REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R MWONGO, J)

CRIMINAL APPEAL NO. 19 0F 2017

OLIVER OKWAKAU OMUSUGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Original Conviction and Sentence in Criminal Case No 19 of 2014 in the Resident Magistrate's Court, Naivasha, (Hon S Muchungi – RM)

JUDGMENT

1. This appeal is against the lower court's judgment by Hon, S. Muchungi (RM) delivered on 4th December 2014 in Naivasha Criminal.Case 19 of 2014 in which the appellant was convicted of defilement contrary to **section 8(1)** as read with **section 8(3)** of the **Sexual Offences Act No. 3 of 2006.** The appellant was sentenced to 20 years in prison.

2. The particulars were that the appellant on 20th August 2014 at [particulars withheld] Estate in Naivasha Sub-county within Nakuru County intentionally caused his penis to penetrate the vagina of TM a girl child aged 14 years.

3. The grounds of appeal are as follows:

> ***1. That the learned trial magistrate erred in law and fact by conviction and sentencing of the appellant but failed to note that, the charge sheet was defective under the meaning of section 214 of the CPC.***
>
> ***2. That the learned trial magistrate erred in law and fact by conducting a trial without following the laid down procedures. Failure to conduct a voir dire to PW2 was prejudicial to the whole process, thus the appellants fundamental rights stipulated under article 50 of the constitution were infringed.***
>
> ***3. That the learned trial magistrate erred in law and fact by convicting the appellant in a prosecution case, under the sexual offences act no.3 of 2006, but failed to note that, the complainant's age was not proved in evidence.***
>
> ***4. That the learned trial magistrate erred in law and fact by convicting the appellant but failed to note that, the evidence on record was uncorroborated, was full of assumptions, presumptions not supported by evidence.***
>
> ***5. That the learned trial magistrate erred in law and fact by failing to give the appellants defence particularly his defence of alibi a fair, objective and open minded analysis and casually rejected the appellant's defence.***

4. The brief facts are that the complainant, PW2, a student at [particulars withheld] school had come home for lunch at 1.00pm on 20th August, 2014. The appellant, whom she referred to as her "uncle" and who lived in the same plot, came over to the house briefly and went back again. After she had her lunch the appellant sent her brothers D and D to the market to get beans. He then called her saying he wanted to send her. When she got there, she sat on a chair, and he gave her some tea and mandazis which she ate. She then started feeling sleepy. When she woke up, the appellant had gone. She found herself in his bed and was in pain in her private parts. She was also locked in, and wasn't able to leave until the appellant returned and opened. She got home at about 7.00pm, and didn't tell anyone.

5. When her mother (PW3) returned on the evening of 24th August 2014, PW2 told her what had happened. On 25th August, 2014 her mother took her to Karagita police station, where they reported the incident. They were then sent to Naivasha District hospital where they went and she was treated.

6. In cross examination, PW2 testified that when the appellant had returned, he told her to make a hole through the mud walls and get out, which she did. There was a stone on the side which she pulled out and it left the hole. She passed through the hole and went home.

7. PW3 the complainant's daughter testified, repeating the story told by her daughter. On the material day she had travelled to Kitale on 19th August, 2014 for a funeral, and returned on 24th August, 2014. On her return her daughter told her what had happened. She said her daughter was thirteen years old and exhibited a copy of her birth certificate. She explained how they went to report at the police station and were given a P3 form.

8. PW1, Messa Sylvester, examined PW2 at Naivasha District Hospital on 25th August, 2014. He produced the P3 form and PRC form as exhibits 1 and 2. He found that she had a broken hymen and a yellowish discharge, but no sperms. He said it was not possible to estimate the age of the broken hymen unless the victim came the same day.

9. PW4, a neighbor, testified that she was at home on 20th August 2014 and saw the appellant at home during the day. She later noticed that the appellant had left, locked his house, and, back at about 7.00pm. Then she saw PW2 walking, heading to the toilet, like someone who had been circumcised. PW2 thereafter went back to her home. In cross examination, she said she saw PW2 looking dusty all over, and from the way she was walking, she suspected something was wrong.

10. PW5, PC Joseph Chemwei, gave evidence that he arrested the appellant on 31st August, 2014. When he first came to the scene, the appellant had relocated. He said that when he went to the scene, he never saw a hole in the appellant's then house, which had not yet been re-occupied. The complainant had never mentioned a hole. He also produced the birth certificate for PW2 which shows she was born on 19/04/2000.

11. The appellant gave an unsworn statement. He said the complainant was a neighbor. That on the material day he returned from work at around 6.30 am and made himself tea and nandazis. He then rested until about 10.00am when he went to the quarry to shape stones and returned at 5.00pm. On reaching the house he was shocked to find the complainant inside his house, and she tried in vain to run away. He asked her how she got in and she did not respond. On searching the house he found that his mandazis and tea had been eaten ad there was a hole in the wall. He called PW2 who he told the story, and said he wanted to take action but PW2 advised against it as she was a young girl. He thereafter tried to get the mother on 25th August, but didn't find her in the house. On 26th August, he found that the mother had left for work. Every day that week he was unable to see the complainant's mother.

12. The issues for determination are:

a. Whether the defective charge sheet invalidated the hearing

b. Whether failure to conduct a voir dire examination was a fatal omission

c. Whether the complainant's age was proved

d. Proof beyond reasonable doubtdf

Defective charge sheet.

13. The appellant alleges that the charge sheet was defective for the reason that it lacked the word "unlawfully". It is his submission that the omission of the word unlawful in conjunction with the word intentional was an insufficient description of the particulars of the offence as prescribed under **section 134** of the **CPC** thus making the charge sheet defective.

14. It is to be noted that **Section 382** of the **Criminal Procedure Code** provides as follows:

> ***"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."***

15. In the case of **Isaac Omambia v Republic, [1995] eKLR** the court considered the ingredients necessary in a charge sheet pointing out that the key requirement is that the particulars must be capable of giving reasonable information as to the nature of the charge. The court stated as follows;

> ***"In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence."***

16. In **Peter Ngure Mwangi v Republic [2014] eKLR** the Court of Appeal quoted the **Isaac Omambia case** and stated:

> ***"A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from***

Archbold, Criminal Pleading, and Evidence and Practice (40th Edn), page 52 paragraph 53, this Court stated in YONGO V R, (1983) eKLR that:

"In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:

(i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,

(ii) when for such reason it does not accord with the evidence given at the trial."

17. The Court of Appeal was also guided in the **Peter Ngure case** by the case of **Peter Sabem Leitu v R, CR.A NO. 482 OF 2007 (UR)** where the Court held thus:

"The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant."

18. In light of the above authorities, I am unable to conclude that the omission of the word "unlawful" does in any way prejudice the appellant. I also find that the omission is insufficient to invalidate a charge sheet. Further, it is also noted that the appellant did not raise an objection on this issue prior to the judgment, as highlighted under **section 382 CPC**. Thus, in my considered view, the omission is insufficient to render the charge sheet defective.

Whether complainant's age was not proved

19. The appellant argues that the age of the complainant was not proved because the mother stated her daughter was 13 years while the complainant, the medical report and the charge sheet indicated that the complainant was 14 years.

20. The prosecution produced a birth certificate indicating that the complainant was born on 19/04/2000 and was therefore 14 years and 4 months at the time of the offence on 20th August 2014. At the time of giving evidence on 6/10/2014, she was aged 14 years and 6 months.

21. In the case of in **Musyoki Mwakavi v Republic [2014] eKLR** the court held that:

"…apart from medical evidence, the age of the complainant may also be proved by birth certificate, the victim's parents or guardian and observation or common sense…".

Similarly, in the case of **Francis Omuroni v Uganda, Court of Appeal Criminal Appeal No. 2 of 2000**, it was held thus:

"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

22. In the present case the age of the complainant was proved by the birth certificate.

Failure to conduct a voir dire examination

23.The record shows, as argued by the appellant, that the complainant was not taken though a voir dire examination, despite her age. The courts have held that the age of fourteen years is a reasonable indicative age of competency to testify for purposes of Section 19 of the Oaths and Statutory Declarations Act. The effect of this non-compliance with section 19 of the Oaths and Statutory Declarations Act was enunciated by the Court of Appeal in **Samuel Warui Karimi v Republic [2016] eKLR** as follows:

"…we are in agreement the purpose of undertaking voire dire examination in a criminal trial is to protect the guaranteed right of a fair trial. Where the witness as 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."

24. In **Shaban Mutua Kiptui v Republic [2017] eKLR** the Court of Appeal answered the question who is a child of tender years in the following manner:

"***The Sexual Offences Act and the Oaths and Statutory Declarations Act are silent on this question. However way back in 1959 in the celebrated case of Kibageny Arap Kolil v R (1959) EA 82 the Court of Appeal for Eastern Africa held that the phrase "a child of tender years" meant a child under the age of 14 years. The only statutory definition of a "child of tender years" is section 2 of the Children Act where it is defined to mean a child under the age of 10 years. This Court has recently in Patrick***

Kathurima v R, Criminal Appeal No.137 of 2014 and in Samuel Warui Karimi v R Criminal Appeal No.16 of 2014 stated categorically that the definition in the Children Act is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination. 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

25. In **Maripett Loonkomok v Republic [2016] eKLR** a different bench of the Court of Appeal had held a slightly different view of the effect of non-compliance with the requirement for voir dire examination holding as follows:

"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."

Thus, if there are sufficient independent facts to support the charge, absence of a voir dire examination will not vitiate the prosecution case.

26. On the peculiar facts and circumstances of this case, it is noted that the complainant was14½ years old at the time of giving evidence. I take, and hold to be ascertained, the age in the birth certificate as the official record and *prima facie* evidence of the date of birth and age of the complainant. In my considered view complainant's evidence was cogent; she was cross-examined and medical evidence confirmed penetration which corroborated the fact of defilement. Accordingly, I conclude that although it would have been appropriate to conduct a voir dire examination, the failure to do so did not vitiate the prosecution case.

27. This ground of appeal therefore fails.

Uncorroborated evidence, assumptions and presumptions not supported by evidence

28. From the judgment of the lower court the magistrate assessed the evidence of the witnesses and had the following to say,

"On whether there was penetration of her vagina, both the P3 form and the PRC form confirm that there was penetration of the minor's vagina. The medical documents indicate that the minor's hymen was broken and she had whitish creamish discharge. She also had numerous epithelial cells. The doctor concluded that the minor had been defiled. The medical evidence corroborated the minor's evidence that she was defiled meaning that there was penetration of her vagina.

On the last issue of who the perpetrator is, it is my holding that the evidence is quite sufficient to prove that the accused herein was the perpetrator. The prosecution's evidence is free-flowing and very consistent. The minor gave the same story to the mother, the police officer and even at the hospital. The evidence was consistent all through. …"

29. In ***George Kioji vs. R - Nyeri Criminal Appeal No. 270 of 2012*** (unreported) court held that-

"Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

30. In the present case the minor gave a detailed account of what transpired between her and the appellant. The trial court which had the opportunity to observe the demeanour of the witnesses found her to be truthful and believed her version of the facts. I find no reason to interfere with that finding.

31. The appellant's evidence, though not subjected to cross examination, was hardly credible in my view, in that it did not portray his actions as those of a reasonable person. His version of the incident is that he came home in the evening on the material day, and found that complainant in his house which he had left locked. He also noticed that his mandazis and tea had been eaten. According to him she could not say why she was there. He did not testify as to how she left the house, but said that he tried unsuccessfully for five days to get her mother to report that she had broken into his house. This appears inconceivable and unlikely because his house and the complainants are virtually next door. Any reasonable adult whose house was broken into by a neighbour's child would probably be agitated enough and most likely hold the child by the hand and go to the neighbour's house to ensure the issue is addressed right away. The record shows that the appellant reported to PW2, but that appears to be an error as PW2 was the complainant. The only other neighbour who gave evidence, PW4, did not mention any interaction with the appellant. His evidence does not stand the test of credibility.

32. It cannot therefore be said that the judgment was based on assumptions, presumptions and not supported by evidence. This ground of appeal accordingly fails.

Alibi

33. The appellant's alibi was that he was not at home at around 1.45 p.m and came back at around 5.00 p.m to find that the complainant had dug a hole and entered into his house. He also states that the complainant's mother (PW3) was trying to set him up since they had wrangles concerning a leadership position in church. He claims that the complainant's mother gave out 2,000/= to the police to arrest him and that she wanted 50,000/= in exchange of his freedom.

34. However, after PW3 gave evidence, the appellant cross-examined her. He did not however raise any issues concerning the alleged wrangles, or challenge her about any money she had given to the police. In my view, the appellant's testimony about such wrangles was an afterthought intended to obfuscate the truth and give credence to his alleged alibi.

35. In my opinion, the prosecution case was proved beyond reasonable doubt. In the case of **Stephen Nguhi Mulili v Republic (2014) eKLR** the court cited the case of **Miller vs Ministry of pensions (1974)** where was held on the degree of proof that:

> ***"the degree is settled. It need not reach, but it must carry high degree of probability. Proof beyond reasonable doubt does not mean proof beyond shadow of doubt, the law would fail to protect the community if it admitted fruitful possibilities to defeat the cause of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favor which can be dismissed with the sentence of course it is possible, but not in the least probable the case is proved beyond reasonable doubt, but nothing short of that will suffice."***

Disposition

36. Having carefully reviewed the evidence on record, and having considered all the appellant's grounds of appeal, I find that all of them fail. Accordingly, I find that on the basis of the available evidence, the learned magistrate correctly convicted the appellant.

37. Accordingly, the appeal is dismissed.

38. Orders accordingly.

Dated and Delivered at Naivasha this 7th Day of March, 2019

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RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Oliver Omugusu Okwakau for the Appellant

2. Koima for the State

3. Court Clerk - Quinter Ogutu