REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. E062 OF 2021

BETWEEN

KENNETH MUCHOMBA...APPELLANT

AND

REPUBLIC .....RESPONDENT

(An appeal from the conviction and sentence in Criminal Case S.O No.44 of 2019 in the Senior Principal Magistrate's Court at Githongo *by Hon. S.Ndegwa* (PM) on 05.03.2021)

JUDGMENT

The charge

1. KENNETH MUCHOMBA (***Appellant***) has filed this appeal against sentence and conviction on a charge of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006 (**the Act**). The offence was allegedly committed on 03.12.2019 against **AK** a child aged 5 years.

Prosecution case

2. The prosecution called a total of six (6) witnesses in support of its case. The prosecution case as narrated by the **PW1 AK** complainant is that she was in PP1 class. She was born on 02.11.2014 as shown on her certificate of birth PEXH. 4. Complainant stated that Appellant was their neighbour. She recalled that she had gone to pick a thorn to unbraid her hair from Appellant's compound when he called her to his house and defiled her and that one **LA** had removed her from Appellant's house. **LA** a minor aged 10 years stated she was in class 6. She said she sent complainant to pick a thorn to unbraid her hair. That she took long to return and upon following her peeped into Appellant's house and saw him defiling her. Complainant was examined by Seberina Kaimetheri a clinical officer on 31.01.2020 which was one month and 27 days after the alleged offence was committed. The vagina had swelling and reddening and hymen was missing. She produced the P3 form as PEXH.1. Complainant's mother upon receiving complainant's report reported the matter to police and escorted complainant to hospital. Appellant was subsequently arrested and charged.

Defence case

3. In his sworn evidence, Appellant conceded that complainant went to his house but he denied defiling her.

4. In a judgment dated on *05.03.2021,* Appellant was convicted and sentenced to life imprisonment.

The appeal

5. Aggrieved by this decision, the Appellant lodged the instant appeal. From the supplementary grounds of appeal and written submissions Appellant raises grounds but mainly that the prosecution case was not proved.

Analysis and Determination

6. I have carefully considered the appeal in the light of the evidence on record and submissions filed on behalf of the Appellant and the State.

7. 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 cannot be wished away.

8. The complainant who was the primary witness in this case was 5 years old. 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."**

9. 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)".**

10. 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".**

11. 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.

12. 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''.**

13. 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.**

14. 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**.

15. From the foregoing decisions supported 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.

16. From the record voire dire examination of the complainant was recorded as follows:

> **PW1 A minor examined by court**
>
> **I am AK**

I don't go to school

I don't know how old I am

I live with my grandmother

Court: Witness to give unsworn evidence

17. Where the complainant as in this case was aged 5 years, the trial court ought to have before taking her evidence though not given upon oath, recorded if in the opinion of the court, complainant was possessed of sufficient intelligence to justify the reception of the evidence, and was possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

18. Where as in this case that essential step was not taken in a criminal trial, that trial becomes problematic. In the circumstances I find the evidence by the complainant was not properly received.

19. The foregoing notwithstanding, the court is still able to uphold the conviction if there is other sufficient independent evidence to support the charge. The only other evidence is that of another minor which in terms of Section 124 of the Evidence Act cannot sustain a conviction because the witness is not the victim of the crime.

20. I have considered whether this court should order a retrial. In **Benard Lolimo Ekimat v Republic [2005] eKLR,** the Court of Appeal stated as follows:

> **'…the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it."**

21. The foregoing decision was echoed in the case of **Dennis Leskar Loishiye v Republic [2015] eKLR** where the Court of Appeal cited the case of **Muiruri v R [2000] KLR 552** with approval and observed that:

> **Generally, whether a retrial should be conducted or not must depend on the circumstances of the case. It will only be made where the interest of justice requires it and it is unlikely to cause injustice to the appellant. Other facts include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to quashing of the conviction were entirely the prosecution making or not**

22. The Appellant was allegedly committed on 03.12.2019 which is 2 years ago. *A retrial if ordered is unlikely to be affected by non-*availability and possible loss of memory of the witnesses or to greatly prejudice the Appellant. Although he has been in custody for over 2 years, the interests of justice dictate that this case be subjected to a retrial.

23. Accordingly, I allow the Appellant's appeal, quash the conviction and set aside the life imprisonment term and order that he shall be **retried** before another magistrate other that **Hon. S.Ndegwa**.

24. The Appellant shall be presented to the Githongo Senior Principal Magistrate's Court on **14th December, 2021** for plea taking and such other and/or further orders that the court might deem fit to grant. Those shall be the orders in the appeal.

DELIVERED AT MERU THIS 02ND DAY OF DECEMBER , 2021

WAMAE. T. W. CHERERE

JUDGE

Court Assistant - Kinoti

Appellant - Present in person

For the State - Ms. Mwaniki