REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 58 OF 2018

JOSPHAT NYAMAI MULI…...............................APPELLANT

VERSUS

REPUBLIC...…............RESPONDENT

(*Being an appeal from the conviction and sentence by Hon K. Kibelion (SRM) in the Chief Magistrate Court (Wamunyu Mobile Court) in Criminal Case Number 226 of 2016 delivered on 29.6.2018*)

BETWEEN

REPUBLIC...PROSECUTOR

VERSUS

JOSPHAT NYAMAI MULI.......................................ACCUSED

JUDGEMENT

1. The appellant was charged, tried and convicted with an offence of defilement contrary to **section 8(1)** read together with **Section (8)(3) of** the **Sexual Offences Act, 2006**. There was also an alternative charge of indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act**. The appellant was sentenced to 20 years imprisonment.

2. The evidence was as follows; **Pw 1 JNG** testified that he schooled at [particulars withheld] and that on the material day the school cook called him at about 5.00am to go to his place and he obliged whereupon he asked him to remove his clothes then he defiled him and he felt pain in the anus. He gave a report to the teacher called MM who was in the office and who him to go to class and not to tell other students what had happened. He told the court that MM and Mr. M called him again and he briefed them on what had happened whereupon MM accompanied him to the police at Katangi Market where he reported the matter and then he was taken to Katangi hospital. It was his testimony that he was examined and given drugs then later he went to Ikombe hospital where he was treated and went back to school. He told the court that the cook`s one roomed house is near the dormitory and which has a bed, table and a chair. On cross-examination, he testified that the offence was committed on 6.7.16 whereas the statement indicates that the offence occurred on 26.7.16. He further told the court that he had indicated in his statement that he was called by Bosco who is the cook, and that he knew the appellant as Nyamai Muli and that Bosco and Nyamai Muli are two different people. He told the court that Nyamai Muli defiled him. He told the court that there was a caretaker in the school called Mama Mwendwa who did not record a statement. He told the court that no other student heard Bosco calling him, and that when he went to the appellant’s house there was a child called M wN, however he has not recorded a statement. He stated that Bosco defiled him and had used Vaseline to smear his anus and that in his statement he indicated that he reported to M the head boy but however M did not record a statement. He did not have treatment notes for Katangi Hospital and that he was aged 15 years old but had not produced a birth certificate. On re-examination, he told the court that the he could not remember the exact date of the offence but that he was defiled by Nyamai Muli who is in the dock and who is also referred to as Bosco at School. Further that the police took the Vaseline and handkerchief that were used by the appellant.

3. **Pw 2 CKM** testified that she is a teacher and the deputy principal at [particulars withheld] and had worked there for five years. She told the court that she sleeps there and that on 26.7.2016, she was in school and was on duty when she took the children to the assembly then met teachers before they left for classes. At around 9.00am a pupil named JN (Pw 1) who is on vocational class told her that Bosco had done bad manners to him. He narrated that he was sleeping and Bosco cook, (who is called Bosco in school but his official names are Josephat Nyamai Muli) called him to his house where he undressed him and smeared oil on his anus then defiled him. He narrated to Pw2 that after he was done he wiped his anus with a handkerchief and told him not to tell anyone. She stated that she informed Mr. M and Senior Teacher M who called Pw 1 from class and told him to narrate what had happened to all of them and he reiterated his story. She informed the principal who advised her to go and report the case at the police station and thus they took a motor bike to Katangi Police base together with Pw1 and after reporting, the police officer directed them to Hospital. Mr. M came to the police base and took Pw1 to the hospital while she went back to the school. Pw1 was taken to Katangi Health Centre after which he went to school then Pw2 went to the Patrol base with Mr. M and the

following day he was arrested then she went to the police station to record statement where she was given a p3 form which was filled. She told the court that Bosco lived within the school in one of the houses next to the boy`s dormitory at a distance of about 10 metres. She stated that Nyamai/Bosco was in court and that Pw1 is 15 years old as per their school records. On cross-examination, she told the court that she did not personally witness the offence and that it is only the complainant who recorded his statement and no other student recorded a statement. She told the court that there was a care taker Rose Syombua who did not record a statement and neither did Miss M. She emphasized that the name Bosco and Josephat Nyamai Muli belong to one and the same person. She confirmed that she did not carry the records of the age of the Pw1 and that at Katanga Health Centre treatment notes were issued. She told the court that the appellant was supposed to be on off duty on 25th July, 2016 at 4Pm and was to resume on 26.7.16 but that he sleeps within the school compound during his off days. Further that the face towel used to wipe the anus of Pw1 was taken by the police. On re-examination, she told the court that the age records of Joshua (Pw1) shows he is aged 15 years old and the treatment notes were with the doctor. She reiterated that employees even on off duty can remain in school.

4. **Pw 3 GKM a** worker at [particulars withheld] told the court that on 26.7.16, he arrived at school at about 7.30am and later the deputy (Pw 2) together with the senior master Mrs M told him that there was a pupil named JN who had informed her that he had been defiled by a school employee. Pw1 then came and narrated what had happened that Bosco who was the cook came and called him through the window and told him to go to his house; he then told him to remove his clothes, smeared oil on his anus and then defiled him; thereafter he wiped his anus and asked him to go and not tell anyone. The principal was informed and he advised Pw1 and Pw2 to report to the police station and thus Pw2 took Pw1 to Katangi Police Station and he joined her where he was asked to take Pw1 to hospital. They went to Katangi Health Centre where Pw1 was taken to the laboratory and was treated and the P3 was filled and taken back to the police station. On cross-examination, he told the court that he never witnessed the defilement. That there is no other student who has recorded statement. That there was a caretaker Rose Syombua who did not record a statement. He told the court that the treatment notes were prepared by the clinical officer at Katangi Health Centre.

5. **Pw4 PM** a teacher at [particulars withheld] for 6 years and the Head teacher of the school told the court that on 26.7.16, he was in a meeting at Matuu Vision Centre and was called by the deputy head teacher who informed him that there was a pupil who had been sodomised by one of the cooks Josephat Nyamai. He arrived at school at around 5.00am and was told that Pw1 had been taken to Katangi police base and Katangi Health Centre and he was already back at school. On the following day he led officers from Katangi Police Patrol base to the appellant who used to live in the school and is referred to as Bosco in school. On cross-examination, he testified that he never witnessed the commission of the offence; that according to the statement the date of offence is indicated as 26.6.16 which is erroneous since the offence was committed 26.7.16. Further that there was a care taker at the dorm called Rose Syombua who did not record a statement in this case. He told the court that the appellant is Bosco in school but Josphat Nyamai Muli is his official name. That Pw1 is 15 years old and he had no age records. He told the court that on 25.7.16, the appellant was off duty but was in school compound and the watchman can confirm that the appellant was in school. On re-examination, he testified that the error of dates in the statement is typographical. The offence was committed in the appellant’s house and that Bosco and Josephat Nyamai are the same person.

6. **Pw 5 Wilson Kimanzai Ngungu** the Clinical Officer at Katangi Health Centre for 6 years told the court that he had a Higher Diploma in Clinical Medicine form Mombasa Medical Training College. That he examined JNG on 26.7.2016 who came with allegation that he had been sodomised by a worker in school and that he had pain while passing stool. The examination found there was visible superficial bruise on the anus. He collected a rectal swab which showed presence of red blood cells, pus cells and cramp negative coccobacili (a bacteria which can cause sexually transmitted infection) and is transmitted through sexual contact. He told the court that the approximate age of the injury was hours and the same was caused by a forceful insertion. He explained that when there are bruises, red blood cells are seen. He signed the P3 form and produced it as Pexhibit1. On cross-examination, he testified that he did not have his practicing license or appointment letter. That the history given about Pw1 was that he was sodomised and is not contained in the P3 form but they are contained in the treatment notes. He told the court that he could discern a bacteria in a rectal swab and the same could be acquired in various ways including sexual conduct. There were no discharge observed but there was a chance to observe discharge if any if there was immediate examination. On re-examination, he testified that he discovered mental incapacitation from the history given by the next of kin (teacher) and the school that is [particulars withheld] and also by the way he explained himself and behaviour. Further that at the time of his examination there was no discharge.

7. **Pw 6 No.93811 Pc Philip Nderitu** attached at Katangi Patrol Base under Matuu Police Station within Masii Police Station was the investigating officer in this matter. He told the court that on 26.7.2017, he was at the patrol base at the report office when he received the complaint concerning JNG from [particulars withheld] who was mentally challenged and in company of the Deputy Head Teacher CM and a male teacher named M. Pw1 reported to him that on the night between 25th/26th /7/2016 while he was sleeping at the dormitory he heard a person call out his name from the nearby window and he recognized that the person calling out his name was the cook Mr. Nyamai who was also known as “Bosco”. Pw1 left the dorm and went to where Nyamai was and on arrival he was led to his house which was within the school compound near the dormitory. On arrival at the house the appellant ordered him to remove his clothes and lie on the bed. Pw1 reported that the appellant smeared some jelly on anus and had anal sex with him and thereafter he wiped his anus with a handkerchief and warned him not to tell anyone what he had done. The following morning Pw1 informed teacher CM what had happened the previous night and that is when they reported the matter and Pw6 recorded the report in the OB and asked the deputy and Mr. M to take the victim to Katangi Health Centre. Pw6 issued a P3 form to the complainant and the same was filled and returned to him. On 27.7.2016, Pw6 received a call from the school deputy headteacher who informed him that the appellant had been locked in the kitchen and Pw6 went and arrested him after informing him of the reason for the arrest. He proceeded with the appellant to his home within the school and conducted search in the home where he recovered the jelly which had been used by the appellant to lubricate the anal opening and he produced the same as exhibit 2. He told the court that in the course of investigation he came into possession of Pw1’s birth certificate which indicated that he was born on 10.3.2004. He produced the same as exhibit 3. He told the court that he did not recover the handkerchief from the house of the appellant that was within the school compound and about 20 metres from the dormitory. On re-examination, he testified that Pw1 was mentally challenged and he could tell based on physical examination and the fact that Pw1 was in a special school. Further that the appellant was known to the complainant as ‘Bosco” Josephat Nyamai is not mentioned in the statement but referred to as Bosco. He did not record any statement from the other pupils in the school as they were mentally challenged. On re-examination, he testified that Josephat Nyamai is also known to the pupils as Bosco and that the victim herein was mentally challenged as he schools in the special school. He also got the history from teachers. He told the court that the only person who perceived the incident is the victim alone.

8. The court found that a prima facie case had been established against the appellant sufficiently to require him to make a defence and he was

placed on his defence. Section 211 was explained to the appellant who elected to give a sworn statement. **Dw1 Josephat Nyamai Muli** testified that he resided in Katangi Sub location within Mwala Sub location, a cook and that in July 2016 he had been employed as a cook at [particulars withheld]. He denied having defiled the complainant. He told the court that on 25.7.2016 he left the school and went for off duty at about 5.30Pm, he went home at Katangi location, a place about 2 ½ Km from the school. He reported back on 27.7.2016 to work at around 7.30am and later on arrival the Principal locked him in the kitchen and police officers came and arrested him on account of an alleged occurrence of 26.7.16. He told the officers that he was not at work on 26.7.16 but he was taken to Katangi Patrol Base. He reiterated that 26.7.16 he was at his home and was nowhere near the school on that date. On cross-examination, he told the court that he left the school at 5.30Pm on 25.7.16, he went through the main gate and there was no one manning the gate. He was given an off duty by the Principal Mr. PM but told the court that he would not be calling the Principal as a witness. He stated that he went back to the school on 27.7.16. He was at home with his family; his wife and 5 children; the eldest J who is 14 years old. He told the court that he arrived at his home on 25.7.16 at around 7.00Pm and on 26.7.2016 he stayed at home where he spent the entire day herding his cows then he left his home on 27.7.16 at 6.00am for work. He told the court he would not be calling his children as witnesses to confirm that he was at home the whole of 26.7.16. He told the court that on that date he was off he left CM on duty but would not be calling her as a witness. He told the court that he had a home within the school compound where he used to live with watchman and two groundsmen and would not be calling the watchman to state that he was off duty on that date.

9. **Dw 2 Jacinta Nyamai Muli** testified on oath that the appellant was her husband and that they had 3 children. N, W and M. She told the court that on 26.7.2016 her husband was at home on off duty and was working at [particulars withheld] as a cook. That the appellant came on 25.7.2016 at about 7.00Pm and stayed at home until 27.7.2016 when he left at 7.00am. She received a report on 27.7.16 from the appellant's brother`s wife called Syombua that the appellant was arrested and she arrived at the police station at about 3.00Pm. She was unaware if anything was taken from the appellant. On cross-examination, she testified that the appellant was working at [particulars withheld] and used to spend in school but came home on off duties. She told the court she was at home on 25th and 26th July, 2016.

10. The appeal was canvassed vide written submissions. It is the appellant's case that the failure to call M W N as a witness meant there was no evidence to corroborate the fact that Pw1 and the appellant were together in the same room on the material day. Further he submitted that the appellant raised a defence of alibi that is corroborated by Dw2's evidence and in this regard dislodged the prosecution evidence and he challenged the failure of the trial magistrate to analyze and allow the defence of alibi. He submitted that the appellant was convicted on insufficient evidence. Learned counsel in his submissions challenged the fact that the trial court went into error in failing to conduct a voire dire and the same vitiated the trial hence the appellant be set free. This ground was not raised in the memorandum of appeal and popped up in the submissions.

11. The state conceded to the appeal and submitted that the options available to the court for failing to conduct a voire dire are either to render the complainant's evidence of no value or to recall the witness. He cited the cases of **Kivevelo Mboi v R (2013) eKLR and John Kariuki Gikonyo v R (2019) eKLR**. On the failure to call crucial witnesses, counsel submitted that the evidence on record failed to place the appellant at the scene of the offence on the material day. On the defence of alibi, counsel submitted that the prosecution failed to tender evidence that placed the appellant at the scene of crime and that the conviction was erroneous and not safe and that the prosecution failed to prove its case.

12. This being a first appeal, the court is under legal obligation to re-evaluate, re-assess and re-analyze the evidence on the record and make its own findings and conclusions except having in mind that it did not have the advantage of hearing or seeing the witnesses testify.

13. The court has carefully considered the petition of appeal and submissions presented. The grounds of appeal may be collapsed into three grounds:

1. ***That the trial Magistrate erred in law by convicting the Appellant for the offence of defilement in the absence of proof of the elements of the offence to the required standard;***

2. ***That the trial magistrate failed to conduct a voire dire hence the trial is vitiated;***

3. ***That the trial magistrate failed to consider the defence of alibi raised by the appellant***

14. Having considered this appeal, the evidence on record and the rival submissions, the issues for determination are whether the failure to conduct a voire dire vitiated the trial, whether the appellant was convicted of the offence of defilement on the basis of a defective charge sheet and the charge should be substituted , what orders may the court grant and whether the prosecution proved its case;

15. With regards to the first issue, it is trite law that every party is bound by their pleadings and the appellant had not challenged the procedure in taking the evidence of a child of tender age in his submissions and has raised the same in his submissions hence would not be allowed to rely on the same. Be that as it may when a court is faced with a child which is stated to be 14 years and below, according to case law (**Kibageny Arap Korir v R [1959] EA 92-93**. the court must first establish whether the child is possessed of sufficient intelligence to justify the reception of that evidence and understands the duty of speaking the truth. In case the child is intelligent enough to give evidence but does not understand the duty of speaking the truth, his or her evidence may be taken without taking the oath but no conviction can follow unless, such evidence is corroborated by some other material evidence in support of it implicating the accused ***(Section 19 of the Oaths and Statutory Declarations Act).***

But if the child understands the duty to speak the truth, then the oath is administered before taking evidence from him or her.

16. Though not indicated in the memorandum of appeal, the issue of absence of a voire dire examination has been raised in the appellant's submissions and that a perusal of the evidence on record reveals failure by the trial court to conduct a voire dire before taking the evidence of the victim and there is also an alleged absence of corroboration of the victim's evidence. This issue concerns the law and procedure of taking evidence of the child and the effect of flaunting that procedure.

17. Section 19 of the Oaths and Statutory Declarations Act provides: **"19. Evidence of children of tender years**

(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.

18. Section 233 has been repealed, however the import of section 19 above is to ensure that the courts take evidence of a child of tender age only upon satisfaction that the child is intelligent enough to testify on the matter before court and understands the duty of speaking the truth. In view of the statutory responsibility to assess the intelligence of the child and establish whether she/ he understands the duty of speaking the truth, the trial court conducts a voire dire before taking the evidence of any child of tender age.

19. A Voire Dire (to speak the truth) is an Anglo-French legal phrase which in the context of common law criminal procedure, refers to a preliminary examination by a trial judge or magistrate to determine the competency of a witness of tender age so as to determine whether he or she is possessed of sufficient intelligence to testify in the matter before court and understands the duty of speaking the truth. My humble view is that the Section 19 is an abrogation of the right to fair trial of a child under Article 50 and right to protection under Article 53(d) of the Constitution because whereas an adult can choose to testify unhindered, a child whose evidence does not go through a voire dire automatically ceases to apply to his /her evidence rendering such evidence useless and of no legal effect. This leaves children who are victims of crime very vulnerable and especially the boy child.

20. There is no statutory procedure or established uniform format that is followed by judicial officers to help them decide on whether the child should testify on oath or not or not at all since determining the intelligence of the child is left to the good sense of the trial judge or magistrate alone. It is common knowledge that children develop in stages and they develop a sense of right and wrong, and will be desperate for praise and approval. It is important to test the intelligence of a child and from the evidence on record, Pw1 had a sense of understanding and indeed was able to identify the person who hurt him. The right to a fair hearing cannot be removed and should not be removed by the legal process of conducting a voire dire which allows the judge or magistrate to exercise their discretion as to whether the child should take oath or not**.** Having gone through the law and legal principles above, the record does not reveal that questions were asked and answers recorded and it cannot be said that it was conducted. The basis of the learned Magistrates opinion to swear in Pw1 is not known since he did not record any questions or answers to any question. There is no evidence of dialogue completely.

21. The next issue to be considered is that of the defective charge and the same was not addressed in the petition of appeal thought it comes out as a result of the analysis of the record. The evidence adduced in the trial Court pointed to the appropriate offence being that of sodomy that falls under an unnatural offence, and not defilement, as the age, lack of consent were proved in addition to the element of penetration.

22. On the issue of what orders the court may grant, a retrial is what comes to mind because I am very convinced that the flaw in taking evidence occasioned a miscarriage of justice. And being faced with the dilemma, the court would have to look at if there was independent evidence that could sustain a conviction in the absence of the evidence of the victim, therefore it cannot be said that the failure entitles the appellant to be released without considering the other evidence on record. From the evidence on record it is undisputed that the complainant was a person below 18 years, there is a birth certificate on record. The evidence on record points towards penetration and this was indicated on the P3 form, the PRC form and the account of the victim. What is in contention is the issue of identification of the appellant as the perpetrator because of the manner of taking the evidence that implicated him.

23. As was stated **in the case of Ahmed Ali Dharmsi Sumar vs Republic 1964 E.A 481** and restated in **Fatehali Manji vs The Republic 1966 E.A. 343**:-

"In general a re-trial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the Prosecution to fill up gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial Court for which the Prosecution is not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to the accused person."

24. The Court of Appeal in the case of **Mwangi vs. Republic [1983] KLR 522 held** as follows;

"…several factors have therefore to be considered. These include:

1. ***A retrial will not be ordered if the conviction was set aside because of insufficient evidence.***
2. ***A retrial should not be ordered to enable the prosecution to fill up the gaps in its evidence at the first trial.***
3. ***A retrial should not be ordered where it is likely to cause an injustice to the accused person.***
4. ***A retrial should be ordered where the interest of justice so demand.***

Each case should be decided on its own merits."

25. I am satisfied that the prosecution had proved its case beyond reasonable doubt but however because of the infraction on the taking of evidence the subsequent conviction of the appellant was unsafe in the circumstances. I find the justice of the case warrants for an order of a retrial. It is noted that the appellant has barely served a fraction of the sentence and that witnesses will be available. Consequently i hereby order for a retrial in this matter.

26. In the result the appeal succeeds to the extent that the conviction is quashed and sentence set aside and substituted with an order for a retrial. The appellant shall be released from prison custody and placed in police custody at Masii police station and thereafter be presented before the Chief Magistrate Machakos law courts on the 19th September 2019 for the purposes of the retrial.

Orders accordingly.

Dated and delivered at **Machakos** this **18th** day of **September, 2019**.

D.K. Kemei

Judge