REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 135 OF 2012

J K M .... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(APPEAL ARISING FROM THE JUDGMENT OF THE SENIOR RESIDENT MAGISTRATE'S COURT AT BARICHO (J.N. MWANIKI – S.R.M) IN CRIMINAL CASE NO. 131 OF 2011 DELIVERED ON 12TH JULY, 2011)

JUDGMENT

The appellant J K M was on 12th July 2011 convicted by the Senior Resident Magistrate Baricho Court (J.N. Mwaniki) for the offence of defilement contrary to Section 8 (1) (2) of the Sexual Offences Act and sentenced to life imprisonment. It was the prosecution case that on diverse dates between 23rd December 2010 and 22nd February 2011 at Kagio township in Kirinyaga West District within Central Province, he intentionally caused his penis to penetrate the vagina of S W child aged 7 years.

The appellant has now filed this appeal against both the conviction and sentence raising seven grounds. The State through Mr. Omayo State Counsel supports both the conviction and sentence stating that it was on sound evidence.

Being a first appellate Court, I have re-considered the evidence afresh to satisfy myself that the conviction was sound.

In his third ground of appeal, the appellant has stated as follows;-

"The learned trial magistrate erred in law and in fact by failing to consider that the evidence of the child (victim) who frankly told the magistrate the prosecutor and her mother that she is being forced by the mother to say that she was raped by the father. She told the Court how the mother is promising goodies if she said that"

In my view, this appeal turns on the above ground. The appellant is the father of the complainant and therefore he ought to have been charged with the offence of incest. However, nothing really turns on that.

It is clear that the complainant was aged 7 years at the time of the incident as per the Medical officer's evidence (HEZRON MACHARIA PW5). It is also clear from the officer's evidence that the complainant had indeed been defiled. The incident came to light when complainant's teacher MARY NJERI (PW3) noticed that she could not run or even walk properly during physical exercise. It was then

that PW3 confronted the complainant who told her that her father does "***bad things to her".*** Complainant was by then living with her father who had taken her and her other siblings from their mother G W M (PW5).

The complainant was therefore the only witness to the defilement charge as there was no other person who saw the appellant commit the offence. Nonetheless, under ***Section 124 of the Evidence Act***, the trial Court could still convict the appellant solely on the complainant's evidence.

"***----- if, for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth"***

The complainant being a child aged 7 years, the trial magistrate was required by law to carry out a voire dire examination before allowing the complainant to testify as she was a child of tender years. This the trial magistrate attempted to do on 24th March 2011 when the trial commenced. The proceedings of that day are important and I reproduce them:

"24/03/2011

Before Hon. J.N. Mwaniki – S.R.M

Prosecutor – C.I. Rose

CC – Naomi

Accused - present

J.N. MWANIKI

SRM

24/03/2011

Having commences in Camera

J.N. MWANIKI

SRM

24/3/2011

PW1: A girl aged 7 years on probing questions states: I am S W. I reside Kagio. I am aged 7 years. I do go to school at [Particulars Withheld] Primary School in class 4. I do go to Kenya Assembles of God Church. I do attend Sunday school. I will answer all questions put to me correctly".

Although in his judgment the trial magistrate stated that he had carried out a voire dire examination of the complainant, what transpired on 24th March 2011 as captured above can hardly be described as a voire dire examination. It is clear that no questions were put to the witness to find out whether infact she understand the nature of an oath or was intelligent enough to justify the reception of her evidence. In ***KINYUA VS REPUBLIC 2002 I K.L.R 256*** the Court of Appeal after examining other cases on the issue of voire dire examination set out the following steps to be followed in that exercise:-

"***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 investigations 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. When the Court is so satisfied, then the Court will proceed to record unsworn evidence from the child witness".

The Court went on to state that the above procedure must be strictly followed as failure to do so may, in appropriate circumstances, "***vitiate conviction and result in allowing the appeal"***

In this case, the trial magistrate did not adhere to the rules set out in the KINYUA case (supra). There is no indication from the record that the Court made a finding as to whether or not the complainant understood the duty of speaking the truth.

The importance of the above comes out clearly when one looks at the testimony of the complainant. She commenced her testimony on 24th March 2011 but was stepped down after the trial magistrate found that she was disoriented. She was however recalled on the same day after several witnesses had testified and her testimony was as follows:-

"***PW1 recalled and proceeds. One day my teacher (pointing at PW2) called me at school. We were playing then. I told teacher what my father had done to me. I was then taken to hospital because I was sick here (pointing at her private parts). That was because my father (pointing at accused) had done bad things to me. He did the bad things while we were at his home. I am the one who told the teacher about those bad things. By then my mother was at home. K and C and I stays at my father's home. Father used to do bad things to me at night. By then C and K were always on their bed".***

However, upon cross-examination by the appellant, the witness stated as follows:-

"You are my father. You used to wash me. I used to sleep on your bed. You did not use to touch my body. It was mother who told me what to say. She said she could buy a cake and a soda for me. I have not engaged in sex with you"

Further on in cross-examination, this same witness says as follows:-

"***Mother never told me what to come and say. She did tell me what to say"***

And in re-examination, she insisted that the father did bad things to her.

Clearly, it was un-safe to base a conviction on such evidence more so bearing in mind that apart from the complainant's testimony, there was no other evidence connecting the appellant to this crime. Certainly, the complainant had been "***engaged in penetrative sexual intercourse for a period of time***" as found by the Clinical officer HEZRON MACHARIA (PW5). However, the trial magistrate could not have been correct to come to the conclusion, which he did, that the complainant's evidence, "***when properly analyzed was consistent***". And neither was it correct for the trial Court to find, as it did, that the complainant "***was possessed of sufficient intelligence and understood the duty of speaking the truth***" when infact no such finding was made by the trial magistrate prior to her testimony which was infact received without a proper voire dire examination. In a Criminal trial, the prosecution must establish its case beyond reasonable doubt. The vevacity of the complainant's evidence in this case, judging by what I have reproduced above, was highly doubtful and was certainly not consistent because at one state she says her father did bad things to her and at in the same breath, she says her mother told her what to say at the same time. The appellant may very well have defiled her but the evidence herein fails far short of

supporting a conviction bearing in mind that it was the only direct evidence connecting the appellant to this crime. It would be a grave injustice to consign the appellant to a life in imprisonment on the basis of such evidence.

Ultimately therefore, I allow the appeal and quash both the conviction and sentence.

The appellant to be released forthwith unless otherwise lawfully held.

B.N. OLAO

JUDGE

28TH NOVEMBER, 2013

28/11/2013

Coram

B.N. Olao – Judge

CC – Muriithi

Appellant – present

Mr. Sitati State Counsel – present

Language – English/Kiswahili

COURT: Judgment delivered this 28th day of November 2013 in open Court.

Mr. Sitati State Counsel present

Mr. Muriithi Court clerk present

Appellant in person present

Right of appeal explained.

B.N. OLAO

JUDGE

28TH NOVEMBER, 2013