REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

Criminal Appeal No. 175 Of 2010

MOSES YAMA……...……APPELLANT

VERSUS

REPUBLIC…….…..….RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 2358of 2009 Republic vs Moses Yamaa in the Resident Magistrate's Court at Kapsabet by J. Njoroge, Principal Magistrate on 19th November 2010)

JUDGMENT

1. The appellant was tried for the offences of defilement of two girls aged six and eleven years respectively,contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, No. 3 of 2006. He also faced alternative charges of committing indecent acts with the children contrary to section 11(1) of the Act. The trial court acquitted him on the two main counts for lack of *documentary* evidence showing the *ages* of the minors. The learned trial Magistrate however found that the alternative charges had been proved. He sentenced the appellant to 10 years imprisonment on both alternative charges. The sentences were to run *consecutively*.
2. The appellant has appealed against his conviction and sentence. The primary grounds urged in the petition of appeal are three. First, that the charges were not proved beyond reasonable doubt; secondly, that the trial court relied on hearsay evidence; and, thirdly, that the court misapplied the evidence *vis a vis* the charge and arrived at a wrong decision.
3. At the hearing of the appeal, learned counsel for the appellant buttressed those grounds with six key arguments: firstly, that in the absence of conclusive evidence of the ages of the minors, the alternative charges could not stand; secondly, no proper *voire dire* examination of both minors was conducted; third, that there was no corroborating evidence; four, that once the court dismissed the main charges, the alternative charges collapsed; five, that the evidence of the investigating officer was not taken; and, lastly, that there were too many inconsistencies in the evidence which made the conviction and sentence unsafe.
4. The appellant submitted that the trial court failed to conduct a *voire dire* examination of the minors. Learned counsel for the appellant referred the Court to page 5 of the record of appeal where the court stated-*"the child [PW2] doesn't understand the nature of an oath. She shall give unsworn evidence"*. Counsel's opinion was that there was no proper examination preceding that statement. The same submission was made regarding the evidence of the other minor (PW5) at page 7 of the record. It was submitted that their unsworn evidence could not have been corroborated by PW3 or PW6 who were also minors. It was submitted that with regard to PW6, no *voire dire* examination at all was conducted.
5. The appellant attacked the medical evidence contained in the P3 form and treatment records. The

primary argument was that there was no medical evidence connecting the appellant to the offence. In particular, it was argued that the appellant was not medically examined. There were thus serious gaps in the evidence. In sum, the appellant's case was that his conviction and sentence were unsafe in the circumstances.

6. The appeal is contested by the State. This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn 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.
7. It is not true that no *voire dire* examination was conducted for *both* complainants. The 1st complainant's evidence appears at page 5 of the record. The record states as follows:

> *"PW2 Voire – dire. [minor's name withheld] I stay at reserve. I attend [particulars withheld] . I am aged 5 years. I go to church. I do not know the name. I have never seen this book [bible].*
>
> *Court: The child doesn't understand the nature of an oath. She shall give unsworn evidence."*

8. There was another brief examination of the other complainant PW5. It appears at page 7 as follows;

> "*Voire – dire. [minor's name withheld] I stay at [particulars withheld]. I am a pupil at [particulars withheld] Primary school. I am aged 11 years. I go to church. This is a bible. It is for the padre [sic]*
>
> *Court: [witness] does not understand the nature of an oath shall order she gives unsworn evidence."*

9. The two minors then proceeded to give unsworn 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. Generally, if the court proceeds to take unsworn evidence, the accused should not be convicted in the absence of *corroborating* testimony. There is an exception under section 124 of the Evidence Act as read together with the Sexual Offences Act. From the above verbatim record of the court titled *voire dire*, a number of questions were answered by the children. The court immediately formed an impression that the girls did not comprehend the nature of an oath. I am of the considered opinion that the *voire-dire* examination could have been a little more detailed. Ideally, the questions by the court should also appear on the record. It was however not fatal. See *Macharia v Republic* [1976-80] 1 KLR 260. The brief *voire dire* in both casesnevertheless met the test in *Johnson Muiruri v Republic* [1983] KLR 445. The two minors were giving *unsworn* evidence. As I will discuss shortly, the evidence of the minors was not the *sole* convicting evidence. I cannot then say that there was non-compliance with section 124 of the Evidence Act.
10. Both complainants were lured by the appellant. He used a cruel trick of promising to give them money to buy sweets. It was a tempting ruse. The 1st complainant testified that-

> *"On 19.7.2009 I was looking after cattle with E when the accused found us by the roadside. He is Musa Yamaa. Approached [sic]and called me and took me in [sic] a tea plantation and defiled me….he lured me by showing me cash in his hands and told me to follow him so that he could buy me chewing gum. He is before court.[points at accused]."*

11. The first complainant told E PW3, a minor, what happened. She confirmed it to court in her testimony. Her testimony was also preceded by a *voire dire* examination at page 6 of the record of appeal. The 1st complainant also reported the matter to her grandmother and mother (PW1). The

2nd complainant (PW5) said she was 11 years. A *voiredire* examination was conducted. I have set it out infull. The court was of the opinion that the minor did not also comprehend the nature of an oath. She proceeded to give *unsworn* evidence. She testified that on 18th July 2009, the appellant lured her with a promise to give her 2 shillings. He led her to his house and penetrated her. She said she felt a lot of pain. She reported the matter to her mother (PW4). The matter was reported to the police. She was treated at Nandi Hills District Hospital where a P3 form was made.

12. The evidence of PW1, the mother of the 1st complainant, is material. At 8.00p.m on 20th July 2009, her daughter, aged 6, complained of pain in her genitals. She said she had been defiled the previous day by the appellant. The appellant was arrested. She took her daughter to hospital and a P3 form was filled out. PW4, the mother of the 2nd complainant, testified that on the material day, her daughter aged 11, came back to the house at 8.00p.m. She said she had been defiled by the appellant who inserted his male organ into her vagina. He had promised to give her 2 shillings. She reported to the police. She took her daughter to hospital.
13. There are two points to be made on that evidence. First, the two mothers confirmed the ages of their daughters to the court as 6 and 11 respectively. The mother to PW1 was a college student at [particulars withheld]. She would *certainly* know the age of her daughter. PW4, the mother of PW5, was a worker at a tea plantation. I cannot say that she would be *unaware* of her daughter's age. Secondly, the two P3 forms produced at the trial confirmed the ages of the two minors to be 6 and 11 respectively. It is thus not true that the ages of the children were not established at the trial. While documentary evidence such as birth notifications and certificates would be appropriate, it was a serious misdirection by the trial court to say that age was not proved *merely* because the prosecution failed to *"avail birth certificates, baptism or hospital birth records…"*.I have reached the conclusion that the ages of the minors were *well established*by oral and documentary evidence at the trial.
14. The appellant did not cross-examine both complainants. Their unsworn evidence was thus unchallenged. They had no plausible reason to frame up the appellant. I have not seen any compelling reason to say they were untruthful. Furthermore, the unsworn evidence of the minors, subject to compliance with section 124 of the Evidence Act, would have been sufficient to ground the conviction. In any event, there was clear corroborating evidence of PW 8, John Koech, a clinical officer at Nandi Hills District Hospital where both minors were examined. He is not the one who filled out the two P3 forms. They were made by one Barasa, his colleague, who was away on a seminar. The appellant attacks the evidence as hearsay. I do not agree. The witness was familiar with his colleague's signature and records. They worked together. The P3s were *originals.* His colleague was not available to testify. No objection to production of the documents was made. They were official medical records of a government hospital. All the conditions for admission of original documents by someone else other than their maker were thus met.
15. The P3 forms confirmed that PW2's hymen was torn, her vulva was swollen and she had a discharge. There were pus cells consistent with a sexually transmitted infection. PW5 had a broken hymen, inflamed vulva and pus cells in her urine. The appellant was not examined. That is why the appellant contends that there was no penetration and no connection between him and the injuries to the complainant. I think that is simplistic. First, there is the unchallenged evidence of the two complainants. I said they were vivid in their testimony. They identified the appellant by name. They had no cause to frame him up. The appellant was arrested immediately. He did not cross-examine the minors. The evidence of the two complainants was largely corroborated by PW8 and the two P3 forms. The evidence is also consistent with the narrative by their two mothers PW1 and PW4.

16. The injuries to the minors' private parts and the infections with venereal diseases were consistent with penetration. Penetration is defined in section 2 of the Sexual Offences Act as follows-

> *"penetration' means the partial or complete insertion of the genital organs of a person into the genital organs of another person."*

17. I have then considered the defence of the appellant in the trial court. It was very brief. He stated:

> *"I stay at [particulars withheld] Location and I am unemployed. On 21.7.09,*

Assistant Chief said I had defiled a small girl. I was then arrested and charged. I don't know if the complainant was medically examined or not."

18. That was it. The onus of proof of the offence lay with the prosecution throughout. But faced with the evidence of the prosecution, the appellant put forward a feeble defence. I also note that the appellant had an opportunity to commit the offence. He did not deny being at the *locus in quo* on the material days. He said he was unemployed. Since the appellant had a clear opportunity to commit the offence, in the circumstances of this case, it would amount to further corroboration. See *Opo v Republic* [1976-80] 1 KLR 1669.

19. Upon re-evaluation of all the evidence, I have come to the conclusion that the main charge of defilement had been proved beyond reasonable doubt. As I said, the learned trial magistrate erred in finding that the age of the minors had not been established at the trial.The acquittal of the appellant on the two main counts was thus an error. The defence put forward by the appellant at the trial was *inconsistent* with his plea of innocence. I find that on the totality of the evidence, all the ingredients of the offence of defilement were proved.
20. Granted those circumstances, this would have been a proper case to reverse the acquittal on the charges of defilement and to enhance the sentence. However, the State did not give appropriate notice to the accused. No suitable warning was given to the appellant at the commencement of hearing of this appeal. It would be thus be highly prejudicial to the appellant to reverse the acquittal or to enhance the sentences.
21. My finding above has a direct bearing on the alternative charges of indecent acts with the two minors. The appellant had largely challenged his conviction on the *basis* of his *acquittal* on the two main charges. I have however found that there was sufficient evidence to *convict* him for *defilement* of the two minors. I have held that the learned trial magistrate erred on that score. It follows as a corollary that in the course of penetration and defilement, the appellant's penis came into contact with the genitalia of the two minors. The decision cited by learned counsel for the appellant in *Benard Ngaruiya v Republic* Nairobi High Court Criminal Appeal 238 of 2007 (unreported) is thus not on point.

22. From the evidence I highlighted earlier, I agree with the trial magistrate that the appellant was properly convicted on the two alternative charges of indecency with the two minors. Under section 11 of the Act, the minimum sentence provided is 10 years imprisonment. I will accordingly not disturb the conviction and the consecutive sentences imposed by the lower court on the alternative charges. This appeal is hereby dismissed.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 23rd day of October 2013

G.K. KIMONDO

JUDGE

Judgment read in open court in the presence of

Mr……..…for the appellant.

Mr…….……..……..…for the State.

Mr. P. Ekitela, Court Clerk.