REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO.131 OF 2012

ABRAHAM KIPROTICH MUNAI…..……..…….
APPELLANT

VERSUS

REPUBLIC……....……..…..…RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 2509of 2011 Republic vs Abraham KiprotichMunai in the Resident Magistrate's Court at Eldoret by R. Koech,Senior resident Magistrate dated 19th July 2012)

JUDGMENT

1. The appellant was convicted on two separate counts of defilement of two girls aged eight and ten years contrary to sections 8(1) and 8(2) of the Sexual Offences Act, No. 3 of 2006. He was sentenced to life imprisonment. The appellant has appealed against his conviction and sentence. The primary grounds urged can be broken into six. First, that the charge was not proved beyond reasonable doubt; secondly, that the trial court violated the provisions of section 200 of the Criminal Procedure Code; thirdly, that the evidence of the minor was not properly taken or corroborated; fourthly, that the ages of the minors were not established; fifthly, that there was fabricated, contradictory or no clear medical evidence connecting the appellant to the offences; and, lastly, that the appellant was denied his right to cross-examine one witness, PW 4.
2. At the hearing of the appeal, learned State counsel, Mr. Mutuku, conceded the appeal. This is a first appeal to the High Court. I am required to re-evaluate all the evidence on record and to draw my own conclusions. In doing so, I have been careful because I have neither seen nor heard the witnesses. See *Njoroge v Republic* [1987] KLR 99, *Okeno v Republic* [1972] EA 32, *KariukiKaranja v Republic* [1986] KLR 190.
3. Section 200 of the Criminal Procedure Code requires that a magistrate who takes over the trial from another to explain to the accused, on the record, that the accused has the right to recall the witnesses. Section 200(3) is couched in mandatory terms: *the succeeding magistrate shall inform the accused person of that right.*Where the accused is convicted on evidence not wholly taken by the convicting magistrate, the High Court can overturn the conviction if there is a *material* prejudice. In that event, a new trial may be ordered.
4. I have examined the original record of 21st March 2012. R. Koech, Senior ResidentMagistrate, took over the conduct of the trial from G. Mutiso, Senior Resident Magistrate. Two witnesses had already testified. There is no record showing that the accused was informed of his rights under section 200 of the Criminal Procedure Code. It might be presumed because the appellant stated *"I am ready, I want the case to proceed from where it has reached"*. That unfortunately does not satisfy the requirements of the law. The record should *indicate* that the right *was* explained to the accused. It would have then been proper for the appellant to make the election that he took. Learned counsel for the State thus properly conceded that ground.

5. It is not true that no *voire dire* examination was conducted. The complainants' evidence appears at pages 8 and 14 of the record of appeal. The record at page 8 states as follows:

> *"Court asks questions to the child to determine if she can testify. My names are [minor's name withheld] I live in [particulars withheld]. Iam 8 years old. I go to [particulars withheld] Primary School. Iam in class one. I go to ACK Church. My sunday school teacher is [particulars withheld], God does not like liars. Liars will be burned in hell. I will speak the truth today.*
>
> *Court: The child can testify".*

6. The minor was then affirmed and gave evidence. The true purpose of a *voire dire*examination is to establish whether a child of tender years understands two things: the nature of an oath and the need to tell the truth. In sum, the court would be trying to establish whether the child possesses sufficient intelligence to understand the duty of speaking truthfully. See *Republic v Peter KirigaKiune* Criminal appeal 77 of 1982 (unreported), *Johnson Muiruri v Republic* [1983] KLR 445. If the court proceeds to take unsworn evidence, the accused should not be convicted in the absence of *corroborating* testimony. There is an exception for sexual offences. There is also an exception in the proviso to section 124 of the Evidence Act.
7. From the verbatim record of the *voire dire*, a number of questions were answered by the first child. The court immediately formed an impression that the girl, aged eight, was intelligent enough to testify and knew the consequences of lying.I am of the considered opinion that the *voire-dire* examination could have been a little more detailed like in the version of the other minor in the trial, PW4 [name withheld] at page 14 of the record of appeal. The actual questions by the court should have been set down like in the latter case. What arerecorded for PW2 are the answers by the child. But that minor lapse was not fatal. See *Macharia v Republic* [1976-80] 1 KLR 260. The brief *voire dire* in this case nevertheless meets the test in *Johnson Muiruri v Republic* [1983] KLR 445. Furthermore, the evidence of the minors was not the *sole* convicting evidence. There is the evidence of her mother, PW1 for example and the challenged medical evidence of PW3. I cannot then say that there was non-compliance with section 124 of the Evidence Act.
8. The child, PW2, confirmed to court that she was eight years. She was in standard one at [particulars withheld] Primary School. It is consistent with a child of that age. Her mother PW1 testified that her daughter was eight. There was another count of defiling [name withheld], of another minor aged 9, on the same day. She confirmed her age was 9 though the charge sheet indicated she was 10. It is thus not entirely true that the ages of the children were not established at the trial.
9. The learned State Counsel rightly conceded that the appellant was not availed the right to cross-examine PW4. As I have stated, PW4 was also a minor. The appellant was not represented by counsel. Section 208(3) of the Criminal Procedure Code enjoins the trial court to inform the accused of his right to cross-examine every witness. See *Samuel Ngugi v Republic* Nairobi, Court of Appeal, Criminal appeal 218 of 2007 (unreported).
10. It is apparent that the judgment of the lower court is impugned more on failures of procedure than the evidence. True, there were gaps or inconsistencies particularly in the evidence of PW3. PW4 is stated to be aged 10 in the charge sheet. She said she was 9. The trial court's judgment found her age to be 10. Either way, the ages of both minors were within the bracket of section 8(2) of the Sexual Offences Act: the punishment is life imprisonment. But looking at the weight of the evidence and the gravity of the offences, the appropriate and just course to take is to order a retrial. There is no serious prejudice to the appellant. See *Samuel Ngugi v Republic*, supra, *Hassan Rehman v Republic* [1976-80] 1 KLR 1243.
11. For all of those reasons,I order that the appellant shall be retried. The appellant will be released into police custody. He shall be produced before any competent court *within* 10 days of the date of this judgment for retrial *except* by R. Koech, Senior Principal Magistrate.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 24th day of October 2013

G.K. KIMONDO

JUDGE

Judgment read in open court in the presence of

Ms……for the appellant.

Mr…….……..…..…for the State.

Mr. P. Ekitela, Court Clerk.