REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYE AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL 197 OF 2018

BETWEEN

BERNARD HINGA NJOGU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case No. 5673 of 2012 delivered by Hon. Stephen Jalang'o SRM on the 21st of September, 2018).

Background

1. The Appellant was charged with defilement **contrary to Section 8(1)(2) of the Sexual Offences Act**. The particulars were that on 31st August, 2012 at [particulars withheld] in Kasarani District, Nairobi County intentionally caused his penis to penetrate the vagina of EN. a girl aged nine (9) years. In the alternative he was charged with committing an indecent act with a minor contrary **to Section 11(1) of the sexual offences Act** in that he intentionally touched the buttocks of ENM a child aged 9 years with his penis.

2. At the conclusion of the trial, he was convicted of the main count and sentenced to serve life imprisonment. In a Petition of Appeal filed on 6th November, 2018 he complained that the charge sheet was defective**,** that the conviction was based on scanty, contradictory and inconsistent evidence, that Section 36 of the Sexual offences Act was not complied with and that his defence though strong was dismissed.

Summary of evidence

3. I am minded that this is the first appellate court whose duty is to reevaluate the evidence and make independent conclusions. See: **Okeno v Republic (1972) EA,32** and **Kiilu &Another v Republic (2005)1 KLR, 174**. I thus summarize the evidence adduced as follows.

4. **PW1, E.N.M** the complainant was walking to the shop on the evening of 31st August, 2012 at about 7.00 pm. She had been sent by a neighbor, Mama Maina to go purchase food since her mother had been hospitalization. As she approached a construction site she was accosted from behind by the Appellant who dragged her into a building under construction where he defiled her. He then released her and she went home. The following day she informed Mama Maina who then called **PW2, TM,** PW1's mother who went home a few days later.

5. PW2 then took PW1 to report to the Police. PW1 gave the name of her attacker as Hinga and even assisted the police to arrest the Appellant. **PW5, PC Robinson Cheruiyot** was the arresting officer who accompanied PW1 to arrest the Appellant. **PW6, PC Lilian Wakesa** was the investigating officer.

6. **PW4, Purity Kajuju,** a clinical officer testified that PW1 was attended to by her colleague Barbara Salano at MSF Hospital in Mathare on 5th September, 2013. It was her finding that PW1 had a healing bruise along her urethral opening and another on the inner walls of the Labia minora. As well, that her hymen was torn on the right side. **PW3, Dr. Joseph Maundu** examined the complainant on 11th September, 2012. It was his finding that there were no bruises but confirmed that PW1's hymen was absent.

7. After the close of the prosecution case, the court ruled that a prima facie case had been established and accordingly put the Appellant on his defence. In his defence, the Appellant stated that he had gone to his rural home and came back on the 4th August, 2012. Thereafter he was arrested. He met PW1, the complainant at the Police Station. His wife, **Nancy Wanja Hinga** testified as **DW2**. She stated that they had been married since the year 2010 and had two children. That on 24th July, 2018 the Appellant went to visit his parents in Gatundu. In cross

examination, she stated that the Appellant remained in Gatundu until 4th August, 2018 and that she could not explain where he was on 31st August, 2018.

Submissions

8. The Appellant appeared in person whilst the Respondent was represented by Miss Kimaru. The Appellant submitted that the age, penetration and identity of the perpetrator were not proved. It was his submission that the complainant did not volunteer the information and therefore she was unreliable.

9. Further. the Appellant submitted that the judgment was not appropriately delivered. He submitted that the trial court delivered judgment in chambers and not in open court. It was also his submission that **section 36 of the Sexual Offences Act** was not complied with. He submitted that there was no DNA evidence taken to establish his involvement. His view was that there was insufficient evidence to convict the Appellant.

10. The Respondent submitted that all the elements of the offence of defilement were established beyond a reasonable doubt. Miss Kimaru submitted that the complainant's age was established through the production of the birth certificate. This placed the age of the complainant at nine years old as at the time of the defilement. As well, that penetration was established through the injuries and that the hymen was absent. As for identification, it was the submission of the Respondent that the perpetrator was known to the complainant. She added that despite the incident happening at night the complainant reiterated that she knew the Appellant and eventually pointed him out to the Police.

Analysis and determination

11. A look at the trial court record shows that a preliminary issue presents itself regarding the conduct of the *voire dire* examination. It behooves this court to critically interrogate the same was conducted.

12. **Section 19 of the Oaths and Statutory Declarations Act** requires that a court interrogates the minor's understanding of the meaning and nature of an oath before it can receives the testimony of the minor under oath. While the court did conduct a *voire dire* examination, it fell short of establishing the minor's understanding of the nature and meaning of an oath. The *voire dire* examination was conducted as follows:

> ***"I am EN. I am 10 year old. I was born in 2003. I used to go to Church and I pray to God daily. I used to go to made the pre-unit classes. In church I was told that it is good to tell the truth because God wants truthful persons otherwise if you will lie you will be punished by God and you will be burnt in hell."***

13. The court then made the following finding:

> ***"The court upon conducting voire dire examination and being satisfied that the witness, a child understands the nature if an oath, I do hereby order that she be sworn in before testifying."***

14. Under Section 19 of the Oaths and Statutory Declarations Act, the purpose of a *voire dire* examination is to test whether the minor understands the reception of making an oath and of speaking the truth. In the above examination, the court only tested whether the minor was capable of speaking the truth but did not test her whether she appreciated the essence of taking an oath. This implies that it was an error on the part of the trial court to direct the minor to give a sworn statement in the circumstances.

15. The next question thus, is whether this error vitiated the entire trial. The current jurisprudence is that the failure to properly conduct a *voire dire* examination does not necessarily vitiate a trial so long as all evidence reevaluated establishes a case against an accused person. That is to say, that if there exists other evidence upon which a court can uphold a conviction, nothing stops the court from proceeding to do so. See: ***Maripett Loonkomok v Republic*** **[2016]eKLR**, the Court of Appeal stated as follows:

> ***"It follows from a long line of decisions that voire 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. But it is equally true, as this Court recently found that,***
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> ***"In appropriate case where voire dire is not conducted, but there is sufficient independent evidence to support the charge… the court may still be able to uphold the conviction." See Athumani Ali Mwinyi v R Cr.Appeal No.11 of 2015."***

16. I then grapple with the question of whether there was other independent evidence to support the charge. While the complainant, PW1, stated that she was accosted by the Appellant she also testified about two crucial things. Firstly, that she heard or felt someone grab her and that it was a night. In the first element she admited that it was not possible for her to see the attacker. Secondly, even if she was facing the attacker, being 7.00 pm, it was already dark. Further, the scene of crime being an incomplete construction site there was definitely difficulty in the conditions to assist visual identification.

17. In my view therefore, the only element that would have left no doubt that PW1 positively identified the Appellant was by way of an identification parade. None was conducted, implying that doubt abound on how subsequently PW1 recognized the Appellant as the culprit. Whereas the defect in failure to conduct a proper *voire dire* examination would be cured by ordering a retrial, any retrial would be tantamount to aiding the prosecution to fill up gaps in its case. This would be prejudicial to the Appellant, thus not serve ends of justice. See: **Ahmed Sumar vs. R (1964) EALR 483**. The court held as follows:

> ***'...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficient of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered;.....'***

18. In the upshot, I quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held.

Dated And Delivered At Nairobi This 9th Day of April, 2020.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Appellant in person.

2. Miss Chege for the Respondent.