REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 243 OF 2018

PETER KAMAU MATIRI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Makadara

Cr. Case No. 2755 of 2015 delivered by Hon. Stephen Jalangó (SRM) on 9th November 2018).

JUDGMENT

Background

1. The Appellant, **Peter Kamau Matiri** was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act No. 3 of 2010**. The particulars were that on diverse dates of 19th August and 25th August, 2015 at Shauri Moyo and Muthurwa market in Nairobi within Nairobi County intentionally caused his penis to penetrate the vagina of **AN**a child aged thirteen years. In the alternative, he was charged with committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2010** in that he intentionally touched the vagina of **AN**a child aged thirteen years.

2. After the trial, the trial court found that the prosecution had failed to prove either of the offences charged. Thus, the trial magistrate invoked the provisions of **Section 179** of the **Criminal Procedure Code** and found him guilty of a cognate but lesser offence of sexual assault. Consequently, he was sentenced to serve ten (10) years imprisonment. Aggrieved by both his conviction and sentence, he preferred the instant appeal to this Court.

3. This Appellant set out the following grounds of appeal:

> ***a. THAT the trial court erred in law and fact by shifting the burden of proof from the prosecution to the Appellant.***
>
> ***b. THAT the alleged penetration was not proved beyond reasonable doubt and there were inconsistencies in the evidence.***
>
> ***c. THAT the trial court violated the Appellant's constitutional right under Article 50 (2) (j) and Article 26 (c) of the Constitution.***
>
> ***d. THAT the learned trial magistrate erred in law by failing to take into account the time spent in custody vide Section 137 (1) (2) (a) of the Criminal Procedure Code.***

Summary of Evidence

4. This being the first appellate court, it is the duty is to re-evaluate the evidence adduced and come up with its own independent conclusions. The court must bear in mind that it has neither seen nor heard the witnesses and give due regard for that. (See **Okeno v Republic (1972) EA 32).**

5. The prosecution called two witnesses. The complainant, **PW1, AN**then aged 13 years testified that on 3rd March, 2015, she was brought

to Nairobi from Meru by a lady called Kench who had offered to employ her as a maid. The lady abandoned her in Nairobi leaving her stranded. She went to Majengo in the company of other women who offered her a place to sleep. She stayed in Majengo for a period of one month then left after having a disagreement with the women. She then went to Muthurwa where she met the Appellant. He told her to go and look for him at a store where he was working. PW1 went to his place of work. The Appellant bought her tea at a nearby hotel then told her to go and sleep at the store.

6. PW1 slept at the store for a period of four days after which the Appellant took her to his friend's house in Shauri Moyo. She returned to the store after four days. While she was at the store, the Appellant came in at around 7.00 pm. He closed her mouth with clothes, removed her skirt and inner wear then removed part of his trouser and defiled her. She started bleeding from her vagina. PW1 reported the matter at Kamukunji Police Station. She was taken to Nairobi Women's Hospital where she was admitted and taken to theatre for an operation. She was admitted for one week and five days. Upon being discharged, she was taken to MSF Clinic. After treatment, she went and showed the police the Appellant leading to his arrest.

7. According to **PW2, SGT Lucy Wairimu** of Kamukunji Police Station, on 7th September, 2015, PW1 was taken to their office by one Madam Martha Kasire, Starehe District Children Officer. PW1 reported to have been defiled by the Appellant, whom she had known for about three weeks at a store which he used to guard at Muthurwa Market. PW2 went with PW1 to Muthurwa market in the company of her colleague PC Richard Tataiya. PW1 identified the Appellant to them and they arrested him. Both the Appellant and PW1 were taken to the police doctor for examination and their P3 forms filled. Thereafter, she took PW1 to Mama Ngina Children's Home but PW1 later disappeared.

8. Further, PW2 stated that PW1 had been treated at Nairobi Women's Hospital where she was admitted on 25th August, 2015 and discharged on 4th September, 2015. She produced the following documents in evidence: PW1's discharge summary from Nairobi Women's Hospital, PW1's Post Rape Care Form from Nairobi Women's Hospital; a trauma referral care form from MSF clinic and two P3 Forms for PW1 and for the Appellant respectively.

9. Upon being placed on his defence, the Appellant gave an unsworn testimony. He stated that on 7th September, 2015 at 11.00 am, he went to Muthurwa market to collect money from a client and he was arrested by police. He was not happy about the arrest.

Analysis and determination

10. This Appeal was canvassed by both written and oral submissions. The Appellant filed his written submissions on 28th October, 2019 whilst the Respondent's written submissions were filed on 22nd November, 2019. During the highlighting of the aforesaid submissions, the Appellant was represented by learned counsel, Mr. Mberere whereas the Respondent was represented by the learned State Counsel, Ms. Nyauncho on behalf of Ms. Akunja.

11. Foremost, Mr. Mberere faulted the trial court for failing to conduct a *voire dire* examination on PW1 to ascertain if she could tell the truth or understood the meaning of taking an oath as required under **Section 19 of the Oaths and Statutory Declarations Act, Cap 15, Laws of Kenya**. Counsel argued that in the circumstances, PW1's evidence was worthless and should not have been relied on by the trial court to convict the Appellant.

12. The Respondent, in the written submissions conceded that it is clear that a *voire dire* examination was never conducted despite the fact that PW1 stated that she was thirteen years old. She stated that this rendered the trial problematic since the evidence of PW1 was not properly received. Further, the Respondent submitted that whereas under **Section 124** of the **Evidence Act** the testimony of a child does not require corroboration if the court believes the child is telling the truth, the truthfulness of the PW1 was nevertheless ascertained or even recorded by the trial magistrate.

13. Miss Akunja added that, although a retrial would the most appropriate redress, the same would not yield fruits because the medical reports were adduced in evidence by PW2 who was not competent to do so. Thus rendering such evidence inadmissible. She prayed that the appeal be allowed.

14. According to the charge sheet, the age of PW1 was stated to be thirteen (13) years. However, it is clear from the record that the trial Magistrate did not conduct a *voire dire* examination on PW1 as required by **Section 19** of the **Oaths and Statutory Declarations Act** which provides as follows:

> ***"19(1) 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 understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.(emphasis added)***

15. From the above provision, it is a mandatory requirement that a *voire dire* examination be conducted on all children of tender years. The question that arises is, who is a child of tender years? **Section 2** of the **Children Act** defines 'a child of tender years' to be a child under the age of ten years. However, the acceptable definition for purposes of a *voire dire* examination was laid down in the case of ***Kibageny arap Kolil* v R *[1959] EA 92*** where the Court of Appeal for Eastern Africa held that, 'a child of tender years' means a child under the age of fourteen (14) years.

16. The importance of a *voire dire* examination cannot be overstated. It is only after a *voire dire* examination that the court can determine

whether the child possesses enough intelligence to appreciate the importance of telling the truth and whether the child understands the nature and essence of an oath after which the court determines whether the child should a sworn or an unsworn statement of evidence.

17. In the present case, the child testified that she was 13 year old which implied that the trial magistrate ought to have conducted *voire dire* examination. Nevertheless, in a recent decision by the Court of Appeal, the failure to conduct a *voire dire* examination does not necessarily vitiate the entire prosecution case. 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,***
>
> ***"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."***

18. I then grapple with the question of whether there was other independent evidence to support the charge. A perusal of the trial court's record shows that PW2 produced medical evidence to prove that PW1 was defiled. The Appellant submitted that the medical reports were produced by PW2 in blatant contravention of **Section 33** of the **Evidence Act** and cited the cases of ***Peter Otieno Obonyo v Republic [2018]eKLR and Joseph Makau Katana v. Republic*** in this regard. He argued that since the medical evidence was produced by a person who was not the maker, it rendered it inadmissible. Mr. Mberere further submitted that no plausible reasons were attached to the production of the said evidence by an incompetent witness. The Respondent conceded to this submission, further arguing that even if the court were to order a retrial the same would be an exercise in futility since the prosecution did not call a medical expert.

19. I entirely concur with both the Appellant's counsel and the Respondent. PW2 was a police officer yet the prosecution did not lay a basis for the production of the documents by such a witness who was not an expert in the medical field and/or who was familiar with the handwriting of the makers. Further, the prosecution did not state why the makers of the documents were not presented in court to produce them. There is also nothing on record to show that any effort was made to secure their attendance in court to testify and/or that the investigating officer experienced any difficulty in securing their attendance.

20. Section 48 of the **Evidence Act** provides as follows regarding expert evidence:

> ***"1. When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions. "***

21. In **Sibo Makovo V R [1997] eKLR** the Court of Appeal stated as follows regarding expert medical evidence produced by a police constable:

> ***"The P3 form which was filled in by the Medical Officer, Naivasha District Hospital, was produced by PW3. The record does not show that the contents of the P3 form were explained to the appellant. Nor does the record show that the maker of the report (P3 form) was not available to give the requisite evidence. No foundation was laid so as to produce the P3 form by a person other than the maker thereof. It is trite law that if the maker of a document is not available the document can be produced only after another person identifies the signature of the maker and in terms as laid down in Section 33 of the Evidence Act (Cap 80, Laws of Kenya) so far as relevant. It appears to us that production of P3 forms in Courts is not taken seriously and we wish to impress upon trial magistrates to be careful in admitting P3 forms when the maker is not called."***

22. In the **Julius Karisa Charo v Republic [2005] eKLR**, the court pronounced itself as follows:

> ***"Decided cases in this point are unanimously that with regard to the production of expert evidence in court, police officers must not be the people to play that role. The ordinary consideration being the chance for the accused person and his counsel to cross-examine the person called to produce the document. Since, medical (or scientific) evidence normally tends to be conclusive, great care has to be taken to ensure that where the person who conducted the examination is not available the person called in his place is technically qualified in the field in question to provide opinion."***

23. Further, in ***James Bari Munyoris-vs- Republic [2010] eKLR*** the court had this to say;

> ***"It is not enough for a witness to state that he was familiar with the handwriting of a particular witness. The prosecution must show that it took due diligence on their part to secure the attendance of the maker of the document. It must be shown that the witness was absent for reasons beyond prosecution's control. The record shows that Dr. Mburu had been transferred to Kenyatta National Hospital. There was no evidence to show that the police attempted and failed to secure Dr. Mburu's attendance in court....."***

24. In view therefore, I find that the medical evidence was produced irregularly and had no probative value to the prosecution case. I agree with the Appellant's submissions that this infringed his right to a fair trial as it denied him an opportunity to cross examine the medical doctors who prepared the reports.

25. This is a case that required proof beyond any reasonable doubt. But from the summary of evidence, it is clear that the police did very shoddy investigations and failed to avail witnesses who could possibly have assisted the court reach a just determination. It suffices to add that police ought to take their investigative role seriously so as to present a case a case in court that would aid the court to arrive at a just decision.

26. I sum, I find that the Appellant's conviction was not safe and cannot be sustained. The next question, is whether a retrial should be ordered. On this question, the learned state counsel contended that a retrial may not yield a conviction because it is on record that PW1 could not be traced.

27. In the case of ***Edward Marwa Maisori & 2 others v Republic [2014] eKLR*** the Court of Appeal stated as follows:

"In Sumar – v- R, (1964) EA 481, the East African Court of Appeal emphasised that whether or not an order for a retrial should be made depends on the particular facts and circumstances of each case, but it should only be made where the interest of justice require it and it is not likely to cause an injustice to an accused person. In Mwangi – v- R, (1983) EA 522, it was held that an order for a retrial should not be made unless the appellate court is of the view that on a proper consideration of the admissible evidence, a conviction may result. In the case of Fatehali Manji – v- R, (1966) EA 343, the Court of Appeal for Eastern Africa held that a retrial can only be ordered when the original trial was illegal or defective. The court stated:

> ***"In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose 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 each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it"***

28. In determining this issue, of paramount consideration is whether the prosecution proved the three elements constituting the offence of defilement. As regards identification of the Appellant, a cursory glance at the evidence of PW1 shows that the Appellant was positively identified as he was well known to her. As regards penetration, I have already delivered myself on this; that its production fell far below the required legal threshold. Hence, even if a retrial were ordered, the same would the prosecution to fill up gaps in its case, which would be prejudicial to the Appellant. On age, PW1 stated her age clearly as thirteen.

29. The totality of my observations is that a retrial would not serve the interests of justice.

30. I accordingly quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held. It is so ordered.

Dated and Delivered at Nairobi This 9th Day of April, 2020.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Mr. Mberere for the Appellant.*

2. *Miss Chege for the Respondent.*