REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NUMBER 122 OF 2017

BETWEEN

LUKAS MULI NZIOKA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Kithimani Senior Resident Magistrate's Court Criminal Case SOA No. 13 of 2015, Hon. G. O. Shikwe, SRM on 21st November, 2017)

REPUBLIC.....PROSECUTOR

VERSUS

LUKAS MULI NZIOKA.....ACCUSED

JUDGEMENT

1. The appellant, **Lukas Muli Nzioka**, was charged before the Kithimani Senior Resident Magistrate's Court Criminal Case SOA No. 13 of 2015 with defilement contrary to Section contrary to Section **8(1) (2)** of the ***Sexual Offences Act*** No. 3 of 2006. The particulars of the offence are that the appellant on the 8th March day of 2015 at around 16oo hours in Masinga Sub county within Machakos County, intentionally caused his penis to penetrate the vagina of **BMK**, a child aged 4 years. In the alternative he faced the charge of Sexual Assault contrary to section **5(1), (a), (ii), (2)** of the ***Sexual Offences Act*** No. 3 of 2006 particulars being that on the 8th March day of 2015 in Masinga Sub county within Machakos County, unlawfully penetrated the vagina of **BMK** with his fingers.

2. Upon being found guilty, the appellant was convicted of the offence of defilement and was sentenced to life imprisonment. Not being satisfied with the sentence the appellant has lodged the instant appeal in which he has raised the following grounds:

1) The Learned Magistrate erred in law and fact by delivering a judgement which was not reflective of the facts presented by the parties.

2) The Learned Magistrate erred in law and fact by failing to appreciate the law as it relates to burden of proof required in criminal cases.

3) The Learned Magistrate erred in law and fact by failing to find a doubt in favour of the appellant on the face of glaring contradictions in the prosecution's case.

4) The Learned Magistrate erred in law and fact by failing to appreciate the lack of sufficient evidence to the required standard against the appellant.

5) The Learned Magistrate erred in law and fact by failing to appreciate that the offence of defilement and indecent assault had not been proved beyond reasonable doubt against the appellant.

6) The Learned Magistrate erred in law and fact by failing to consider the appellant's defence.

7) The Learned Magistrate erred in law and fact by shifting the burden of proof to the appellant.

8) The Learned Magistrate erred in law and fact by convicting the appellant on insufficient evidence.

3. In support of the prosecution's case the prosecution called 4 witnesses.

4. Before the hearing, the prosecution informed the court that the complainant was a young girl aged 4 years and was not able to give evidence. Accordingly, an application was made that she be treated as a vulnerable witness. Upon considering the said application, the court allowed the same and directed that the complainant testifies through an intermediary in terms of section 3 of the ***Sexual Offences Act***.

5. According to PW1, **VMK**, the complainant (PW2) was her daughter born on 5th December, 2010 and to prove her age, she exhibited her birth certificate. It was PW1's evidence that on 8th February, 2015 at about 4pm, she left her children, one **K** and the complainant at home as she went to the market. When she returned, she did not find the complainant and upon asking her other child, she was informed that the complainant had gone to play. After about 10 minutes, PW1 heard PW2 cry and went towards the cry and found the Appellant dusting the complainant off on the road. PW1 called PW2 and the Appellant left immediately he saw PW1. PW2 informed PW1 that she had been called by the Appellant to go buy sweets but on the way, the Appellant removed her underpants and removed his then penetrated her. PW1 inspected PW2's underpants and found that they were wet. PW1 then proceeded to the village elder who advised her to go and report to the police which she did the following day on 9th March, 2015 and was given a P3 form after which they went to Masinga hospital. According to PW1, the Appellant, who was like an uncle to the complainant was arrested by PW1's father.

6. PW2 was the complainant. According to the record, she gave unsworn statement through an intermediary and there was no evidence of any *voir dire* examination having been conducted. According to her evidence, she was 4 years old. On 8th March, 2015, she was called by the appellant who told her to that he wanted her for her a sweet and the complainant followed him to Kakongo.

7. PW3, **Edwin Mutembei**, from Masinga Hospital testified that on 9th March, 2015, the complainant aged 4 years was taken to him with a history of defilement. He examined her on 8th March, 2015 at 4pm and found her dress blood stained with blood in her vagina. Further, her hymen was freshly torn and her underpants were wet. He treated her and filled the P3 form which he exhibited. Upon examining the appellant, he found his urine had fungal infection which he treated and exhibited his P3 form as well.

8. PW4, **PC Daniel Kandogo**, testified that on 9th March, 2015 at around 11.08 am, while on duty, PW1 and PW2 went to the station and reported that PW2 had been defiled by the Appellant on 8th March, 2015 at about 1640 hours. According to him, PW1 saw the appellant getting up and dusting his trousers and asking the minor why she refused to go with him to the market to buy sweets. PW2 then she interrogated PW2 who claimed that the Appellant had called her from a neighbour's house and defiled her. He then escorted both the victim and the appellant who was taken by members of the public for examination and the clinical officer returned a finding that the child was defiled. PW1 gave PW4 PW2's blood stained clothes which he produced as exhibit and PW4 later visited the scene.

9. Upon being placed on his defence, the appellant chose to make an unsworn statement without calling any witness. According to him, on 10th March, 2015, he woke up, took tea as usual and went to work up to 3pm when he proceeded to the market to charge his phone where he was up to 4pm. He was then informed that his eldest wife was looking for him and upon going, he found her with an elder and two *bodaboda* operators. He was then confronted with the allegations, was arrested and taken to the Hospital.

10. In his judgement, the learned trial magistrate found that from the evidence adduced there was no doubt that PW1 (sic) was defiled. She told her mother that she was defiled by the appellant and her mother saw her with the accused person on the road who merely denied this and claimed that he was working the whole day. The court therefore found that the accused defiled the complainant and convicted him accordingly.

11. In this appeal, the appellant submitted that the prosecution did not adduce any scientific evidence to wit DNA to link the appellant with the offences he was charged with.

12. It was submitted that based on the findings of the learned trial magistrate that from the medical evidence although the appellant's condition was classified as chronic it had not been determined that he is permanently insane and decided to proceed in terms of section 167(a) of the ***Criminal Procedure Code***, under the said provisions of the law, it is clear that the learned magistrate acknowledged that the appellant was not in a position to understand the proceedings and that's why he did not even cross examine Pw1. It was submitted that the Learned Magistrate therefore should not have proceeded with the matter once he established that the appellant was not in a position to understand the proceedings. To the appellant, there is therefore a clear miscarriage of justice and this court should acquit the appellant and/or order for a retrial before another court.

13. It was submitted that section 167(a) aforesaid makes it mandatory that in the event an accused person is convicted under the said section the said order must be subject to confirmation by the High court which is not the case in this matter because the High court did not confirm the conviction meted against the appellant.

14. It was further submitted that the proceedings of 19th October, 2015 do not indicate what language the witness was using and therefore this amounts to miscarriage of justice because it is not indicated whether there was any interpretation to the appellant who does not understand English or Kiswahili. Similarly, the evidence given by Pw3 on 30th August, 2016 indicates that the witness was using Kiswahili language and that there is no indication on record that the proceedings were interpreted to the appellant. The evidence of Pw4 which was on 21st September, 2017 indicates that the witness was using English language and that there is no indication on record that the proceedings were interpreted to the appellant so that he could understand the nature of evidence against him.

15. It was therefore submitted that failure by the court to interpret the proceedings to the appellant in a language he understands amounts to miscarriage of justice and therefore this court was urged to invoke the provisions of Section 382 of the ***Criminal Procedure Code*** and reverse the conviction due to the omission by the court to interpret the proceedings of the two witnesses to the appellant which is highly prejudicial to him. In this respect, the appellant relied on the case of **Leskei vs. Republic [2006] 2 KLR 119** and submitted that that the appellant's trial was fraud in this case because of the reasons stated hereinabove and therefore urged this court to find that the conviction was unsafe and therefore allow the appeal and set aside the conviction and sentence.

16. On the part of the Respondent it was submitted by learned prosecution counsel, **Ms Mogoi**, that in its judgment, the trial court indicated that it declared PW2 a vulnerable witness based on her age and inability to testify. This however is not reflected on the typed proceedings. In view of the foregoing, the Court was invited to also refer to the handwritten proceedings when making its judgment to satisfy itself that the typed proceedings are a true reflection of the handwritten proceedings. Otherwise, it was submitted that it seems that the trial magistrate did not record everything. However, being the one who conducted the trial and wrote the judgment, he could re-call what transpired in court during the trial despite not recording it.

17. On the issue of age, it was submitted that the PW1 produced PW2's birth certificate that proved beyond any reasonable doubt that she was 4 years at the time of the commission of the offence having been born on 5th December, 2010. Regarding penetration, it was submitted that although PW2 could not finish her testimony of what transpired, it was the evidence PW1 that she heard PW2 crying and when she went to where she was, she found the Appellant dusting PW2. On interrogating PW2, she informed PW1 that the Appellant had called her to go buy her sweets but on the way, he removed her underpants, removed his, and he defiled her. It was the evidence of PW1 that she inspected PW2's underpants and it was wet. Her evidence on penetration was corroborated by the medical evidence by PW3 who testified that PW2 had blood stained dress, she had blood in her vagina and her hymen was freshly torn. From the medical evidence, it was submitted that it was clear that PW2 had been penetrated and the penetration was very recent.

18. On the issue whether the penetration was caused by the Appellant, it was submitted that PW1 found the Appellant with PW2 immediately she heard her cry. He was dusting her and when he saw PW1, he immediately left meaning that he was aware of what he had done and that he had been caught. PW1 interrogated PW2 immediately and she informed her that the Appellant had called her to go buy her sweets but had defiled her on the way. PW2 in her brief evidence, confirmed that on the day of the defilement, the Appellant called her to go buy sweets and she followed him. PW2's evidenced corroborated the evidence of PW1 as informed by PW2 after the interrogations.

19. PW1 in her testimony, stated that the Appellant was like her uncle hence he was someone known to her hence she could have not mistaken him with someone else. Further, when PW1 saw the Appellant with PW2, it was during broad daylight hence PW2 must have seen her assailant very well and identified him as the Appellant hence it was easy for her to tell PW1 who had called her and defiled her.

20. The defence by the Appellant, it was submitted, can be viewed as a mere denial that did not shake the prosecution's case. The prosecution's case was brief, straight to the point and leaves no doubt the PW2 was defiled by the Appellant.

21. In view of the foregoing, it was submitted that the Court duly analysed the evidence led by the Prosecution and Defence and was satisfied that it led to the irresistible conclusion that the Appellant did commit the offence hence convicted the Appellant. The decision of the Court was well reasoned and supported by evidence. Further, the prosecution's evidence was consistent, direct, clear and without any doubt whatsoever that the appellants committed the offence. Considering the age of PW2, it was submitted that the sentence meted is sufficient hence there is no need for this honourable court to interfere with the trial court's decision.

22. The Respondent therefore urged this Court to uphold the conviction of the Lower Court and confirm the sentence.

Determination

23. This is a first appellate court, as expected, this court is obliged to analyse and evaluate afresh all the evidence adduced before the lower court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See **Okeno vs. Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> **"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."**

24. Similarly, in **Kiilu & Another vs. Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

> **1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**
>
> **2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.**

25. Section 8 of the ***Sexual Offences Act*** provides as follows:

> ***8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.***
>
> ***(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.***
>
> ***(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.***
>
> ***(5) It is a defence to a charge under this section if -***
>
> ***(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and***
>
> ***(b) the accused reasonably believed that the child was over the age of eighteen years.***
>
> ***(6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.***
>
> ***(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children' s Act.***
>
> ***(8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.***

26. It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant. See the case of **Charles Wamukoya Karani vs. Republic, Criminal Appeal No. 72 of 2013,** where it was stated that:

> "**The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."**

27. In this case, PW1 testified that at the time of the incident, the complainant was 4 years old. This was proved by birth card. Accordingly, it was proved beyond reasonable doubt that the complainant was a child aged 4 years old at the time of the incident.

28. As regards penetration, section 2 of the ***Sexual Offences Act*** defines "penetration" as:

> ***the partial or complete insertion of the genital organs of a person into the genital organs of another person.***

29. In this case the only evidence of what happened between the appellant and the complainant was the complainant's evidence as narrated by PW1. According to PW1, when she heard PW2 cry, she went towards the cry and found the Appellant dusting the complainant off on the road. PW1 called PW2 and the Appellant left immediately he saw PW1. PW2 informed PW1 that she had been called by the Appellant to go buy sweets but on the way, the Appellant removed her underpants and his then penetrated her.

30. The word "penetration" is however a legal term. In sexual offences allegations particularly as regards the ingredient of penetration, the facts constituting penetration ought to be recorded in the exact words of the victim and legal terms such as "penetration" and "defilement" ought to be avoided. It is only when the act done by the accused is stated that the court can conclude that the facts constitute legal penetration. It is therefore unfortunate that the term recorded by the learned trial magistrate was a term of art rather than what actually took place. In these circumstances, it is clearly difficult to find that there was penetration as legally defined under section 2 of the ***Sexual Offences Act***.

31. However, the totality of the evidence reveals that there was contact with the complainant's genital organs despite the fact that the object of that contact cannot be determined from the evidence presented. This was clearly discernible from the evidence of PW1 as well as the medical evidence.

32. As regards identity of the offender, the appellant was found with the complainant. The two were closely related, the appellant being an uncle to the complainant. In those circumstances there was no possibility of mistaken identity. Accordingly, I find that the third ingredient of the offence was proved.

33. In this case however, the complainant was treated as a vulnerable witness. Article 50(7) of the Constitution which protects fair trial provides thus:

> ***In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with***

the court.

34. Section 31 of the ***Sexual Offences Act*** provides that:

(1) A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is -

(a) the alleged victim in the proceedings pending before the court;

(b) a child; or

(c) a person with mental disabilities.

(2) The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of -

a) age;

b) intellectual, psychological or physical impairment;

c) trauma;

d) cultural differences;

e) the possibility of intimidation;

f) race;

g) religion;

h) language;

i) the relationship of the witness to any party to the proceedings;

j) the nature of the subject matter of the evidence; or

k) any other factor the court considers relevant.

(3) The court may, if it is in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon an intermediary to appear before the court and advise the court on the vulnerability of such witness.

(4) Upon declaration of a witness as a vulnerable witness in terms this section, the court shall, subject to the provisions of subsection (5), direct that such witness be protected by one or more of the following measures -

(a) allowing such witness to give evidence under the protective cover of a witness protection box;

(b) directing that the witness shall give evidence through an intermediary;

(c) directing that the proceedings may not take place in open court;

(d) prohibiting the publication of the identity of the complainant or of the complainant's family, including the publication of information that may lead to the identification of the complainant or the complainant's family; or

(e) any other measure which the court deems just and appropriate.

(5) Once a court declares any person a vulnerable witness, the court shall direct that an intermediary referred to in subsection (3), be appointed in respect of such witness unless the interests of justice justify the non-appointment of an intermediary, in which case the court shall record the reasons for not appointing an intermediary.

(6) An intermediary referred to in subsection (3) shall be summoned to appear in court on a specified date, place and time to act as an intermediary and shall, upon failure to appear as directed, appear before the court to advance reasons for such failure, upon which the court may act as it deems fit.

(7) If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may -

a) convey the general purport of any question to the relevant witness;

b) inform the court at any time that the witness is fatigued or stressed; and

c) request the court for a recess.

(8) In determining which of the protective measures referred to in subsection (4) should be applied to a witness, the court shall have regard to all the circumstances of the case, including -

(a) any views expressed by the witness, but the court shall accord such views the weight it considers appropriate in view of the witness's age and maturity;

(b) any views expressed by a knowledgeable person who is acquainted with or has dealt with the witness;

(c) the need to protect the witness's dignity and safety and protect the witness from trauma; and

(d) the question whether the protective measures are likely to prevent the evidence given by the witness from being effectively tested by a party to the proceedings.

(9) The court may, on its own initiative or upon the request of the prosecution, at any time revoke or vary a direction given in terms of subsection (4), and the court shall, if such revocation or variation has been made on its own initiative, furnish reasons therefor at the time of the revocation or variation.

(10) A court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary.

(11) Any person, including a juristic person, who publishes any information in contravention of this section or contrary to any direction or authority under this section or who in any manner whatsoever reveals the identity of a witness in contravention of a direction under this section, is guilty of an offence and liable on conviction to imprisonment for a term of not less than three years or to a fine of not less than fifty thousand shillings or to both if the person in respect of whom the publication or revelation of identity was done is under the age of eighteen years and in any other case to imprisonment for a term of not less three years or to a fine of not less than two hundred thousand shillings or to both.

(12) Any juristic person convicted of any offence under this section shall be liable to a fine of one million shillings.

(13) An accused person in criminal proceedings involving the alleged commission of a sexual offence who has no legal representation shall put any questions to a vulnerable witness by stating the questions to the court and the court shall repeat the questions accurately to the witness.

35. The procedure for conducting proceedings through an intermediary was dealt with *in extenso* in **John Kinyua Nathan vs. Republic [2017] eKLR** where the Court of Appeal cited the decision in **M. M. vs. Republic [2014] eKLR** and expressed itself as hereunder:

"In this case, the High Court appears to propound the legal position that a child of tender years lacks capacity to testify and is thus not required to give evidence at all. With respect, this is erroneous. The error, in our view, arises from a misapplication of the decision of this Court (differently constituted) in *M. M. v. Republic [2014] eKLR* which we must re-examine *in extenso*. In that case, the child was aged 4 years and was, unlike this case, called to testify. However, the trial court stood her down after conducting the *voire dire* and making a finding that she was *"too tender and does not comprehend what she is being asked…..She cannot adduce any evidence."* There was, nevertheless, direct and independent evidence from the mother of the child who found the defiler lying on top of the child with his trousers down to his knees. There was also medical examination of the child a few hours later which confirmed she was defiled. That was sufficient evidence linking the appellant with the offence, even without the evidence of the infant. In the *MM case (supra)*, the Court, examined at length the existing provisions of the law relating to the testimony of children and other vulnerable groups through intermediaries and stated:

"The whole object of the proceedings through an intermediary is to achieve fairness in the determination of the rights of all the people involved in a trial and to promote the welfare of a child or vulnerable witness."

In the end the Court stated the law on intermediaries as follows:-

"It is clear from sections 31 (2) and 32 that, first and foremost it is the duty of the prosecution to ascertain the vulnerability of the witness and to apply to the court to make that declaration before appointing an intermediary. In addition, the court, as we have earlier observed, can on its own motion, through voire dire examination, declare a witness vulnerable and proceed to appoint an intermediary. Any witness (other than the one to be declared vulnerable) can likewise apply to the court for the declaration. The application must not be granted merely because the victim is young or too old or appears to be suffering from mental disorder. The court itself must be satisfied that the victim or the witness would be exposed to undue mental stress and suffering before an intermediary can be appointed. It is clear from what we have said so far that the procedure of appointing an intermediary precedes the testimony of the intended vulnerable witness even where the court does so suo motu. It is also clear that an intermediary can be an expert in a specified field or a person, who through experience, possesses special knowledge in an

area or a social worker, or a relative, a parent or a guardian of the witness.

The expertise, possession of special knowledge or relationship with the witness must be ascertained by the trial court through examination of the prospective intermediary before the court appoints him or her. It goes without saying, in view of that role, that an intermediary must subscribe to an appropriate oath ahead of the witness' testimony, undertaking to convey correctly and to the best of his/her ability the general purport of the evidence. The trial court must then give directions to delineate the extent of the intermediary's participation in the proceedings".

It was clear in the mind of the Court that the evidence presented by the intermediary to the court is that of the witness and not the intermediary's.

"The intermediary's role is to communicate to the witness the questions put to the witness and to communicate to the court the answers from the victim to the person asking the questions, and to explain such questions or answers, so far as necessary for them to be understood by the witness or person asking questions in a manner understandable to the victim, while at the same time according the victim protection from unfamiliar environment and hostile cross- examination; to monitor the witness' emotional and psychological state and concentration, and to alert the trial court of any difficulties".

For the above reasons, the Court concluded with the passage cited out of context by the High Court in this matter, thus:-

"From what we have said, we conclude that it was in error for the two courts below to treat the evidence of the complainant's mother as that of an intermediary, the steps leading to such appointment having not been followed. It was sufficient to rely on her direct evidence as an independent eye witness.

***Any requirement that insists on a child victim of defilement, irrespective of his or her age to testify in order to found a conviction would occasion serious miscarriage of justice. What fair hearing would a child victim aged six (6) months, like that in the case of Robinson Tole Mwakuyanda V. R. H. C. Cr. Appeal No. 227 of 2007, get if the courts were to insist on the evidence of such a child, who on account of his/her tender age cannot speak."* (Portion cited by the High Court emphasized)**

36. In agreeing with the decision in MM's case the court held that:

"There can be no argument about the stress child complainants in sexual offences suffer when they testify in courts where they are required to relive the horror of the crime in open court. At times they are subjected to the most brutal and humiliating treatment by being asked to relate the sordid details of the traumatic experiences that they had gone through. In many countries of the world including South Africa, this apparent treachery on the child has been mitigated by Constitutional, statutory, judicial and administrative reforms. See for example the South African Constitutional Court case of *Director of Public Prosecutions, Transvaal versus Minister For Justice and Constitutional Development & Others. Case CCT 36/08 [2009] ZACC 8*. Kenya is also progressively making efforts of her own through the Constitution, statutes and administrative reforms to project the paramountcy of the rights and interests of the child which are universal. Various legal enactments including the *CPC*, the Children *Act, the Witness Protection Act, the Victim Protection Act*, the *SOA* and the *Constitution* itself, attest to that effort. Nevertheless, the Kenyan child is still obligated to undergo the *voire dire* under *Section 19* of the *Oaths and Statutory Declarations Act* when called to testify to determine *whether the child understands the nature of an oath; or if the child, in the opinion of the court does not understand the nature of an oath, whether the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.* In either case the child is liable to cross examination. They must also appear before the court for determination of any issue on the appointment of an intermediary. In the case before us, the child was a necessary witness both in determining the third element of the offence as to whether the appellant was responsible, and also in determining whether she was a vulnerable witness and therefore needed an intermediary to speak on her behalf. No reason was given for the failure to call the complainant in this case and the trial court made no finding on that crucial aspect of the case. The High Court on its part, as already stated, misdirected itself. If PW2 was to be believed, the child was able to inform her about her injury and the person responsible and so, as argued by the appellant, she was capable of stating so to the court directly or through an intermediary. In the circumstances, the evidence of PW2 was at best hearsay as she was not the appointed intermediary. Only, part of her evidence was corroborated by medical evidence and findings thereon correctly made."

37. In this case, no *voir dire* examination was conducted. According to the record, the prosecution simply informed the court that the complainant was a young girl aged 4 years who may not be able to give evidence and based on that proceeded to apply that she be treated as a vulnerable witness. Without affording an opportunity to the appellant to be heard on that application, the court proceeded to rule that on account of her age, the complainant be treated as a vulnerable witness and directed that she testifies through an intermediary. That intermediary was however not appointed and the court directed that the mother proceeds to testify. In other words, as rightly noted by **Ms Mogoi**, there was no appointment of an intermediary. What followed therefore was not the testimony of the complainant through an intermediary but the testimony of the complainant's mother.

38. In the present case the evidence of PW1 did not meet the threshold of an intermediary. Her evidence was purely her own observation as well as what was relayed to her by the complainant outside the hearing of the court.

39. It is important for the courts to scrupulously adhere to the provisions relating to intermediaries since such provisions are an exception to the evidential rule that evidence be direct. The role of an intermediary must clearly be understood as one through whom the testimony of the victim is relayed as opposed to a person who testifies on own behalf as to what he heard or saw outside the court.

40. The appellant also took issue with the fairness of the trial. On 25th June, 2015, the prosecutor requested that the appellant be taken for

psychiatric evaluation. That seems to have been done since on 17th August, 2015, the court found that based on the findings of the doctor, though the appellant's condition was classified as chronic, it had not been determined that he was permanently insane. The court invoked the provisions of section 167(a) of the ***Criminal Procedure Code*** and proceeded to carry on with the hearing. The said provision provides as follows:

> ***(1) If the accused, though not insane, cannot be made to understand the proceedings -***
>
> ***(a) in cases tried by a subordinate court, the court shall proceed to hear the evidence, and, if at the close of the evidence for the prosecution, and, if the defence has been called upon, of any evidence for the defence, the court is of the opinion that the evidence which it has heard would not justify a conviction, it shall acquit and discharge the accused, but if the court is of the opinion that the evidence which it has heard would justify a conviction it shall order the accused to be detained during the President's pleasure; but every such order shall be subject to confirmation by the High Court.***

41. What I understand by this provision is that it applies where there is a determination that the accused, though not insane, cannot be made to understand the proceedings. In that event, if the evidence which it has heard would not justify a conviction, it shall acquit and discharge the accused. However, if the court is of the opinion that the evidence which it has heard would justify a conviction it shall order the accused to be detained during the President's pleasure; but every such order shall be subject to confirmation by the High Court. In this case, the court found that the evidence justified conviction but instead of ordering that the appellant be detained during the President's pleasure subject to confirmation by the High Court proceeded to sentence the appellant to life imprisonment. Obviously that sentence was unlawful.

42. Apart from the foregoing a look at the proceedings show that on 3rd September, 2015 when PW1 testified there was no indication that the said proceedings were interpreted to the appellant contrary to the previous proceedings. The same position seems to have repeated on 30 th August, 2016 when PW3 testified. Article 50(2)(m) of the Constitution provides that an accused person is entitled to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial.

43. In the absence of clear evidence of penetration as defined under section 2 of the ***Sexual Offences Act*** for the purposes of defilement, coupled with the failure to adhere to the provisions relating to vulnerability of witnesses as well as the unlawful sentence imposed on the appellant, not to mention the manner in which the proceedings were undertaken, the appellant's conviction cannot stand.

44. What is the course available to the Court in such circumstances? In other words, should the Court order a retrial or not? The Court of Appeal in the case of **Ahmed Sumar vs. R (1964) EALR 483** offered the following guidance:

> **"...in general a retrial 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 purposes 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;....."**

45. The Court of Appeal likewise had the following to say in the case of **Samuel Wahini Ngugi vs. R [2012] eKLR**: -

> **"The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:**
>
> **'It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered…In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person'**
>
> **That decision was echoed in the case of Lolimo Ekimat vs. R, Criminal Appeal No. 151 of 2004(unreported) when this Court stated as follows:**
>
> **'…the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it.'"**

46. In **Muiruri –vs- Republic (2003), KLR, 552** and **Mwangi –Vs- Republic (1983) KLR 522** and **Fatehali Maji vs. Republic (1966) EA, 343** the view expressed was that: -

> **"Although some factors may be considered, such as illegalities or defects in the original trial, the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether on a proper consideration of the admissible or potentially admissible evidence a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for a retrial should only be made where the interests of justice requires it."**

47. **Makhandia J.** (as he then was) in the case of **Issa Abdi Mohammed vs. Republic [2006] eKLR** opined that: -

> **"An order for retrial would have been most appropriate in the circumstances of this case. To do so however, in the circumstances of this case would cause irreparable prejudice to the appellant since the prosecution may have become wiser and would wish to plug the loopholes already alluded to in this judgment. In the result there is only one channel left to this court and that is to allow the appeal, quash the conviction and set aside the sentence. The appellant may be set at liberty forthwith unless otherwise held on a lawful warrant."**

48. Considering the "comedy of errors" that happened in the course of the appellant's trial through to his sentencing, I am of the view that it would be a miscarriage of justice to order a retrial.

49. Before penning off, it is my view that in order for justice to be done to victims of sexual offences, the Inspector General of the Kenya Police Service ought to ensure that each police station has at least one officer who is properly trained in forensic investigations in matters of that nature. This court has noted with concern that due to poor investigations in such matters, a number of those accused of such offences end up being acquitted not necessarily due to their innocence but due to poor investigations undertaken by those who investigate such matters.

50. Consequently, this appeal succeeds, the appellant's conviction is hereby set aside, his sentence quashed and he is set at liberty forthwith unless otherwise lawfully held.

51. I further direct that the Deputy Registrar transmits a copy of this decision to the Inspector General of National Police Service for his attention and necessary action.

52. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 3rd day of October, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Mr Musyimi for Mr Uvyu for the Appellant

Miss Mogoi for the Respondent

CA Geoffrey