REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 92 OF 2017

(CORAM: HON. R.E. ABURILI - J)

MICHAEL OKOTH OCHIENG……...…….……...….APPELLANT

VERSUS

REPUBLIC……...…..……RESPONDENT

(Being an Appeal against Judgment, conviction and sentence in Siaya Law Courts vide Siaya PMCR (SO) Case No. 4 of 2016 dated 5/10/2017 before Hon. T.M. Olando, SRM)

JUDGMENT

1. The Appellant herein **Michael Okoth Ochieng** was charged before Siaya PM's court with the offence of defilement of a child contrary to **Section 8(1) as read with Section 8(4) of the Sexual Offences Act**. He also faced the alternative charge of committing an indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act**. The Complainant was JAO (full name withheld aged 17 years).

2. The Appellant pleaded not guilty to both charges and the Prosecution called 5 witnesses to prove their case against the Appellant. The Appellant gave sworn testimony on being placed on his defence. He did not call any witness.

3. The trial court found that the prosecution had proved their case against the appellant beyond reasonable doubt, convicted him and after mitigation, sentenced him to serve 10 years imprisonment, which is a mandatory minimum sentence under **Section 9(4) of the Sexual Offences Act**. This was on 5/10/2017.

4. Dissatisfied with the judgment, conviction and sentenced imposed on him, appeals namely HCRA 96/2017 filed on 9/10/2017 which was within the first four days after the judgment and this Appeal No. 92/2017 which was filed on 06/10/2017 a day after the judgment. I am therefore obliged to consolidate the two appeals since they both relate to the same case and issues.

5. In the Petitions of Appeal, the appellant basically claims that the trial magistrate erred in law and fact by conducting the trial without adhering to **Article 50(j) of the Constitution**.

6. However, in his submissions canvassing the appeals, the Appellant challenges his conviction on account that the prosecution failed to call crucial witnesses to testify against him to prove the charge beyond reasonable doubt and secondly, that the medical evidence adduced did not support the charge of defilement.

7. The Appellant filed supplementary grounds of appeal on 18/1/2019 raising the above new grounds and adding that the evidence of prosecution witnesses hearsay.

8. The law requires that before determining the merits and demerits of an appeal of this nature, as a first Appellate Court, I must re-evaluate and reassess the evidence adduced before the trial court and arrive at my own independent conclusion bearing in mind that I neither saw nor heard the witnesses as they testified hence I shall not comment on their demeanor which I did not observe unlike the trial court.

9. This appeal was opposed by the Respondent represented by Miss Makokha Prosecution counsel on the ground that the three main ingredients of the offence of defilement were proved by the prosecution. She urged the court to dismiss the appellant's appeal.

10. This judgement was expected to be delivered on 21/5/2019 but the court was heavily engaged in judgment writing in three Judge Bench Constitutional Petitions.

11. I would have delved into the business of revisiting the evidence adduced before the trial court and reassessing it as required by the decision in ***Okeno Vs. Republic***. However, something peculiar caught my attention and so I must discuss it.

12. The evidence of PW1 JAO was taken on 3/4/2017. I have confirmed from the handwritten proceedings and the typed proceedings. The trial was conducted before Hon. T.M. Olando, SRM. However, there is nothing on record to show whether PW1 was sworn, affirmed or whether she gave unsworn evidence. In addition, no *voire dire* examination was conducted on her by the trial court to determine whether she was intelligent enough to understand the proceedings or take oath or to tell the truth.

13. Whereas failure to conduct *voire dire* examination particularly on a child who is not a child of tender years *perse* may not be fatal to the prosecution's case, but the record must clearly indicate whether the child gave sworn or unsworn evidence or was affirmed.

14. In the instant case, the trial record is silent on whether PW1 gave sworn or unsworn evidence or was affirmed, no voire dire examination was conducted on her.

15. In all the criminal trials, the mandatory provisions of **Section 151 of the Criminal Procedure Code** requires that all witnesses be examined on oath. The only exemption is where a witness is child who cannot understand the meaning of an oath or where a person is affirmed because of their faith or belief.

16. In my humble view, the trial court's error of omission in failing to state whether PW1 gave evidence on oath or whether she was affirmed or whether she gave unsworn evidence was a fatal omission which vitiated the proceedings in the lower court.

17. Having found so, I find no reason to determine the merits or demerits of this appeal save to justify my finding above in the succeeding paragraphs.

18. **Section 151 of the Criminal Procedure Code** provides: -

> ***"Every witness in a criminal cause shall be examined upon oath and the court before which any witness shall appear shall have full power and authority to administer the usual oath."***

19. In addition, **Section 15 of the Oaths and Statutory Declarations Act Cap 15 Laws of Kenya** provides for affirmation of persons who object to the taking of an oath; whereas **Section 16** of the same Act sets out the form of affirmation to be administered.

20. Authors of **Archbold, Criminal Pleadings, Evidence and Practice, 2002** state: -

> ***"The general common law rule is that the testimony of a witness to be examined viva voce in a criminal trial is not admissible unless he had previously been sworn to speak the truth.***
>
> ***……this general common law rule is subject to important exceptions (post. 55 8 - 31 et seq.) The witness must be sworn in open court."***

21. In Kenya, the only exception to this rule is with regard to the evidence of children of tender years, who do not understand the nature of an Oath, as stipulated in **Section 19 of the Oaths and Statutory Declarations Act**. It is therefore follows that generally, the testimony given in criminal cases must always be either under oath or affirmation.

22. In this case, the trial court record indicates that all the other prosecution witnesses PW2 - PW5 were duly sworn. It is however silent as to the swearing or affirmation of the key witnesse who is PW1 the victim of the alleged crime.

23. On 7.2.2017, the Court of Appeal per Alnashir Visram, W. Karanja and M. Koome, JJA (Mombasa) held as follows in ***CRA 14/2018 John Kariuki Gikonyo Vs. R [2019]eKLR*** concerning a criminal trial where the evidence of PW2 was not taken on oath and the effect of such evidence in a criminal trial.

> ***"....As rightly submitted by counsel for the appellant, the consequences of testimony given without oath or affirmation are dire, as the defect in turn impacts on the legality of the conviction (Samuel Muriithi case supra). The learned first appellate Judge erred in failing to address this issue even though the same was raised before her. What is the way forward? As per Phipson on Evidence (15th Edition) at page 159, where a witness has given testimony without oath or affirmation, the defect is curable by recalling the witness and administrating the oath or affirmation or then asking him/her to ratify his previous testimony. However, where the trial has already been concluded as is the case herein, the recourse left is either an acquittal or a retrial, depending on the circumstances of the case."***

24. The Court of Appeal then agonised whether or not to order for a retrial, applying the principles espoused in ***Ahmedi Ali Dharamsi Sumar Vs. R ([1964] EA 481 and Fatenah Manji Vs. R [1966] EA 343*** and held that the failure to swear or affirm PW2 was a mistake by the trial court and that the Prosecution had nothing to do with it. Unfortunately, counsel for the prosecution did not address the court on whether the witnesses would be available to testify if a retrial was ordered six years after the offence was committed in December 2012. The court held: -

> ***"Witnesses charge their addresses, although perhaps the formal witnesses were police officers, we have no information of whether they are in service or whether the documents produced as exhibits are available. With these reservations in mind, we are also conscious that a retrial should not prejudice the appellant who has served a number of years in prison. The benefit of the question that was not answered on whether he would be prejudiced by a retrial goes to the appellant.***

The appeal herein is hereby allowed, we quash the conviction and set aside the sentence of death."

25. A reading of the above judgment from the Court of Appeal reveals that the court was compelled to determine the issue of the effect of failure by the trial court to administer an oath or to affirm the star witness and leave out the merit issues on account that it would be futile to re-evaluate the evidence before the trial court as that would revolve around PW2's testimony which was a *nullity ab initio* as it was not taken on oath or on affirmation.

26. Having considered the above legal position and considering that the trial in this case took place two years ago with no indication whether the prosecution would be in a position to locate and recall all the prosecution witnesses including PW1 who was the key witness to testify in a retrial if ordered, and having found that the evidence of PW1 was a nullity as it was not taken under any oath or affirmation or even a voire dire examination carried out on her, I am of the view that it is not be in the interest of justice to order for a retrial of the appellant.

27. In ***Fatenah Manji Vs. R*** *(supra)* the Court of Appeal of Eastern Africa held:-

> ***"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 purpose of enabling the prosecution to fill the 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 own facts and circumstances and an order for retrial should only be made where the interest of justice require it."[emphasis added].***

28. In this case, the failure to swear PW1 was a mistake by the trial court and the prosecution had nothing to do with it but the prosecution did not even take the trouble to see this defect as the Appellant was unrepresented hence he had no legal information on the requirement.

29. As earlier stated, I do not find it appropriate to order for a retrial of an Appellant who has already served 2 years in jail, of the 10 years imprisonment meted out and in a trial which commenced in 2016.

30. Accordingly, the appeal herein is hereby allowed, on the ground of mistrial as PW1 was not sworn. The conviction of the Appellant Michael Okoth Ochieng is hereby quashed and the sentence of 10 years imprisonment meted out on him is set aside. Unless otherwise lawfully held, he is set at liberty.

31. This judgment accordingly determines HCRA 92/2017 and HCRA 96/2017. The two files as consolidated herein are hereby closed.

Dated, signed and Delivered at Siaya, this 22nd Day of October 2019.

R.E. ABURILI

JUDGE

In the Presence of:

Mr. Namasake, for State

The Appellant, Michael Okoth Ochieng in person

Court Assistants: Brenda and Modestar