down to allow amendments to the charges, the court must make a determination whether there existed such defects in the trial as to make it defective and liable to an order for retrial, which if made, the court cannot analyze the evidence so as not to prejudice the court that hears the retrial.

8. Accordingly, the issues before the court in chronological consequential order will be:

a. Whether the trial was defective for the reasons given by the appellant or otherwise;

b. If the trial is defective, whether a retrial should be ordered or the appellant should be acquitted for reason that a retrial is in the circumstances of the impossible; and

c. If the trial is not defective, whether the evidence supports the charge against the appellant.

DETERMINATION

Whether trial defective for relying on unsworn evidence

9. Evidence in criminal Court trials is required to be taken on oath, with perhaps the only possible exception being in the circumstances of a child of tender age who does not understand the nature of the oath but is possessed of sufficient intelligence to justify reception of her evidence under section 19 of the Oaths and Declarations Act.

> "19. (1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, ***any child of tender years*** called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; ...."

Discussing the case of persons who need not swear, the Learned Authors of ***Phipson on Evidence*** (Sweet & Maxwell) 17th ed. (2010) at pp. 269-270 given the position in England notes, in addition to children of under 14 years where the Sovereign, Counsel and Judges when merely required to explain a case in which they have acted, a witness called merely for purposes of producing a document may not be required to be sworn although swearing is advised where the evidence given maybe contentious.

10. In considering the matter of evidence by a child of tender years, 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."

11. In this case the trial court found that the child then presented as a 13 year old could be sworn and give evidence on oath. After the amendment of the charge indicating her age as 15 years, no *voire dire* was carried out and the child was sworn before she commenced giving evidence but again when the trial was adjourned to permit a further amendment the child was not re-sworn or reminded that she was still on oath, or if it was done it is not shown on the record of the proceedings which simply indicates 'PW2 recalled'. There cannot be merit in an objection that *voire dire* examination was not conducted on the child as she was not a child of tender age within the meaning of section 19 of the Oaths and Statutory Declarations Act as read with the Children Act which places a child of tender age at age 10.

12. **Section 151 of the Criminal Procedure Code requires the taking of evidence in criminal cases on oath as follows:**

> ***151.*** *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 th*e usual oath.

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.

15. Discussing ***unsworn evidence by mistake: re-swearing witnesses***, the Learned authors of ***Phipson*** at p. 270 para. 9-44 writes:

> *"The common law rule is that outside the exceptional situations above, unsworn testimony is "not evidence". [**R. v. Lee** (1988) Crim. LR 525 CA; **R. v. Sharman** (1998) 1 Cr. App. R 406 CA]. Thus, where the Lord Lieutenant in Ireland had given evidence on his attestation of honour as a peer, without oath, this was held illegal, but as the losing party who had called him had acquiesced, no new trial was granted. Where a witness before a magistrate had, by mistake, not been sworn, and the case was accordingly heard on sworn testimony the same day, the second hearing was held justified, as the first was a nullity and never placed the defendant in peril."*

16. In England, far reaching changes on the matter were effected by the Youth Justice and Criminal Evidence Act 1999, section 56 (5) thereof it is provided that a conviction may not be quashed as unsafe only for reason only that a witness did not give evidence on oath. ***Phipson*** ibid. notes the development as follows:

> *"Statute has now expressly provided, however, that in a criminal case no conviction, verdict or finding shall be taken to be unsafe by reason only that it appears to the Court of appeal that a witness ought to have given his or her evidence on oath. If it is realized during the proceedings that the witness has not been sworn, it may sometimes be possible to cure the effect by swearing the*

witness and asking him or her to ratify his or her previous testimony. This will not be acceptable, however, where the previous testimony was contradictory. In civil cases such an error may require a retrial."

17. As further observed in ***Archibold***, *Criminal Pleading, Evidence and Practice* (Sweet & Maxwell) 2012 at p. 1242 para. 8-50 the 1999 Act amended the Criminal Justice Act 1988 by providing in section 34 (3) of the latter Act that "unsworn evidence admitted by virtue of section 56 of the Youth Justice and Criminal Evidence Act 1999 may corroborate evidence (sworn or unsworn) given by any other person." Such provisions where unsworn evidence is not only relied upon but may be corroborative of other unsworn evidence is wholly removed from the Kenya situation.

18. In Kenya, there are no such express statutory provision permitting receipt of unsworn evidence let alone using it as corroboration. The law on unsworn evidence in Kenya is as good as set out in section 155 of the Criminal Procedure Code and section 19 of the Oaths and statutory declarations act: except in case of children of tender years [children of 10 years and below] all witness in criminal cases must give evidence on oath [or affirmation]. Accordingly, the trial before the Magistrate's Court herein was required by law to be had with sworn evidence of the witnesses, including the complainant (PW2) allegedly age 15 years and therefore not a child of tender years for purposes of section 19 of the Oaths and Statutory Declarations Act, and the mother PW3.

19. From the record of proceedings the complainant PW2 was on 20/5/2014 stood down to allow an amendment of the charge sheet and the trail was adjourned to 15/6/2014. On the return date, the record of proceedings shows that "PW2 recalled and continues". There is no indication that the complainant was re-sworn or reminded that she was still on oath, as is sometimes done. Similarly, on the same day 5/6/2014, PW3 took the witness stand was duly sworn but was shortly stood down when the prosecution told the court that 'the witness is feeling unwell' and the trial was adjourned to 18/6/2014. On 18/6/2014 the case was adjourned when prosecution applied 'for more time to amend the charge sheet in respect of the names of the complainant.' Hearing resumed on 24/6/2014, when the record simply shows the witness PW3 continuing with her testimony without any record as to whether she was sworn. The record merely states "PW3 recalled and continues". This court has compared the typed proceedings with the handwritten record of the trial court and confirmed that there was no record of the two witnesses being sworn after the adjournments of the hearing as aforesaid.

20. The defect of unsworn evidence cannot be cured by the broad-spectrum remedy of section 382 of the Criminal Procedure Code, because the remedy is itself subject to other provisions of the Code such as section 151 which requires evidence on oath in criminal case. Section 382 of the Criminal Procedure Code is in the following terms:

*"**382. Subject to the provisions hereinbefore contained,** no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision **on account of an error, omission or irregularity** in the complaint, summons, warrant, charge, proclamation, order, judgment **or other proceedings before or during the trial** or in any inquiry or other proceedings under this Code, **unless the error, omission or irregularity has occasioned a failure of justice:***

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the Court shall have regard to the question ***whether the objection could and should have been raised at an earlier stage in the proceedings.***"

21. In ***Mwangi v. Republic*** (2006) 2 KLR 94, a case that is almost on all fours with the present appeal and which is binding on this court, the Court of Appeal not being able to determine whether the witnesses had been sworn, declared the trial a nullity and ordered a retrial as follows:

"The usual practice of all the courts in Kenya is, of course, to show in the record that a witness has taken 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

evidence. Most likely, they took the oath before giving evidence. But there is also the possibility that they might not have taken oath and if that is 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 a trial was a nullity then it does not matter at what stage that issue is raised."

22. The total effect of the legal provisions of section 155 of the Criminal Procedure Act and the authorities referred to above is that in criminal matters as in other contentious matters, evidence of witnesses must be receive on oath. The default in this regard makes the trial of the appellant herein defective as a nullity, and liable to an order for retrial.

Whether retrial should be ordered

23. The Court of Appeal has laid out the circumstances in which retrial will be ordered as developed in several decisions considered in ***Opicho v. R.*** (2009) KLR 369 as follows:

"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)."*

24. The gravity and prevalence of the offence with which the accused is charged is a consideration in determination whether to order a retrial. In ***Opicho***, supra, at. p. 375 the Court considered the public interest in the prosecution of child abuse cases and held retrial appropriate as follows:

"The allegations made against the appellant are extremely serious and of public interest as they relate to child abuse, a phenomenon now topical on the world stage, and in this country, due to its prevalence. It is in the interests of justice that the appellant receives a fair trial and if he is to be acquitted or convicted, then it ought to be seen that it was, in either case, in accordance with the law. We are inclined in all the circumstances of this case to order a retrial."

25. Again, in ***Mwangi v. Republic*** (2006) 2 KLR 94, the Court of Appeal considered the gravity of the charge and held as follows:

"What orders should we make? 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."

FINDINGS OF THE COURT

26. There was a defect in the trial in that the two key witnesses – the complainant PW2 and the mother PW3 – who separately had to be stepped down to allow for amendment to the charge sheet had proceeded to testify on the return hearing dates after the adjournments without being sworn contrary to the requirement of section 155 of the Criminal Procedure Code that evidence in criminal cases be taken on oath.

27. The illegality in taking evidence without swearing the witnesses and reliance by the trial Court on such unsworn evidence to convict the appellant renders the trial defective as a nullity and liable to an order for retrial. Having read the evidence without analyzing it and making a decision thereon, so as to prejudice the Court that hears the retrial, this Court considers that there is admissible evidence, which if proved, may entitle a Court properly directing itself to make a finding of guilt and convict the appellant.

28. As the right to a fair trial is an **unlimitable** right under the Bill of Rights in the Constitution of Kenya, the appellant must only be convicted upon evidence received in accordance with the fair trial guarantees of sworn evidence and cross-examination of the prosecution witnesses. See Articles 25 (c) and 50 (2) (k) of the Constitution of Kenya 2010. The appellant must be granted a fair trial in accordance with the Criminal Procedure Code, cap 75 Laws of Kenya.

29. The Court must in considering the retrial take into account any hardships in conducting a retrial. The Court observes that the incident the subject of the trial was alleged to have occurred on the 26th March 2014, and considers that the period of 1 ½ years which has passed since the alleged offence is not so long as to make a retrial impossible by reason of non-availability of the witnesses or impairment of their memory by passage of time. Moreover, the Court considers that the offence of defilement is a heinous crime for which the appellant should be tried in a fair trial and if innocent acquitted, but if guilty convicted and sentenced appropriately. The Court, therefore, finds that an order for retrial is appropriate.

30. In view of the finding of the court that a retrial will be ordered, this court cannot go into the third issue as to whether the evidence supports the charge against the appellant - which will be a matter for determination at the rehearing of the matter by the retrial court - for any comments thereon may prejudice that retrial.

31. As held in ***Otieno & Another v Republic*** (1991) KLR 493 an appellate court in ordering a retrial does not ***quash*** the conviction because it has not heard the appeal on its merits, it can only ***set aside*** the conviction.

ORDERS

32. Accordingly, for the reasons set out above, the Court finds that the trial of the appellant by the Principal Magistrate's Court at Taveta in Criminal Case ***No. 141 of 2014*** was defective and, consequently, sets aside the conviction and the sentence imposed on the appellant therein. The court orders that the appellant shall be tried by a competent court at Taveta Law Courts differently constituted by a magistrate other than ***Hon. R. K. Ondieki, PM.***

DATED AND DELIVERED THIS 25TH DAY OF AUGUST 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

……..... for the Appellant

……..... for the Respondent

..... Court Assistant.