REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. E127 OF 2021

BETWEEN

JOHN MUTURIA.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(An appeal from the conviction and sentence in Criminal Case* S.O No. 12 of 2019 *in the Principal* Magistrate's Court at Maua *by Hon. A.G.Munene (PM) on 04.05.2021)

JUDGMENT

The charge

1) **JOHN MUTURIA** (**Appellant**) has filed this appeal against sentence and conviction on a charge of attempted defilement contrary to section 9(1) as read with section 9(2) of the Sexual Offences Act No. 3 of 2006 (**the Act**). The offence was allegedly committed on 04th February, 2019 against **BG** a child aged 3 years.

Prosecution case

2) The prosecution called a total of five (5) witnesses in support of its case. The prosecution case as narrated by **PK** the complainant's mother was that on 04.02.2019, the complainant who is three years old and her brother went to school in the morning. They later returned home and reported that Appellant had taken complainant to the forest, undressed her and attempted to defile her. PW2 a minor whose age was not determined stated that Appellant took the complainant to Mach Nne place and urinated on her. Complainant was examined on the date of the incident. She had a small laceration on the vaginal wall and hymen was mildly perforated. The complainant had no vaginal bleeding or discharge and the clinical officer stated that he could not determine the age of the injuries. He tendered the P3 form as PEXH. 1. A teacher who visited the scene said complainant was half naked. He additionally said she was in school uniform and that Appellant was arrested by PC Bernard Muini near the scene where complainant was. Appellant was handed over the investigating officer who preferred charges against him.

Defence case

3) In his unsworn evidence, Appellant denied the charges.

4) *In a judgment* dated on *04.05.2021*, Appellant was convicted and having been found to be insane was ordered detained at the President's Pleasure.

The appeal

5) Aggrieved by this decision, the Appellant lodged the instant appeal. From the amended grounds and written submissions filed on 30.04.2021, Appellant raises grounds that:

1. Prosecution case was not proved

2. The sentence was illegal

Analysis and Determination

6) It is a duty to re-evaluate, re-analyze and re-consider the whole evidence in a fresh and exhaustive way before arriving at its own independent decision. (See **Collins Akoyo Okemba & 2 Others vs Republic [2014] eKLR**).

7) I have considered the appeal in the light of the evidence on record, the grounds of appeal and submissions by the appellant and by the state.

8) Before I delve into the substance of the appeal, I wish to deal with an issue of law which was neither raised by the Appellant nor by the state but which might determine the appeal anyway.

9) In considering the matter of evidence by a child of tender years, the Court of Appeal in **Johnson Muiruri v. R. (1983) KLR 445** held as follows:

> **"Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which [case] his sworn evidence may be received. If the court is not so satisfied, his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him."**

10) The court record reveals that the eye witness was a child. The said witness was not subjected to voire dire examination to determine if he was possessed of sufficient intelligent to understand the importance of telling the truth as this aspect seems to have eluded the trial court.

11) Subjecting a witness of tender age to voire dire examination is founded under **Section 125 (1)** of the **Evidence Act**, which states: -

> "**All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause)".**

12) **Section 19 (1)** of the **Oaths and Statutory Declarations Act** provides the procedure of receiving evidence of a child in the following terms:

> **"Where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth".**

13) In the leading case of **Kibangeny Arap Korir v Republic, [1959] EA 92**; the Court of Appeal for Eastern Africa while dealing with a determination of the issue, held that tender years means a child under the age of 14 years.

14) In a recent decision of; **Patrick Kathurima v Republic, [2015] eKLR**, the Court of Appeal held:

> **"We take the view that this approach resonates with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of Section 19 of Cap 15. We are aware that Section 2 of the Children's Act defines a child of tender years to be one under the age of ten years. The definition has not been applied to the Oaths and Statutory Declaration Act, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes''.**

15) In addressing what age would be appropriate for a trial court to conduct a *voire dire* examination, this court has also considered the holding in the case of **Maripett Loonkomok v Republic [2016] eKLR** where the Court of Appeal reiterated that children under the age of fourteen (14) ought to be taken through a voire dire examination and held that:

> **"The only statutory definition of a "child of tender years" is section 2 of the Children Act where it is defined to mean a child under the age of 10 years. The court reiterated the holding in Patrick Kathurima v R,Criminal Appeal No.137 of 2014 and in Samuel Warui Karimi v R Criminal Appeal No.16 of 2014 where it categorically stated that the definition in the Children Act is not of general application and that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify.**

16) The court additionally stated that:

> **"It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination. It follows from a long line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person**."

17) From the foregoing decisions supported by the definition of a child of tender years to be 14 years, I have no good reason to depart from this well-trodden path, as I am persuaded that the purpose of undertaking voire dire examination in a criminal trial is to protect the guaranteed right of a fair trial. Where the witness as in this case was a minor and that essential step was not taken in a criminal trial, that trial becomes problematic. In the circumstances I find the evidence by the complainant's minor brother was not properly received thus, the conviction of the Appellant becomes unsafe to sustain.

18) I have considered whether to make an order of retrial. In so doing, I have considered that Appellant was convicted on the ground that complainant had a small laceration on the vaginal wall and hymen was mildly perforated. The doctor noted that there was no vaginal bleeding and that he could not tell the age of the injuries. The fact that the age of the injuries could not be determined can only mean that they were not fresh and that explains why there was no vaginal bleeding. Complainant was examined on the same date that the offence was allegedly committed and had the injuries been fresh, the clinical officer would clearly have so stated. From the foregoing, I find that the injuries on complainant's genitalia were not caused on the date of the alleged offence.

19) A teacher who visited the scene said he found complainant and Appellant half naked. He additionally said complainant was in school uniform and that Appellant. No attempt was made by the prosecution to have the witness explain what he meant by complainant and Appellant half naked. The trial court's finding that the Appellant had undressed the complainant was therefore not supported by cogent evidence and ought to have been rejected.

20) From the foregoing, I find that even if the trial had not been vitiated by the failure to conduct *voire dire* examination on complainant, the evidence on record was not substantial and a conviction upon it was unsafe.

21) Concerning the sentence imposed on the Appellant, several cases have cast doubt on constitutional validity of provisions that impose an indeterminate sentence on an accused at the instance of an authority other than the courts. For example, in **Republic V SOM, Kisumu High Court Criminal Case No.6 of 2011 Majanja J** declared parts of the provisions of **section 166 of the Criminal Procedure Code** unconstitutional on the basis of finding the indeterminate sentence under **section 166 of the Criminal Procedure Code** cruel and inhuman. In **AOO and 6 Others v Attorney General and Another NRB Petition No. 570 of 2015 [2017] eKLR**, Mativo J., held that the provisions of the Penal Code where a child found guilty of murder is held at the pleasure of the President is unconstitutional as it violates the right to a fair trial under the Constitution.

22) Our courts have also been concerned about the treatment of persons with mental disability under the provisions of the CPC. In **Hussan Hussein Yusuf v Republic Meru High Court Criminal Appeal No. 59 of 2014 [2016] eKLR**, Kiarie J., held that section 167(1) of the CPC which directs that a person suffering from mental disability and is unable to understand the proceedings is to be detained at the pleasure of the President is unconstitutional as it violates Articles 25 and 29 of the Constitution that prohibit cruel, inhuman and degrading treatment. In **Joseph Melikino Katuta v Republic, Voi HC Criminal Appeal No. 12 of 2016 [2016] eKLR**, Kamau J., emphasized the point that keeping a mentally ill person in prison for an indeterminate period of time is cruel, inhuman and degrading treatment contrary to Articles 25 and 29 of the Constitution.

23) Even if the Appellant was guilty, the sentence that required that he be detained at the President's Pleasure is unlawful and this court would have given appropriate orders that resonate with the provisions of the Constitution that prohibit cruel, inhuman and degrading treatment.

24) From the foregoing analysis, I find that this appeal has merit. The conviction is quashed, the sentence set aside and it is hereby ordered that Appellant be forthwith set free unless he is otherwise lawfully held.

DELIVERED AT MERU THIS 02ND DAY OF DECEMBER, 2021

WAMAE.T. W. CHERERE

JUDGE

Court Assistant - Kinoti

Accused - Present in person

For the State - Ms. Mwaniki