



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 189 OF 2012

J M T APPELLANT

VERSUS

REPUBLICRESPONDENT

**(APPEAL ARISING FROM THE JUDGMENT OF THE SENIOR PRINCIPAL
MAGISTRATE'S COURT AT KERUGOYA (S. N DEGWA – S. R.M) IN CRIMINAL CASE NO.
202 OF 2011 DELIVERED ON**

14TH APRIL, 2011)

JUDGMENT

The appellant herein J M T was on 14th April 2011 convicted by the Senior Resident Magistrate Kerugoya (S.N. NDEGWA) for the offence of defilement and sentenced to life imprisonment. It was alleged that on 11th March 2011 in Kirinyaga County, he intentionally and unlawfully caused his penis to penetrate the vagina of JNM a girl aged five (5) years. He has now filed this appeal against both conviction and sentence raising the following grounds:-

- 1. That he pleaded not guilty***
- 2. That the trial magistrate erred in law and in fact by sentencing him to life imprisonment when the circumstances and evidence of the case were tainted with doubts, suspicion, hearsay and un-certainty***
- 3. That the trial magistrate erred in law and in fact by convicting him on a single sided evidence of his second wife, his niece who has been coached on what to say***
- 4. That the trial magistrate erred in law and in fact when he failed to address himself as to whether the offence against him had been proved beyond any reasonable doubt***
- 5. That the trial magistrate erred in law and in fact by dismissing his defence and shifting the blame on him without noting the family dispute between him and his wife***

Six (6) witnesses testified against the appellant in the lower Court. The complainant testified as PW1 and said that on the material day, the appellant who is his uncle removed her pants and put his finger in her vagina. She felt pain and cried. Her mother MM (PW2) said she was at work when CW (PW3) went and informed her that complainant was in a room with her father and was crying. When she went to the house, she found it locked but on peeping between the roof and wall, she saw the appellant and complainant in bed with the appellant putting his penis into her vagina. So she screamed and people came. She said appellant is a step-father to the complainant.

PW3 (CW) a minor, testified that she heard the complainant screaming so she went and called

complainant's mother who came and also started screaming. HENRY NJOGU (PW4) the area assistant Chief said he arrested the appellant the same day and took him to the Police Station and handed him over to P.C JOSEPH ERASET of Kerugoya Police Station. Complainant was examined by ESTHER GACHOKI (PW6) and a Clinical officer at Kerugoya District Hospital who confirmed she had been defiled as her hymen was broken and the labia majora and minora were swollen and reddish.

In his un-sworn statement in defence, the appellant stated that on the material day, she arrived home and his daughter said she wanted to sleep so he opened the door for her and she slept. He then went to the shamba and while there, his wife started screaming. A crowd of people surrounded him and beat him before taking him to the Police Station.

When I looked at the record of proceedings, I noticed that no voire dire examination was carried out on the complainant who was aged five (5) years at time of the incident. I put this to the State Counsel Ms Kambanga who confirmed that indeed no voire dire examination was carried out but she nonetheless urged me to find that there was sufficient evidence to warrant a conviction.

The complainant testified as PW1, on 29th March 2011 and the record for that day reads as follows:-

“ Before S.N. Ndegwa – S.R.M

Prosecutor C.I. Mbarani

CC – Leah

Accused – present

Court – For hearing

Complainant: A minor examined by Court

I am Juliet Ngendo. I don't go to school.

Court: She is of tender age. To give un-sworn evidence”

The compliant then went ahead to testify. What the trial magistrate did above must have been intended to be a voire dire examination as required under the Oaths and Statutory Declaration Act Cap 15 Laws of Kenya. In **KIBANGENY ARAP KOLIL VS REPUBLIC 1959 E.A 92**, the Court stated that though a voire dire examination need not be lengthy, it should nonetheless be directed to the particular question whether the child understands the nature of an oath. And in **NYASANI s/o GICHANA VS REPUBLIC 1958 E.A 190**, the Court stated as follows after quoting verbatim Section 19 of the Oaths and Statutory Declaration Act:

“ It is clearly the duty of the Court under that Section to ascertain, first whether a child tendered as a witness understands the nature of a oath, and if the finding of this question is in the negative, to satisfy itself that the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth”

The above two cases were cited with approval by the Court of Appeal in **KINYUA VS REPUBLIC 2002 1 K.L.R.** which went on to lay down the following guidelines in a voire dire examination:-

“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 it is done, it must appear on the 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 a child – witness”

I have deliberately quoted that long passage to demonstrate the importance of a voire dire examination and how it ought to be conducted. From what transpired on 29th March 2011, it is clear that no proper voire dire examination was carried out with respect to the complainant in this case. It is not even clear what questions, if any, were put to her by the Court. All that she said was

“ I am J N. I don’t go to school”

A voire dire examination is required by statute and needs strict compliance otherwise a trial may be vitiated due to non-compliance. In this case, I find that non-compliance with that requirement vitiated the trial.

What has concerned me in this case is whether or not to order a re-trial. A retrial should not be ordered unless the appellate Court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction may result – MWANGI VS REPUBLIC 1983 K.L.R 522 (CA). In ordering a re-trial, the Court should also consider the nature of the offence. In this case, the offence is a serious one and attracts a mandatory sentence of life and there is nothing to suggest that the prosecution will have difficulties in mounting a re-trial. It is in the interest of justice to order a retrial in the circumstances of this case as no prejudice will be caused to the appellant.

Accordingly therefore, the appellant’s trial having been defective, his conviction and sentence are quashed. Instead, a re-trial is ordered. He be placed before the Chief Magistrate at this Court on 28th October 2013 for plea taking and re-trial before any other magistrate other than S.N. Ndegwa.

It is so ordered

B.N. OLAO

JUDGE

23RD OCTOBER, 2013

23/10/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Appellant – present

Mr. Sitati State Counsel – present

Language – English/Kiswahili

COURT: Judgment delivered this 23rd day of October 2013 in open Court.

Mr. Sitati State Counsel present

Mr. Muriithi Court clerk present

Appellant present in person

Right of appeal explained.

B.N. OLAO

JUDGE

23RD OCTOBER, 2013