



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

LODWAR LAW COURTS

CRIMINAL APPEAL NO. 14 OF 2019

JACKSON EKAI ABOK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Case no 84 of 2017 of P.M Lodwar)

JUDGMENT

1. The Appellant was tried and convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2006 the particulars of which were that on 26th day of June, 2017 in Turkana Central sub county within Turkana County intentionally caused his penis to penetrate the vagina of LAT a child aged 13 years. He was sentenced to 20 years imprisonment from 29th June, 2017.

2. Being dissatisfied by the conviction and sentence he filed this appeal and raised the following grounds of Appeal:-

- a) The exhibit tendered before the court by PW1 was from her home and not police station.
- b) There were no eye witnesses.
- c) The age of the complainant was not proved beyond reasonable doubt.
- d) The prosecution case was full of contradicting evidence.

SUBMISSIONS

3. When the Appeal came up for hearing, the Appellant who was unrepresented filed written submissions which he relied upon, while Mr. Mongare for the prosecution opposed the appeal through oral submissions. The Appellant submitted that crucial witnesses mentioned by the complainant and those who arrested him were not called to testify and therefore ad verse inference should have been made against the prosecution as per the case of **BUKENYA v UGANDA (1972) EA 49 (sic)**. It was submitted that penetration was not proved as the P3 form tendered confirmed that *“the vaginal examination showed that she had a normal genitalia, urine analysis showed pus cells and Red blood cells.”*

4. It was submitted that the prosecution evidence was full of contradiction and in particular the evidence of PW1 contradicted that of PW4. It was further submitted that he was not properly identified and that there was contradiction in his names on the charge sheet and that given in evidence by PW4. It was contended further that there was contradiction between the evidence of PW2 and PW3 on how he was arrested and that there was a grudge between him and PW2 which was not taken into account as part of his defence.

5. It was submitted by Mr. Mongare that the Appellant’s identification was safe as PW1 testified that there was strong electric light which enabled them to identify the Appellants who was known to her before and therefore it was a case of recognition. It was contended that PW2, the father of the complainant corroborated her evidence on the identification of the Appellant. On the issue of age it was submitted that age assessment report was produced in court by PW3 who confirmed both age and penetration.

6. This being a first appeal the court on the basis of the authority of **OKENO v REPUBLIC [1972] EA 32** is under a legal duty to re-evaluate the evidence tendered before the trial court to come to its own conclusion though giving allowance to the fact that unlike the trial court it did not have the advantage of seeing and hearing witnesses.

PROSECUTION CASE

7. The prosecution case against the Appellant was that the complainant who testified as PW1 and gave her age as 13 years, stated that she knew the appellant who was her neighbor whose home was approximately two hundred (200) meters away from her home. On 26/6/2017 while attending the burial ceremony at the Deputy Head teacher's home, the Appellant called her and told her that her uncle was calling her she was with one "SN". The Appellant then followed her, tripped her down, tied her hands with a rope which was nearby and her legs with his shirt, took her to his house and defiled her for about one hour. She was able to see the Appellant since there was electric light and lights from the motor vehicles.

8. In cross examination she stated that "SN" left for her home when the Appellant called her and that when the Appellant left the house, she managed to escape through the window and jumped over the fence without her skirt and reported what had happened to her.

9. PW2 "ST" the father of the complainant testified that at 12.00 a neighbor called him and told him that PW1 was naked and had been raped (sic). He went to the scene and found PW1 naked. They searched for the Appellant who had escaped and ran away from the scene and found him at Napilele hiding himself under a mattress. The appellant was known to him. In cross examination he stated that he found the Appellant at the scene and struggled with him for a while before he escaped. He stated that he went with the complainant to the house of the Appellant and found the window opened. He further stated that the Appellant had in the past defiled a minor and ran away.

10. PW3 ANDREW EMURIA LOKONG a clinical officer at Lodwar County and Referral Hospital was stepped down when he wanted to testify on behalf of PW5 NGASIKE JOHN KILONGA who testified that he filled P3 form in respect of the complainant who had a normal genitalia but with a torn hymen at examination. She had a urinary tract infection and as a result of the examination formed an opinion that it was defilement. He put the age of PW1 at 13 years. In cross examination he stated that the torn hymen meant that there was penetration. He stated that he did not conduct age assessment but had supporting documents on her age.

11. PW4 SAMUEL EDUNG KAUK stated that he knew both the Appellant and the Complainant. On the material day he heard a voice of a young girl and when he went outside his house he found PW1 naked. When he asked her what had happened, she told him that the accused had told her that her uncle was calling her and followed her and defiled her. He called her father on phone, who came to the scene and found the complainant naked. He confirmed having seen the Appellant outside his gate when the security light went on automatically. PW2 urged them to help arrest the Appellant but they did not manage to do so.

12. It was his further evidence that on 28th they received information that the Appellant was at Napleta where he was arrested from and that he asked PW2 to forgive him for the offence but he declined. In cross examination he stated he saw the Appellant running away while naked when the lights came on before he would get hold of the complainant and take her back to his house. He confirmed that the Appellant sold to him land where his house was for Kshs.130,000/-. He stated that he had no grudge against the Appellant who was his friend leading to him buying his land.

13. PW6 APC MARTHA AKAL the investigating officer received the complaint in her office and recorded her statement. She was taken to Lodwar Referral where a P3 was filed and her age assessed at 13 years. The Appellant was later on arrested by the PW2, a Kenya Police Reservist and one person known as Kauka. In cross examination she stated that she visited the scene after one day and found the house locked.

DEFENCE CASE

14. When put on his defence the Appellant stated by testifying that on 26/6/2017 at 4.00 p.m. he was at a certain church in the village with the father of the complainant who started to abuse him and that it was not the first time they were quarreling. He further testified that on 28th June, 2017 in the morning he heard a knock at his door and saw two KPR officers and PW2 who demanded to know if he was Ekai. He was then taken to the police station where PW2 demanded that he compensate him by paying Kshs,50,000/- which he did not have. He pleaded with him to give him time so as to look for money but he became adamant leading to him being charged. He stated that in 2013 he had fought with PW2 because of land.

ANALYSIS AND DETERMINATION

15. From the proceedings and submissions here, I have identified the following issues for determination in this appeal:-

- a) Whether the Appellant's identification was safe and free from error.
- b) Whether the prosecution case was proved beyond reasonable doubt.
- c) Whether the Appellant's defence was considered and properly rejected.

16. Before considering the issues as identified here, it must be stated that the complainant was aged 13 years and from the record of the proceedings it is not clear whether the trial court conducted *voir dire* and whether it was necessary for the court to do so before receiving the evidence of PW1 and whether the Appellant suffered any prejudice.

17. In the case of **JOHNSON MUIRURI v REPUBLIC [2013] eKLR** the Court of Appeal had this to say on *voir dire*:-

"We once again wish to draw attention of our courts as to the proper procedures to be followed when children are tendered as witness. In PETER KARIGA KIURU v REPUBLIC (Unreported) we said:-

‘Wherein 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 voir dire examination, whether the child understand the nature of oath in which event his sworn evidence may be received. If the court is not satisfied his unsworn evidence may be received if it is the opinion of the court he is possessed of sufficient intelligence and understands the duty of talking the truth. In the latter even an accused persons shall not be liable to be convicted unless it is corroborated by material evidence in support thereof implicating him. (Section 19 Oaths and Statutory Declaration Act Cap 15, The Evidence Act (Section 124 Cap 80). It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellants court is able to decide and not be forced to make assumptions.’

18. The Court of Appeal in **SAMUEL WARUI KARIMI v REPUBLIC [2016] eKLR** set out the definition of a child of tender age for purposes of *voir dire* as follows:-

“16). Which definition should guide the court in determining who is a child of tender years, is it the Children Act or the Precedents set by the Court of Appeal? The requirement by the aforesaid provision of the Evidence Act and the Oaths and Statutory Declaration Act of Voir dire examination of a witness of tender years in a criminal trial is meant to guarantee an accused person a fair trial. A fair trial is guaranteed by the constitution. We have done the aforementioned review of the law and decided cases in an attempt to ascertain in this case whether failure by the trial magistrate to conduct voir dire examination on the complainant a child aged 12 years affected the credibility of her evidence. We are persuaded by the definition of a child of tender age under the Children Act cannot globally be imported to offences under the criminal law. This is because children develop and mature differently depending on their social economic and other factors such that some children of 11, 12 or 13 years cannot be very sharp and intelligent witnesses whereas others in the same age bracket may not at all comprehend what is a court of law. This explains why the courts have held on the age at 14 years and sometimes even higher age as the age below what a child of tender age years for purposes of criminal trial and insisted the competency tested through questions that must be put to the child and answers given by the child be recorded verbatim. The definition of a child of tender years provided under the Children Act has remained a guide in regard to Criminal responsibility.

17.) *In a recent decision of the Court of Appeal sitting in Nyeri the case of PATRICK KATHURIMA v REPUBLIC (2015) eKLR it was held:-*

“We take the view that this approach resonated when the need to preserve the integrity of the viva voce exclusive 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 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 hereto in the absence of express statutory direction given the different context of the two statutes.

18.) *The above decision support the definition of a child of tender years to be 14 years and below and contextualize that definition within the Oaths and Statutory Declaration Act and under the children Act. On our part we have no good reason to depart from this well-trodden past as we are in agreement that the purpose of undertaking voir dire examination in a criminal trial is to protect the guaranteed right of a fair trial, whereas the witness in this case was aged 12 years and that essential step was not taken in a criminal trial, that trial becomes problematic. In the circumstances we find the evidence by the complainant was not properly received thus the conviction of the appellant becomes unsafe to sustain as she was the complainant and not any other witness.”*

19. From the above decision of the Court of Appeal, it is clear that the trial court fell into error by receiving the evidence of the complainant without conducting a *voir dire* noting that the complainant was aged 13 years but the Court of Appeal in the case of **MARIPETT LUON KOMOK v REPUBLIC [2016] eKLR** as quoted with approval by Mwangi J, in **OLIVER OKWAKAU OMUSUNGU v REPUBLIC [2019] eKLR** had this to say on the effect of non-compliance with the requirement for *voir dire* as follows:-

“It follows from along line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not vitiate the entire case. But the evidence taken without examination of a child of tender age 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. (Emphasis added)

20. In this case the complainant was aged 13 years and in class seven. She was clear in her evidence in chief as to what had happened to her as well as under cross examination by the Appellant. Her evidence was corroborated in material particulars by PW2 her father and PW3 an independent eye witness as to what happened. It must be noted that the Appellant did not raise the issue both at the trial and in his submission during the hearing of his appeal. I am therefore satisfied that the Appellant did not suffer any prejudice as the integrity of the trial was preserved throughout.

21. On the identification of the Appellant, from the evidence tendered before the trial court, it is clear that it was identification by recognition. In the case of **NZARU v REPUBLIC [1991] KAR 212** the Court of Appeal held that the evidence of identification by recognition at night must be absolutely water tight. See **HASSAN ABDALLAH MOHAMED v REPUBLIC [2017] eKLR**. From the evidence tendered before the trial court, the appellant was known to the complainant who was her neighbor for a long time. Though it was at night, there was adequate light. The Appellant approached her and spoke with her. He was further put at the scene by PW2 and PW3 both who knew him. I am therefore satisfied that the Appellant was adequately identified and his identification by recognition was free from error.

22. On whether the prosecution case was proved beyond reasonable doubt it is clear that the age of the complainant was proved through oral and documentary evidence. Penetration was also proved through the evidence of the complainant as corroborated by PW5 the clinical officer who examined her. I have looked at the defence of the Appellant and note that the same was an afterthought as he did not put to the complainant's father the issue of compensation during his cross examination and the issue of dispute between him and PW2 was displaced as he stated that the Appellant was his friend who even sold to him land. I therefore find that the Appellant's defence was considered and properly dismissed.

23. The final issue for determination is whether the sentence of twenty years was lawful. The complainant's age was proved to be 13 years and under Section 8(3) of the Sexual Offences Act the sentence provided for upon conviction is for an imprisonment for a term of not less than twenty years which is the minimum sentence provided for which according to the reading by the Court of Appeal of the case of **FRANCIS MURUATETU & ANOTHER v REPUBLIC [2017] eKLR** was outlined.

24. The court must therefore consider whether there was justification for the trial court to award the minimum sentence provided for under the Sexual Offences Act. In Sentencing the Appellant the trial court had this to say:-

“COURT: Mitigation is considered. However the minimum sentence is prescribed by law. I also consider the period that the accused has been in custody. I sentence him to serve 20 years in prison. The sentence to run from the time that he appeared in court to take plea.”

25. Whereas the sentence is lawful, the trial court did not call for pre-sentencing report nor give weigh to the Appellant's mitigation which is advisable through the provisions of the Judiciary Sentencing Policy Guidelines. I have however noted from the evidence of PW3 that the Appellant had a previous case of defilement at one time which apparently was not reported to the police after the parents of the minor assaulted the Appellant. Since sentencing is at the discretion of the trial court I am unable to interfere with the same having found that it was lantal.

26. In the final analysis I am satisfied that the Appellant's conviction was safe and accordingly dismiss the appeal as lacking merit both on conviction and sentence and is accordingly ordered. The Appellant has a right of appeal.

Dated, Signed and Delivered at Lodwar through Skype this 12th day of May, 2020.

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Mwaura for the State

Appellant – present

Court Assistant: Maureen/Lotim