IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 115 OF 2019

CORAM: D.S. MAJANJA J.

BETWEEN

JACKSON MUTEMBEI MBAE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. E. Ayuka, SRM dated 7th July 2019 at the Magistrate's Court at Nkubu in Sexual Offence Case No. 46 of 2018)

JUDGMENT

1. The appellant, **JACKSON MUTEMBEI MBAE**, was charged and convicted of the offence of defilement contrary to **section 8(1)** as read with **section (2)** of the ***Sexual Offences Act*** ("the ***Act***"). The particulars of the charge was that on 26th November 2018 in Imenti South within Meru County, he intentionally and unlawfully caused his penis to penetrate the vagina of MMK, a child aged 10 years.

2. The appellant now appeals against conviction and sentence on grounds of appeal set out in the petition of appeal and the supplementary grounds of appeal filed on 2nd April 2020 in which he states that the prosecution did not prove its case beyond reasonable doubt, that he was not identified at the scene of the offence and that the trial magistrate contravened the provisions of **section 19** of ***the Oaths and Statutory Declarations Act (Chapter 15 of the Laws of Kenya)***.

3. The respondent filed written submissions. It supported the conviction on the grounds that the prosecution proved all the ingredients of the offence of defilement.

4. It is the duty of this court, being a first appellate court, to subject the evidence on record to a fresh review and scrutiny and come to its own conclusions all the time bearing in mind that it did not see the witnesses testify as to form its own opinion on their demeanour (see ***Okeno v Republic*** **[1972] EA 32**). It is therefore necessary to outline the facts emerging at the trial court.

5. The complainant, MM (PW 1), testified on oath after a voire dire. She stated that she was 10 years old and that she knew the appellant as he was from the area and he used to come to their home. She told the court that the appellant had sexually assaulted her on four separate occasions. She explained that he had drilled a hole in the wall and he would pass through and gain entry into the room where she slept. She stated that, *"he used to remove my clothes and undress me"* and that he would, *"insert his penis into my vagina"*. She recalled that on 26th November 2018, the appellant came and sexually assaulted her. She fled home and went to inform her neighbour of her ordeal.

6. The complainant's brother, PW 6, testified on oath. He stated that he knew the appellant. He explained that the appellant used to come at night while their father was away and sleep in his sister's room where he used to sleep on top of her. He told the court that he did not tell anyone because he feared the appellant would beat him up.

7. According to PW 2, PW 1 came to her place on 1st December 2018 and told her that the appellant had sexually assaulted her. She knew the appellant as she used to see him in the village. PW 2 reported the incident to the area chief, PW 3, and the matter was reported to the police station. PW 3 confirmed that PW 2 reported the incident to her and she interviewed PW 1 who narrated to her what had taken place. She organized for the appellant to be arrested by the area assistant, PW 4.

8. The investigating officer, PW 5, confirmed that PW 1 was brought to the police station by PW 3. She issued the P3 medical form and recorded witness statements. She re-arrested the appellant after he had been arrested by PW 4 and members of the public.

9. The final prosecution witness, PW 7, was the clinical officer, who examined PW 1 and signed the P3 medical form on 4th December 2018 which she produced in evidence. The key observations and findings by PW 7 were that PW 1's private parts were reddened with bruises and

the hymen was absent. The High Vaginal Swab and urinalysis showed epithelial and pus cells but there were no spermatozoa. She concluded that based on the bruises on her genitalia, absence hymen and reddened vagina, there had been penetration.

10. When placed on his defence, the appellant, DW 1, denied the offence. He explained that on 2nd December 2018, he was arrested at about 4.30pm while going about his business at his farm on suspicion of defiling a child. He stated that the complainant's home was about 500 metres away. He stated that he was framed by neighbours because of another case.

11. In order to prove the offence of defilement under **section 8(1)** of the ***Act***, the prosecution must establish that the complainant was a child, that there was penetration and the act of penetration was by the accused person. *"Penetration"* under **section 2** of the ***Act*** means, *"the partial or complete insertion of the genital organs of a person into the genital organs of another person."*

12. Before I consider the evidence, I think the appellant raised an important issue regarding how the testimony of the child witnesses, PW 1 and PW 6 was taken as their evidence was key in establishing the appellant's complicity. The law governing reception of the evidence of a child of tender years is to be found at **section 19** of the ***Oaths and Statutory Declarations Act*** which provides:

> *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.*

13. The procedural prerequisite before reception of evidence of a child of tender years under **section 19** of the ***Oaths and Statutory Declarations Act*** has been considered by the Court of Appeal in several cases among them ***Johnson Muiruri v Republic*** **[1983] KLR 445** and ***Kinyua v Republic*** **[2002] 1 KLR 256**. The authorities show that if, after the *voire dire* examination, the trial court is satisfied that the child understands the nature of the oath, the court proceeds to swear the child and receives the evidence on oath. But if the court is not so satisfied, the unsworn evidence of the child may be received if, in the opinion of the court, the child possessed sufficient intelligence and understands the duty of speaking the truth.

14. As regards the testimony of PW 6, the trial magistrate did not conduct a voire dire yet it was clear that he was a child of tender years. He proceeded to swear the child in contravention of **section 19** of the ***Oaths and Statutory Declarations Act***. The verbatim examination conducted by the trial magistrate for PW 1 was as follows:

> *VOIRE DIRE*
>
> *Question; What's your name (?)*
>
> *Answer: MM*
>
> *Question: Do you attend (school)?*
>
> *Answer: M Primary School Class 5*
>
> *Question: What's the name of your class teacher (?)*
>
> *Answer: Ms. K.*
>
> *Question: Do you attend church (?)*
>
> *Answer: Yes. PCEA M.*
>
> ***Court: The witness (Minor) is intelligent enough to testify. She shall give a sworn statement.***

15. It must be clear from the substance of proceedings that the essential elements of **section 19** of the ***Oaths and Statutory Declarations Act*** have been complied with (see ***Johnson Muiruri v Republic*** **(Supra)**). From the examination conducted by the trial magistrate, what emerges from the questions and answers, is that the trial magistrate focused on the first part of conducting a *voire dire*, that is to determine whether the child was intelligent enought to give sworn testimony. The trial magistrate did not examine the child on whether the child understood the nature of the oath by asking her questions that point to her understanding the duty to tell the truth and the consequences of failing to tell the truth. The *voire dire* was therefore defective and was not in accordance with the accepted procedure.

16. The consequence of whether testimony is sworn or unsworn is important. Ordinarily sworn evidence does not need corroboration. **Section 19** of the ***Oaths and Statutory Declaration Act*** had a proviso which stated:

> *Provided that, where evidence admitted by virtue of this Section is given on behalf of the prosecution in any proceedings against any person for any offence, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him.*

That section was amended and that proviso re-enacted as **section 124** of that ***Evidence Act (Chapter 80 of the Laws of Kenya)*** and a further proviso added thereto as follows:

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

17. What then is the consequence of the trial magistrate's error? The authorities establish that failure to follow the prescribed procedure does not necessarily vitiate the trial. In ***Patrick Kathurima v Republic*** **CA NYR CR App. No. 131 of 2014 [2015]eKLR**, the Court of Appeal observed that;

> *The trial magistrate's failure to reflect on the record the questions put to H.W. during the voir dire examination was not therefore per se fatal to the prosecution case. The sustainability or otherwise of the prosecution's case solely depended on whether the evidence on which it was anchored met the thresh hold of proof beyond reasonable doubt.*

18. In ***Maripett Loonkomok v R*** **CA MSA Criminal Appeal No. 68 of 2015 [2016]eKLR**, the Court of Appeal stated;

> *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. But it is equally true, as this Court recently found that;*
>
> *"In appropriate case where voir 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***

19. Following the statements of principle, I have outlined above, I find that the testimony of PW 1 was deficient and the proper approach is to consider it as unsworn testimony, evaluate it with the rest of the evidence to see whether a conviction can be sustained. I would of course disregard the testimony of PW 6 as the court did not even express its view whether the child was intelligent enough to understand the proceedings. I now turn to the evidence.

20. PW 1 gave graphic testimony of how she had been subjected to acts of penetration by the appellant. The appellant was known to PW 1 and the other neighbours and having sexually assaulted PW 1 several times before, the issue of mistaken identity does not arise. PW 1's evidence alone is capable of supporting a conviction as the proviso to **section 124** of the ***Evidence Act*** dispenses with corroboration if the trial magistrate, for reasons to be recorded believes the child to be telling the truth. In this case the trial magistrate was convinced that the child was telling the truth, he stated as follows:

> *I also observed the complainant's demeanor throughout her testimony. She was eloquent and consistent in her evidence, both in chief and on cross-examination. She was very specific in her narration of what transpired. I am convinced she told the court the truth. I trust her testimony.*

21. I find that there is sufficient corroborative evidence to support PW 1's testimony. The medical evidence in the form of P3 medical reports showed that PW 1 had injuries had private parts consistent with an act of penetration. PW 1's credibility was enhanced by the fact that she told PW 2 what had transpired. In light of all this evidence, the appellant's defence that he was being framed was an afterthought as there is no reason why PW 1 would frame him. Likewise, nothing of the sort was put to PW 2 in cross-examination. The defence was properly dismissed.

22. The age of a child is a question of fact. The fact that PW 1 was in Class 5 shows that she was a child and although the prosecution did not produce a birth certificate, PW 7 who examined her assessed her age at 10 years.

23. From the totality of the evidence I have analyzed above, I am satisfied that the prosecution proved every element of the offence of defilement. I affirm the conviction.

24. I now turn to the issue of the sentence. Under **section 8(2)** of the ***Act***, the life sentence is mandatory where victim is below the age of 11 years. In the circumstances, the sentence was lawful. However, the Court of Appeal has since declared the mandatory minimum sentence unconstitutional in several cases among them; ***BW v Republic*** **KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR**, **Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR** and in ***Jared Koita Injiri v Republic*****, KSM CA Criminal Appeal No. 93 of 2014.** The learned trial magistrate was alive to this fact when he imposed a sentence of 30 years' imprisonment.

25. The court's jurisdiction to review the sentence is circumscribed. It has jurisdiction to interfere with a sentence imposed by the trial court if it is satisfied that in arriving at the sentence, the trial court did not take into account a relevant factor or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive (see ***Wanjema v Republic*** **[1971] EA 493**).

26. In the sentencing notes, the trial magistrate considered several decisions of the Court of Appeal including those I have cited and stated as follows:

> *I have considered the nature of the offence, the demeanor of the accused and the circumstances of the case. From the record, the accused repeatedly defiled the complainant. In the circumstances, I find the accused deserves a deterrent sentence. The court is alive to the emerging jurisprudence in respect of mandatory sentences ….. Guided by the above superior court decisions, I hereby sentence the accused to serve imprisonment for a period of thirty (30) years …*

27. I therefore cannot say the trial magistrate erred in discretion in imposing the sentence given the age of the child and the fact that the appellant had subjected her to acts of defilement previously. It is affirmed.

28. The appeal is dismissed.

DATED and DELIVERED at MERU this 14th day of MAY 2020.

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Nandwa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.