REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

CRIMINAL APPEAL NO. 65 OF 2016

JOHN KAMAU MANGARA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against original conviction and sentence of life imprisonment

from a judgment dated 13th April 2016 by Hon. F. Mugungo - (RM)

in Adult Cmcr No. 259 of 2013(528/13)

JUDGMENT

1. The Appellant Samuel Njenga Wanyoike was charged and convicted for the offence of Defilement of a three (3) year old girl child, LM (herein after referred to as the victim) on the 8th May 2014 at Molo, within Nakuru County contrary to **Section 8(1)** as read with **8(2)** of the **Sexual Offences Act No. 3 of 2006.**

2. This appeal is against both the conviction and the sentence on the grounds stated in the appellant's petition of appeal dated the 19th April 2016 and the supplementary grounds filed by this advocates Ms. Mongeri & Co. Advocates.

3. The grounds of appeal may be summarized into the following that:

> *The trial magistrate erred in law and fact in convicting the appellant on contradictory and insufficient evidence, lack of proper identification of the appellant, shifting the burden of proof to the appellant, lack of corroboration of the unsworn evidence of the minor complainant, insufficient and contradictory medical evidence of penetration as well as admission of hearsay and incredible evidence. The trial magistrate is also faulted for failure to consider the appellants defence and the life sentence which is said to have been excessive.*

4. Being the first appellate court, it is my duty to re-examine and re-evaluate the conflicting evidence adduced before the trial court, and come up with my own findings and conclusion, but not to merely scrutinise the evidence to support the lower court's findings- **Okeno –vs- Republic (1972) EA 32.**

5. The age of a victim of sexual assault is very crucial as punishment and sentence upon conviction is graduated and depends on the age. It calls for strict proof – **Hilary Nyongesa –vs- Republic Cr. App No. 123 of 2009**.

6. **Issues for determination**.

> *(1) The validity of the unsworn evidence of the victim and failure to accord the appellant an opportunity to cross examine the victim*.
>
> *(2) Corroboration of prosecution witnesses evidence*
>
> *(3) Contradictions and inconsistencies in the evidence*
>
> *(4) Medical evidence*

(5) Failure to call necessary witnesses and to consider defence evidence

(6) Whether the sentence was excessive.

7. **Victim's unsworn evidence (PW1)**

The court took the minor victim through *voire dire* examination.

The magistrate was satisfied that the victim did not understand or possess the necessary intelligence to be sworn having stated that she did not comprehend an oath. The victim therefore gave unsworn evidence.

8. The appellant's complaint is that he was not given an opportunity to cross examine the victim upon her unsworn evidence. The court record shows that the appellant was not called upon to cross examine the victim on conclusion of her unsworn evidence in chief nor did the trial magistrate invite and or request the appellant whether he wished and/or had questions to put to the victim by way of cross examination.

9. This ground is the gravamen of this appeal.

Section 208(1) of the Criminal Procedure Code (Cr PC) states

(1) "If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence (if any).

(2) The accused person or his advocate may put questions to each witness produced against him.

(3) If the accused person does not employ an advocate, the court shall, at the close of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any questions to that witness and shall record his answer.

10. The appellant did not employ an advocate in the trial court, thus he acted in person.

Section 208 (3) is couched in mandatory terms that in circumstances where an accused person is unrepresented by an advocated the court shall at the close of examination of each witness for the prosecution ask the accused whether he wishes to put any questions to that witness and shall record his answer.

11. The trial Magistrate's failure to comply with the mandatory provision was a denial to the appellant of his constitutional right to fair hearing under **Article 50**. In my view, it matters not whether the said prosecution evidence is by a minor, sworn or not, or by an adult. The accused ought to have been given the opportunity to test the victim's (PW1) truthfulness of her evidence by cross-examination, if he wished to, an option he would have taken only after the trial magistrate gave him that opportunity.

12. The **Court of Appeal** has rendered itself on the issue and particularly in the case **Busia CA Criminal Appeal No. 326 of 2010, H.O.W. –vs- Republic (2014) e KLR.**

Page 4, Paragraph 3 that

"The first such matters and which is the main one is on point of procedure which in law, we feel fundamentally prejudiced the entire case and the appellant. This is that the complainant J.S. who was a minor was taken through voire dire examination and this was proper in law for whatever evidence was given on age, she was not above twelve (12) years in age. The learned trial magistrate found as a result of voire dire examination that she did not know the normal duty of telling the truth and its normal consequences.

She was ordered to give unsworn statement and she did so. That evidence seriously implicated the appellant, but at the end of it, for some reasons unrecorded, it was not subjected to cross-examination by the appellant who was present in court. There was no indication or any record to show that the appellant was afforded an opportunity to cross-examine this witness and no reasons were recorded as to why that procedure was not done. Unfortunately the appellant was unrepresented and clearly could no apprehend his right to cross examine the witness. He clearly relied on the trial court which had a duty to invite him, at the end of the witnesses' evidence in chief to cross-examine the witness, which invitation did not come forth in respect of this witness. We can find nor reason for this serious omission except that we think perhaps the court erroneously felt that as an accused person who gives unsworn evidence is not to be cross-examined so would an witness who gives unsworn evidence not be cross-examined. Of course that was a misapprehension of the law…"

13. The court went ahead to state thus:

"In our view, unless such a child's evidence is subjected to cross-examination it would be impossible to know whether the evidence he gives is false or not.

The provision in our view strongly supports the law as above that Section 208 of the Criminal Procedure code applies to all witnesses who give evidence and is not confined to only those witnesses who give sworn evidence. It covers children giving evidence not on oath as well. Thus the learned court erred in law in failing to ask the appellant to cross-examine J.S. if he wished to do so., and the High Court erred in failing to direct its mind to that serious legal lapse. We say serious legal lapse because the conviction was based on that evidence on the main."

14. I associate myself with the learned Judges of Appeal on their holding above, whose facts are similar to the present facts in the appeal before me.

The position that a child witness who gives unsworn evidence is liable to cross-examination to test the veracity of her/his evidence is thus settled.

15. However an accused person is not liable to cross-examination if he choses to give unsworn testimony, as earlier rendered by the **Court of Appeal in Nicholas Mutula Wambua –vs- Republic – Criminal Appeal No 373 of 2006 at Mombasa**.

> *That "all prosecution witnesses are liable to be cross-examined in order to test the credibility and the veracity of the witness. The trial courts should always observe that requirement of the law in all criminal trials to obviate an otherwise stable case from being lost on that omission."*

16. It was therefore not possible for the appellant to test the credibility and veracity of the victim (PW1) evidence that implicated him to the commission of the offence he was charged with without cross- examining her.

The trial magistrate relied heavily on the victim's evidence to convict the appellant.

The appellant has urged this court to quash the conviction and sentence on this one ground alone as it carries serious legal ramifications.

17. On its part, the prosecution conceded to the failure by the trial court's failure to comply with the legal imperatives in **Section 208 Cr. PC as well as Section 200 thereof** on the matter of conviction on evidence partly recorded by one magistrate and partly by another - but submitted that such failure did not cause injustice to the appellant as **PW1's** evidence was corroborated by other prosecution witnesses.

18. The appeals before the Court of Appeal in **H.O.W. –vs- Republic and Nicholas Mutula Wambua –vs- (Supra)** Succeeded on the failure by the trial magistrate to observe and comply with provisions of **Sections 208 of the Criminal Procedure Code.**

In the result, I find that the trial magistrate erred in law in her failure to accord the appellant an opportunity to cross examine PW1 on her unsworn evidence which formed the main basis of the conviction.

19. In my view I need not go into the interrogation of the other grounds of appeal as my findings may not overshadow this finding, which is very core to the appeal.

20. However, I want to state something about the medical evidence as adduced by **PW4, Doctor Thomas Matara**.

Upon examination of the victim on the same day of the alleged defilement, the doctor made observations as follows

> ***Bruises on outer genitalia, Tear on vestibule, hymen intact, anus intact, no discharge noted***.

This was barely three hours after the alleged defilement. I have seen the P3 Form (PExt 3).

On cross examination by the appellant the doctor stated

> ***"the patient did not present the clothes she had at time of incident. I do not know why you were not taken to hospital for examination…***
>
> ***There is nothing linking you to the incidence save for history given by the patient***.

21. He confirmed from a medical opinion there can be penetration when bruises is present like where the penetration is inside to about 0.5CM.

22. On the above evidence, there is doubt as to whether there was penetration which is a very core ingredient in a sexual offence that requires strict proof.

The doctor did to state that penetration occurred, but only gave his opinion. In my view if indeed penetration had occurred and the examination having been done within four hours of the offence, the doctor's observations would surely have been different. Discharge would have been noted and also bloodstains taking into account the young age of the child victim.

23. **Section 2 of the Sexual Offences Act No. 3 of 2006** defines **penetration** to mean "*the partial or complete insertion of the genital organs of a person into the genital organs of another person*."

24. Proof of penetration by medical evidence, not medical opinion is paramount – **Hilary Nyongesa (Supra) Mwilu J** (as she then was) as well as **Warsame J in John Gordon Waguer –vs- Republic Cr. App No. 404 of 2009 (Nairobi).** The **Doctor (PW4)** was heard stating that there was nothing linking the appellant to the crime.

25. The trial magistrate in finding that the minor was penetrated created her own hypothesis by recreating the scene as to the genital organ of the minor notwithstanding that the minor's hymen was intact, but failed to consider that in view of the medical evidence the bruises noted

on the outer genitalia of the minor may have been caused by or in other ways, not necessarily by Sexual Conduct – See **Michael Mugo Musyoka –vs- Republic (2015) e KLR** where the doctor who examined the three years old child found a tear on her genitals, but no discharge, cervix was intact, and nor virginal discharge. He concluded that there was no penetration.

26. My findings on the matter is that I find no credible evidence that the child victim was defiled. The medical evidence was based on mere suspicion. It cannot form a basis for conviction. In Mary **Wanjiku Gichira –vs- Republic Criminal Appel No.17 of 1998,** the court held that however strong suspicion and speculation they cannot provide a basis for inferring guilt which must be proved by evidence beyond reasonable doubt.

27. That having been said coupled with the trial court's failure to comply with provision of Section 208 of the Criminal Procedure Code, I find merit in the appeal. It is hereby allowed with the result that the conviction as well as the sentence are quashed.

The appellant is set at liberty forthwith unless otherwise lawfully held.

Signed, delivered and dated at Nakuru this 11th Day of July 2019.

J.N. MULWA

JUDGE