REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL APPEAL NO. 32 OF 2017

BARAKA WILLY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence in Mutomo senior Principal

Magistrate's court Criminal case (SOA) No. 36 of 2015 by Hon. S.K.Ngii on 17/12/15)

J U D G M E N T

1. **Baraka Willy**, the Appellant was arraigned in Court following an accusation that he had defiled the complainant herein, a child aged eight (8) years old.

2. Facts of the case were that the complainant with her sister who was also a minor were on their way from school when they encountered the Appellant who held her and led her into the thicket. He told her sister to go home and not tell anyone lest he slaughtered her, while in the thicket he undressed her and violated her sexually. He threatened to harm her if she screamed therefore she didn't scream.

3. On accomplishing his mission he left her. She dressed up and went home. She told her mother what had befallen her. PW2 **KK** her mother went to the scene of the incident and saw foot prints that led her to the home of the Appellant. The complainant pointed at the Appellant as her assailant. She went and reported the incident to the police. The complainant was taken to the Mutomo Health Centre for treatment. The Appellant was arrested and charged.

4. When put on his defence the Appellant opted to make an unsworn statement. He stated that he visited his grandmother on 30/08/2015 where he stayed for three (3) days. On his return he took water to bathe but before splashing it he heard a person calling her out. When he went out he was confronted with accusations of having defiled a child, their neighbour. He denied the allegations and left going to demand payment of money from a school for work that he had done. He was arrested.

5. The trial magistrate considered evidence adduced, returned a verdict of guilty, convicted and sentenced the Appellant to serve **life imprisonment.**

6. Aggrieved, he now appeals on grounds that: no proper *voire dire* examination was conducted to allow PW1 to give sworn evidence or affirmation; the trial Court failed to ascertain and confirm whether PW1 was a truthful witness who understood the meaning of an oath/affirmation whose uncorroborated testimony could be relied on to convict the Appellant; Accepting evidence of PW1 a sole eye witness who

did not know the Appellant before was a misdirection; medical evidence adduced confirmed the absence of defilement; the appellant was denied the opportunity to re-call PW1 for further cross examination; the Appellant was not advised on the right to be assigned an advocate at the state expense, if substantial injustice would result, the Trial Magistrate misdirected himself by attaching unnecessary weight to the testimony of PW3, the Appellant's father whose testimony was unsubstantiated by real evidence and influence of family discord; and relying on evidence of foot prints leading from the scene the Appellant's home was erroneous as the alleged shoes were not produced in evidence.

7. The Appeal was canvassed by way of written submissions.

It was urged that the Trial Magistrate failed to establish whether the minor was competent to testify by understanding questions put to her and giving rational answers as provided by **Section 124** of the **Evidence Act** and whether she understood the nature of oath. To buttress this ground various Court decisions cited including the case of **Johnson Muiruri vs. Republic (1983) KLR 445** where it was held that:

> ***"We once again wish to draw the attention of our courts as to the proper procedure to be followed when children are tendered as witnesses. In P K K, Criminal Appeal No. 77 of 1982 (unreported) we said:-***
>
> ***"When in any proceeding before any court, a child of tender years is called as a witness, the court is required to form an opinion, on voire dire examination, whether the child understands the nature of an oath in which event his sworn evidence may be received. If the court is 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 (section 19, Oaths and Statutory Declarations 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 appellate court is able to decide whether this important matter was rightly decided, and not be forced to make assumptions."***

In the case of **John Otieno Oloo V Republic (2009)** eKLR the Court of Appeal stated thus:

> ***"In our view, whereas we agree that as concerns C, who said she was 13 years old the trial court should have, out of caution formed an opinion, on a voire dire examination whether she understood the nature of an oath before she could be sworn. We do not agree with the superior court that failure to do so could not have occasioned miscarriage of justice had that been the only witness on the issues that were before the Court. It goes without saying that if a witness who does not understand the nature of oath is made to swear, her evidence will have higher probative value than if the same evidence was given unsworn."***

It was queried why the minor was affirmed and not sworn and argued that according to **Section 15** of the **Oaths and Statutory Declarations Act,** a witness can only be affirmed if he refuses to take an oath and the court did not give any reason why it chose to have the child affirmed.

Citing the case of **S. K. N. V Republic Criminal Appeal Number 164 of 2016 (2017) eKLR** where it was stated thus:

> **"16. In** ***the instant case the learned magistrate failed to form an opinion whether the child understood the nature of the oath. The learned magistrate also failed to make a finding the code results in proceedings as to whether he was satisfied that the alleged victim was telling the truth as required by the proviso to section 124 of the Evidence Act.***
>
> ***17. The learned Magistrate made a finding that the Complainants evidence was credible and consistent. Credible evidence may be worth of being considered but it may not necessarily be***

true……

22. Having reconsidered the case as a whole I find the conviction having been unsafe due to failure to comply with the proviso to Section 124 of the Evidence Act.

23. In the result the Appeal is allowed. The conviction is hereby quashed and the sentence meted out set aside. The Appellant shall be set at liberty unless otherwise lawfully held."

It was urged that the court should have satisfied itself that the child was telling the truth

8. That PW2 manipulated her daughter to wrongfully accuse the Appellant as the complainant stated that her assailant was **Mulatya Nzenge** which called for conducting an identification parade to establish the identity of the assailant.

9. That the Trial Court relied on evidence of PW2 regarding footprints to place the Appellant at the scene of crime but such evidence being real evidence should have been tendered before court. In this regard he cited the case of **Wilson Mwangangi vs. Republic (2015) eKLR** where the High Court stated thus:

"No one saw the appellant breaking into the shop and stealing the bag of green grams and also taking away the motorbike. The evidence of commission of the offence is thus based on circumstantial evidence. The appellant is said to have been traced through footprints and marks of the shoe that he wore by PWI and PW2. He is also said to have been found in possession of the motor cycle and the bag of green grams at Kyuso…

In this present case, it was said that the appellant was traced through footprints and a shoe that he wore. There was however no description by any of the witness PW1 and 2, as on how they identified footprints to be those of the appellant. The evidence on the shoe alleged to have been worn by the appellant was also scanty. There was no specific description of how that shoe looked like and how the prints of that shoe would connect the appellant with the offence. The appellant was said to have stolen the shoe from his grandfather. However nobody from his grandfather's homestead was called by the prosecution to come and confirm that contention by the prosecution. I find that the evidence regarding the footprints and shoe print of the appellant is scanty and hazy and cannot connect him to the commission of the offence."

And **Samuel Njuguna Versus Republic eKLR** where the High Court Stated thus;

"27. In my considered view, the trial magistrate erred by glossing over and accepting without analysis the identification and related evidence. Indeed the assurance drawn from his conclusion that the Accused had "not disputed the foot prints or that they were made by his shoe which was recovered from him" has no evidential basis. The evidence of footprints or tracks leading to the arrest of the Appellant was itself flimsy if not altogether incredible."

10. It was contented that there was no evidence of penetration as the complainant did not state that the Appellant penetrated her anus, that she never testified that the Appellant's penis penetrated her which was a avital omission as in defilement penetration can only be by a male genital organs. That the nature of injuries sustained by the complainant could have resulted from a myriad of scenarios and not necessarily penile penetration of the anus.

11. That denial of re-calling of witnesses was prejudicial to the Appellant. He cited the case of **Thomas Alugha Ndegwa vs. Republic (2016**) **eKLR** where the court of Appeal was of the opinion that an Appellant serving life imprisonment was in a circumstance where substantial injustice may result unless represented. He also cited the Supreme Court Case of **Republic vs. Karisa Chengo and 2 others (2017**) **eKLR** where the Court stated as follows:-

"[87] Article 50(2)(h) **of the Constitution provides that "***[e]very accused person has the right to a fair trial, which includes the right…to have an advocate assigned to the accused person by the*

state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly." It does not define what "substantial injustice" means. However, in David Macharia Njoroge v. Republic, (supra), the Court of Appeal held that "substantial injustice" results to "persons accused of capital offences" with "loss of life" as the penalty if they have no counsel during their trials. We do not entirely concur with that holding, as it has the effect of limiting the right to legal representation in criminal trials only to cases where the accused person is charged with a capital offence. The operative words in Article 50 (2) (h) are "if substantial injustice would otherwise result…" While it is therefore undeniable that a person facing a death penalty and who cannot afford legal representation is likely to suffer substantial injustice during his trial; the protection embedded in Article 50 (2) (h) goes beyond capital offence trials. The Court of Appeal indeed appears to have embraced this reasoning in a recent decision in Thomas Alugha Ndegwa v. Republic; C.A No. 2 of 2004, when it allowed an application for legal representation by the appellant who had been convicted of defilement and sentenced to life imprisonment."

12. The State through learned Counsel **Mr. Mamba** opposed the appeal. He urged that **Section 19** of the **Oath and Statutory Declaration Act** is more concerned with the reception and admissibility of evidence of a child of tender years. That the Act declares that where the child does not, in the opinion of the court understand the nature of an oath, his or her evidence may nevertheless be received though not given upon oath. But that the evidence shall only be received if, again in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence and also if the child understands the duty of speaking the truth. That the code does not prescribe the precise manner of ascertaining and determining whether the child witness understands the nature of oath or is possessed of sufficient intelligence or even his/her ability to understand the duty of speaking the truth. He argued that the process that was taken by the court met the threshold set by Section 19 of the Oath and Declaration Act. He cited the case of **Republic vs. Braiser (1779) I Leach Vol. Case XC VIII** where it was stated that:

"…. An infant, though under the age of seven years, may be sworn in a criminal prosecution, provided that such infant appears on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath….. for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence."

He argued that the questions put to the child and answers that were given satisfied the question of suitability.

Regarding the Johnson Muiruri Case (Supra), it was his argument that the question and answers format and the recording of the child's answers only was acceptable.

13. Further, he submitted that in respect of the child being truthful, that her testimony was consistent and believable. That the evidence to prove that the minor had a tear on the anal region and the presence of blood cells which confirmed that there was bleeding which was evidence of the child having been sodomized.

14. Regarding re-calling of witnesses he urged that the term used in **Section 146(4)** of the **Evidence Act** is 'May' therefore the application could be granted or rejected, but these was nothing to show that the Appellant made such an application.

15. With regard to **Article 50(2)(b)(c)(g)** and **(j)** of the constitution he submitted that the provisions of law were adhered to as the Appellant was informed of his rights.

16. On the issue of the court having attached more weight on the evidence of PW3, he urged that the accused had the opportunity to cross examine him but failed to challenge the evidence. That after footprints was seen it led PW2 and the complainant to the home of the Appellant and PW3 confirmed that he had just arrived.

17. This being the first Appeal, I am under a duty to subject the evidence adduced at trial to a fresh scrutiny and make my own conclusion bearing in mind the important fact that I never observed the witnesses who testified at trial therefore I am unable to that extent to assess their credibility or veracity of their evidence. **(See Okeno vs. Republic (1972) EA 32).**

18. In conducting *voire dire* examination, the trial court recorded questions put to the child and the answers thus:

> ***"Introduction***
>
> ***My name is K K. I am pupil at [particulars withheld]. I am in nursery.***
>
> ***Question: What the name of your class teacher?***
>
> ***Answer: Teacher K.***
>
> ***Question: Is the teacher a male or a female?***
>
> ***Answer: She is a female.***
>
> ***Question: If she is a female how you would address her in other words; I mean Aunt or uncle?***
>
> ***Answer: I would address as her "Aunt".***
>
> ***Question: Do you attend a Sunday school?***
>
> ***Answer: No I don't attend Sunday.***
>
> ***Question: Given a chance would you tell a lie or truth?***
>
> ***Answer: I would choose to tell the truth.***

Having observed and heard the child the court was of a considered opinion that the child could testify. The trial magistrate stated thus:

> ***"From the foregoing voire dire, I am satisfied that the witness though a child apparently of tender age, is possessed of sufficient intelligence to testify. She will give evidence under affirmation."***

The trial magistrate did put questions to the child that established if she was competent to testify. It is contented that it was not verified if the child understood the nature of oath/affirmation. A question was put to the child as to whether she attended Sunday school and she denied. In the case of **Maripett Loonkomok v Republic (2016) eKLR** it was held by the court of Appeal thus:

> ***"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 perse 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 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 evidence to uphold the conviction."***

There was no question put to the child as to whether she understood the meaning of oath. The trial magistrate having abandoned further examination in that respect after the child stated that she did not attend Sunday School. The trial court had however noted the child's ability to testify as she was intelligent enough and understood the duty of speaking the truth. The child was affirmed and the appellant

was given the opportunity to cross examine her. This is a case where *voire dire* examination was conducted. As stated by the Court of Appeal, even where Voire dire is not administered the trial may not necessarily he destroyed legally as each case must be determined based on the peculiar circumstances and facts.

19. Concerning the argument that the trial court failed to confirm truthfulness of the victim, **Section 124** of the **Evidence Act** provides thus:

> ***"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:***
>
> ***Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."***

It is evidence that throughout the proceedings there was no compliance with Section 124 of the evidence Act. The reason being that in the court's opinion there was corroboration of the victim's evidence. The case being defilement the prosecution had a duty of proving;

> ***(i) The age of the complainant.***
>
> ***(ii) Proof of penetration.***
>
> ***(iii) Positive identification of the assailant. (See Charles Wamukoya Karuri Versus Republic Criminal Appeal number 72 of 2013).***

20. Prosecution Witness 2, the complainant's mother stated that she was eight (8) years old. A child health card was also adduced in evidence which proved that the complainant was born on **24/05/2007**. Therefore as at **September 2015** the child was **eight (8)** years old and this fact was not in dispute.

21. With respect to the act of penetration, the particulars of the offence were that the assailant caused his penis to penetrate the anus of the victim. Prosecution witness 1 stated that the assailant undressed her completely, he removed his trouser, got hold of her legs, fell her down and fucked her. Fuck is of course an obscene word that refers to the act of sexual intercourse. It is evident the court used its literal sense to refer to penetrative sex. Penetration is defined as the partial or complete insertion of the genital organs of a person into the genital organs of another **(See Section 2 of the Sexual Offences Act)** and the genital organs is defined thus:

> ***"Includes the whole or part of the male or female genital organs and for purposes of this act includes anus."***

Prosecution Witness 7 **Daniel Mulwa,** the Clinical Officer who examined the Complainant found her with a tear on the anal region and there were blood cells which confirmed the presence of bleeding. He was of the opinion that the child had been sodomised. Sodomy is generally anal sex. The findings of the clinician corroborated the fact of the assailant having had penetrative anal sex with the complainant which was proof of penetration.

22. It was the evidence of Prosecution Witness 1 that the assailant told her that he was known as **Mulatya Nthenge** and at the outset she reported to her mother that her assailant was **Mulatya Nthenge**. Since the name was not known to her (Complainant) and there was **Mulatya Nthenge** an old man who lived away from them, to the knowledge of her mother, she led her to the scene of the incident. They noticed foot prints at the scene which led them to the home of the Appellant. On arrival the Appellant was just about

to start bathing.

23. Prosecution Witness 3 **WM** was the father of the Appellant whom they found at home. He confirmed that the Appellant had just arrived home and was intending to bathe. He confirmed that the scene of the incident was on his parcel of land. The complainant on seeing the Appellant pointed at him as her assailant. The trial magistrate interpreted this kind of identification to be identification at a confrontation and expressed the dangers of relying on such identification. The Court did caution itself of relying on such identification and went on to accept evidence of shoe marks that was adduced. The fact of identification by confrontation (showing the suspect directly to a witness) was used in 1950's where it was impossible to use parade identification. It is clear in this case that the basis of the case was not identification by confrontation.

24. If the court is to rely on footprints impression, it should have been preserved and documented. However, this was a case where the argument was that the complainant and her mother were guided by some prints which led them to the home of the accused. At the home were two (2) people, the Appellant and PW3 who confirmed that the Appellant had just returned from the farm and the complainant pointed him out as her assailant. This piece of evidence was not challenged as in his defence the appellant stated that he had just arrived and prior to bathing Prosecution Witness 1 and Prosecution Witness 2 arrived and accused him of having defiled PW1. Evidence adduced was relevant, admissible and credible which supported the allegations of the complainant thereby implicating the Appellant.

25. It has been urged that the Appellant was denied a right of recalling witnesses. After the close of the prosecution's case and the appellant having been put on his defence he stated thus:

> ***"I am not ready to proceed. I want the complainant to be re-called. There are questions I did not ask her well."***

26. The application was rejected by the court. The Appellant is of the view that **Section 150** of the **Civil Procedure Code** allows the court to recall witnesses for further examination and there is no bar on when the application can be made. **Section 150** of the Criminal Procedure Code provides thus;

> ***"A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:***
>
> ***Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness."***

27. Looking at the marginal note the provision of law empowers the court to summon witnesses or to examine a person who is present in court if that individual's evidence can assist the court to reach a just decision. The power is discretionary.

Section 146(4) of the **Evidence Act** alluded to by the state counsel provide thus;

> ***"The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively."***

That provision of law is also discretionary and in rejecting the application the trial Magistrate stated thus:

> ***"The application for the recall of the complainant is rejected considering that the prosecution***

case has since been closed and the accused placed on defence. From record it is also clear that the accused extensively cross-examined the complainant on all the material aspects of the charge following him. Its thus my view that the application for recall is a gimmick to delay conclusion of this matter.

Accordingly, having declined the application I order that the accused do proceed to make his defence."

Which discretion was exercised following reasons given and there is nothing to suggest that the Appellant was prejudiced.

28. It is further urged that the Appellant's constitutional rights were violated. **Article 50(2) (h)** of the constitution provides thus;

"(2) Every accused person has the right to a fair trial, which includes the right—

(***h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly."***

The court of Appeal in the **Thomas Aluga Ndegwa** case (Supra) appreciated the fact that **Article 50(2) (h)** of the **Constitution** should be implemented so that any person requiring such services can apply for the same in writing.

Indeed provision of legal services is constitutional. In the case of **David Macharia vs. Republic (2011) eKLR** the Court of Appeal addressed itself thus:

"*Article 50 sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some of form of legal aid be given to the accused because of the nature of the offence."*

It was acknowledged that the right to legal representation would be achieved progressively not instantaneously. In the premises the prejudice alleged is farfetched.

29. This was a case where after full trial and subsequently conviction, the appellant was granted the opportunity of tendering a pre-sentence address. He expressed how remorseful he was and clearly stated how it was his first time to commit the offence. It was a peculiar case where the Appellant confessed to the act before the trial Magistrate.

30. The sentence that was meted out. Was the mandatory sentence prescribed for the offence. Therefore I do affirm both the conviction and sentence. The Appeal which is unmeritorious is accordingly dismissed.

31. It is so ordered.

Dated, Signed and Delivered at Kitui this 9th day of January, 2019.

L. N. MUTENDE

JUDGE