



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION- MILIMANI COURT**

**CRIMINAL APPEAL NO.44 OF 2020**

**EVERLINE MWEYERI.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an Appeal arising from the original conviction in Criminal Case No.1300 of 2015 at*

*Chief Magistrates Court Makadara by Hon. Kithinji AR –SPM on 13<sup>th</sup> June 2017)*

**JUDGMENT**

1. **Everline Mweyeri**, the **Appellant**, was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No.3 of 2006. Particulars being that on the 13<sup>th</sup> day of April, 2015 within Nairobi County, intentionally caused her vagina to be penetrated by the penis of DB a child aged 11 years.

2. In the alternative, she faced a charge of committing an indecent act with a child contrary to section 11(1) of the sexual offences Act No. 3 of 2006. Particulars of the offence were that on the 13<sup>th</sup> day of April, 2015 in Nairobi County, intentionally touched the penis of DB a child aged 8 years.

3. Having been taken through full trial he was found guilty, convicted for the main count and sentenced to serve fifteen (15) years imprisonment.

4. Aggrieved, she appeals on grounds as amended, that: critical elements of defilement, especially penile penetration was not proved; voire dire examination was not conducted on the complainant; the Appellant was not accorded fair trial due to lack of disclosure as she was not supplied with witness statements contrary to Articles 25, 50(2) (j) of the Constitution and being held in custody for eight (8) days in contravention of Article 49(1)(f) of the Constitution without any explanation; there were inconsistencies and contradictions that were capable of unsettling the prosecution's case; nonpayment of the Appellant's dues resulting into grudges was not taken into consideration; and the pragmatic statement of defence was not taken into consideration as required by section 169(1) of the Criminal Procedure Code.

5. The prosecution's case was that the Appellant was a house help at the complainant's home. On the material date the complainant was watching television with two of his siblings who retired to bed leaving him with the Appellant in the sitting room. The Appellant switched off lights and carried him to the bedroom where she molested him.

6. PW2 MM, his mother went back home at 8.00pm to find the Appellant and complainant asleep. When she confronted the Appellant to establish why she slept early she asked to leave and alleged that she had been bewitched. The following morning, the complainant informed her about what had befallen him. They arrested the Appellant and took her to the Police Station while the complainant was taken to Hospital.

7. PW3 Penina Ambereri , a clinical officer, who examined the complainant found no injuries on his genitalia. On cross-examination, she said that the complainant alleged that he was defiled.

8. PW4 Dr. Joseph Maundu, examined the complainant following allegations of having been defiled. The complainant had no physical injuries.

9. Upon being put on her defence, the Appellant stated that in the course of her employment she used to sleep on the couch in the living room. That as she slept she was molested by the man of the house and when she raised a complaint and requested to leave so as to go and attend to her sick child at home, they came up with allegations and made the complainant to lie.

10. The Appellant canvassed the appeal by way of written submissions. It was urged that the charge was defective as it did not disclose whether the act was unlawful therefore the criminal aspect of the charge was not evident. That the prosecution failed to illustrate the fact of penetration as there was disparity of evidence adduced by the complainant and his mother in respect of the object used.

11. The Appellant faulted the court for not conducting *voire dire* examination to ascertain whether or not the victim understood the importance of telling the truth. She also complained that she was held in custody for 7 days, which was in contravention of Article 49(1) (f) of the Constitution.

12. Further, she pointed out that there was disparity of dates given as to when the victim was molested that should not have been disregarded. That no reason was given by the trial court as to why it believed the complainant pursuant to Section 124 of the Evidence Act and that she should have been given a benefit of doubt.

13. The State through learned Counsel Mr. Mutuma opposed the appeal. He urged that the complainant aged 11 years gave candid evidence as to what transpired and how he reported to his mother upon arriving home. That although *voire dire* was not conducted the minor had sufficient intelligence and that the learned magistrate in convicting relied on section 124 of the Evidence Act. He called upon the court to uphold the conviction and sentence meted out.

14. In response thereto, the Appellant sought a second chance.

15. This being a first appellate court, I am duty bound to revisit evidence adduced before the trial court, re-evaluate it and come to my own conclusion bearing in mind that I neither saw nor heard witnesses who testified so as to observe the demeanor. (See **Okeno v Republic (1972) EA 32**).

16. Elements that must be proved in a charge of defilement are captured in section 8(1) of the Sexual Offences Act that provides as follows:

**“... A person who commits an act which causes penetration with a child is guilty of an offence termed defilement...”**

17. Therefore, as stated in **Fappyton Ngui v Republic (2012) eKLR**, the prosecution was required to prove the age of the complainant, the act of penetration and positive identification of the perpetrator of the offence.

18. The Appellant faults the trial court to have proceeded in a matter where the charge sheet was defective for want of the word...“unlawful”...hence not disclosing the criminal element of the offence. In the case of **Sigilani v. Republic [2004] 2 KLR** it was held that: The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.

19. Looking at the particulars of the offence, it is stated that the Appellant **“... intentionally caused her vagina to be penetrated by the penis of...”**

20. Section 43 (1) An act is intentional and unlawful if it is committed -

(a) .....

(b) .....

(c) *in respect of a person who is incapable of appreciating the nature of an act which causes the offence.....*

**(4) The circumstances in which a person is incapable in law of appreciating the nature of an act referred to in subsection (1) include circumstances where such a person is, at the time of the commission of such act –**

**(f) a child.**

21. A child is defined as any human being under the age of 18 years. (see Section 2 of the Children Act). Therefore, the age of the child having been stated, it was sufficient for the Appellant to know what she was being accused of and was in a position to prepare for the defence. In the circumstances, the charge was not fatally defective.

22. PW2, the mother of the complainant stated that he was 10 years old. **PW5, No.60137 Corporal Virginia Murage**, the Investigation Officer adduced in evidence the age assessment report authored by **Dr. M. N. Gideon** of the Department of Pediatrics, Dentistry and Orthodontics, School of Dental Sciences, University of Nairobi, which indicated that the complainant was aged between 10 and 11 year.

23. In the case of **Francis Omuroni –vs- Uganda, Criminal Appeal No. 2 of 2000**, the Court of Appeal observed that:-

**“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the “In defilement cases, medical evidence is victim in the absence of any other evidence, apart from medical evidence, age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense...”**

24. The case of **Mwalongo Chichoro Mwajembe vs. Republic, Criminal Appeal No. 24 of 2015 (UR)** it was stated that:

*“...the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See Denis Kinywa-Vs- Republic, Criminal Appeal No.19 of 2014 and Omar Uche -Vs- Republic, Criminal Appeal No.11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in Francis Omuroni -Vs- Uganda, Criminal Appeal No. 2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim’s age, it has to be credible and reliable...”*

25. Medical evidence adduced that was not questioned was proof of the fact of age. Therefore, the ingredient of age was proved beyond reasonable doubt.

26. The complainant underwent medical examination and no physical injury was noted on his genitalia. In the case of **George Kioji V. Republic, CR. APP. NO. 270 of 2012 (Nyeri)** the Court stated thus:

*“Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.”*

In reaching the decision to convict the Appellant the trial court based its decision on section 124 of the Evidence Act that stipulates thus: -

*Notwithstanding the provisions of section 19 of the oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other evidence in support thereof implicating him.*

*Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.*

27. Relying on the case of **Bichana vs Republic (1958) EA 190**, the Appellant argued that *voire dire* was not conducted, that it was not enough for the trial court to record hearing of the *voire dire* without recording the conversation the court had with the alleged witness as it happened in the instant case.

28. The complainant herein was of an apparent age of between 10-11 year. In **Kibageny Arap Kolil v R (1959) EA 82** the Court of Appeal for Eastern Africa held that a child under the age of 14 years was a child of tender years. In the **Bernard Embenzi v Republic (2018) eKLR** the Court of Appeal had this to state: -

*“[13] The procedure for testing whether or not a child understands the nature of the oath and if not, whether or not the child is intelligent and also understands the duty of speaking the truth has been prescribed in many decisions of various courts. (See Johnson Muiruri v. Republic [1983] KLR 445).*

*It should appear on the face of the record that there was due compliance with the provisions of Section 19 of the Oaths and Statutory Provisions Act (Nyasani s/o Bichana v. R [1958] EA 190). If *voire dire* is not carried out, the evidence of a child of tender years would be deemed to be wrongly admitted and may result in the conviction being quashed unless there was other evidence sufficient to sustain a conviction (Nyasani s/o Bichana v. R. (supra); Dhamuzungu v. Uganda [2002] 1EA 49).*

*[14] Since the trial court did not conduct a *voire dire* examination before receiving the unsworn evidence of the child, it follows that the evidence was wrongly admitted and should have been excluded from consideration by the High Court.”*

29. In **Marripett Loonkomokv v Republic (2016) Eklr** the Court of Appeal stated that;- “**Voir Dire definition**” **Duhaime’s Legal Dictionary**. But the origin of the rule on *voire dire* examination of a child witness as we know it today was first applied in the ancient yet landmark English case of **R v Braisier (1779) 1 Leach Vol. I, case XC VIII, PP 199 – 200**, which incidentally was a case involving sexual assault on a girl under 7 years of age. The twelve Judges in that case stated, in part, that;

*“.. an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath... for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence” (our emphasis)*

Although this decision, through section 19 of Oaths and Statutory Declarations Act underpinned the legal practice in relation to children’s testimony in Kenya, we reiterate that the format and procedure of testing the intelligence, and sufficient knowledge and nature of the oath has been varied. For instance, in the past the courts insisted that *voire dire* examination

must be in the form of a dialogue, with the trial court recording questions posed to the child and the child's answers nearly verbatim in the first person before drawing its conclusion on the question of suitability of the child. See *Johnson Muiruri v R* (1983) KLR 447. The courts today accept both the question and answer format and the recording of the child's answers only. See *James Mwangi Muriithi* (supra). What is constant is that, whatever format the court adopts it must be on record. It is equally settled that by dint of sections 208 and 302 of the Criminal Procedure Code, the law allows cross-examination of a witness who does not give evidence on oath.....”

30. The record of the trial court reads thus:-

“...Hearing Voir Dire An African male child aged about 8-10 years.

Duly affirmed as court establishes that he is intelligent enough and courageous enough and also understands the court process, he will not be sworn in due to his age.”

31. The format that the trial court adopted in establishing that the child's suitability to testify was not recorded. Without a proper format being seen for purposes of re-evaluation by this court, it cannot form an opinion as to whether or not the child was seized of sufficient intellect so as to be believed by the court.

32. The Appellant complains that she was not presented in court within time stipulated by the Constitution. Article 49(1)(f) of the Constitution provides as follows:-

“...(1) An arrested person has the right—

(f) to be brought before a court as soon as reasonably possible, but not later than—

i. Twenty-four hours after being arrested; or

ii. If the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

The Appellant argues that she was arrested on the 15<sup>th</sup> April, 2015. The charge sheet does not have either the date of arrest or arraignment, but, the plea was taken on 23<sup>rd</sup> April, 2015. I take cognizance of the pre-charge violation of the Appellant's rights, but, this cannot result in an acquittal, she can only be compensated by damages in a civil claim. This was decided in the case of *Julius Kamau Mbugua v Republic* [2010] eKLR where the court of Appeal on the issue said:

*"The alleged unlawful detention does not exonerate the appellant from the serious crime he is alleged to have committed. The breach could logically give rise to a civil remedy – money compensation as stipulated in Section 72 (6). That is the appropriate remedy which the appellant should have sought in a different forum."*

33. It is also contended that the Appellant was not supplied with witness statements in contravention with Articles 25, 50(2) (j) of the Constitution that provides thus: -

**25. Fundamental Rights and freedoms that may not be limited Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—**

(a) Freedom from torture and cruel, inhuman or degrading treatment or punishment;

(b) Freedom from slavery or servitude;

(c) The right to a fair trial; and

(d) The right to an order of habeas corpus...

(2) Every accused person has the right to a fair trial, which includes the right—

(j) To be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

34. The Appellant herein having been unrepresented, the court had the duty of not only informing him of the right to have evidence (witness statements and documentary evidence if any) that the prosecution intended to rely on. The court was required to inform the Appellant of that right and to record the explanation rendered. A perusal of the record confirms that the court made an order for the Appellant to be provided with statements at her own costs. There was no indication if the Appellant who failed to raise bail managed to obtain them.

35. In the case of *Simon Githaka Malombe vs Republic* (2015) Eklr the Court of Appeal stated thus:

*"The duty of disclosure lies with the prosecution and not with the court. In the face of clear constitutional provisions, it is not a*

*responsibility that the Office of the Director of Public Prosecutions can shirk. Whenever an accused person indicates inability to make copies, the duty must lie with the State, which the prosecutor represents, to avail the copies at State expense. It is for that Office to make proper budgetary allocation for that item. Then only can the constitutional guarantee in Article 50(2) (c) and (j) be real.*

*The denial of witness statements in the present case reduced the trial to a farcical sham.”*

36. From the foraging, it is apparent that the conviction herein is vitiated by errors on the part of the court. The question lingering is whether the conviction should be quashed and the Appellant set free or if she should be retried? In the case of **Ahmed Sumar v Republic (1964) EALR 483**. The East African Court of Appeal stated in regard to retrial in criminal cases:

*“It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered...In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person...”*

37. In **Muiruri –vs- Republic (2003), KLR, 552** and **Mwangi – Vs- Republic (1983) KLR 522** and **Fatehali Maji vs. Republic (1966) EA, 343** the view expressed was 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 own particular facts and circumstances and an order for a retrial should only be made where the interests of justice requires it.”*

38. The offence herein was committed on the 13<sup>th</sup> day of April, 2015, the Appellant failed to raise a recognizance during the trial that took two years. She was sentenced on the 13<sup>th</sup> day of July, 2017, therefore has been incarcerated for a period of six (6) years. The complainant on the other hand is a teenager aged about 17 years. Subjecting him to judicial process once again may be more traumatizing. This is a case where the interest of justice favours the Appellant.

39. In the premises, I quash the conviction and set aside the sentence meted out against the Appellant who should be set free unless otherwise lawfully held.

40. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 10TH DAY OF MARCH 2021.**

**L. N. MUTENDE**

**JUDGE**