REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT KISUMU

(CORAM: WAKI, NAMBUYE & OKWENGU, JJA

CRIMINAL APPEAL NO. 66 OF 2015

BETWEEN

NAHASHON OTIENO ODHIAMBO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(*Appeal from the Judgment of the High Court of Kenya at Migori (**Majanja D.S, J.**) dated 24th October, 2014

in

Migori H.C.RA. No. 27 of 2014)

****

JUDGEMENT OF THE COURT

This is a second appeal arising from the judgment of the High Court of Kenya at Migori in Criminal Appeal Number 27 of 2014 (**Majanja D.S, J.)** dated 24th October, 2014.

The background to the appeal is that, the appellant was charged before the Senior Principal Magistrate's court at Migori in Criminal Case Number 204 of 2012 with the offence of defilement contrary to Sections 8(1) and (2) of the Sexual Offences Act, 2006 (SOA). The particulars of the offence were that, on the 2nd day of April 2012, within Migori County in the Republic of Kenya, the appellant intentionally and unlawfully caused his penis to penetrate the Vagina of J.A., a child aged 5 years. In the alternative, that on the same date and place, he intentionally and unlawfully touched the vagina of **J.A.**, a child aged 5 years with his penis. The appellant denied the offence prompting a trial in which the prosecution tendered evidence through four (4) witnesses to prove the charge, while the appellant who gave unsworn evidence was the sole witness for his defence.

The brief facts of the appeal are that **CAH** (**PW2),** the mother of the complainant, came home and found her daughter J.A (the child) crying and in pain. The child informed her that the appellant had defiled her. PW2 upon inspecting the child's genitals discovered a whitish discharge. She took the child to the area dispensary and then to Migori District Hospital.

A**ndrew Were (PW3),** a Clinical Officer at Migori District Hospital examined both the appellant and the child. On the child, he observed a tender lower abdomen. A vaginal examination on the child revealed evidence of lacerations on the child's private parts and seminal fluid. On the basis of those findings PW3 concluded that there was defilement. Upon examination of the appellant by squeezing his genitals, he noted presence of seminal fluid. A report was made to Migori Police Station, where it was received by Corporal **Rhoda Chepkemboi** PW4. Upon investigation, the area chief arrested the appellant, and handed him over to Migori Police Station. He was subsequently charged with the offences he faced at the trial.

The appellant gave unsworn evidence in his defence stating that the offence was fabricated against him because of making demands for wages not paid for work done.

At the conclusion of the trial, the trial Magistrate assessed and analyzed the record and rendered himself as follows:

"This court noted that the child was quite afraid and was of quite tender years that in my opinion was not capable of taking an oath or being of sufficient intelligence to fathom the nature of the proceedings. Nonetheless, she did state that the accused person "did bad things to her." I was able to comprehend she meant she was defiled.

I did not give the accused person the chance to cross examine her because, I noticed she was frightened and its unfortunate she had to face him. I therefore considered her a vulnerable witness.

Her mother PW2, produced the health card for the girl and it indicated the child was born on xxx. She noted the child was in pain and observed a white discharge and blood oozing from the child's vagina. The medical record indicated that the child had been defiled. Further the medical report conducted on the accused person revealed seminal fluid.

In order to secure a conviction in such a case, the evidence of the complainant must be corroborated. This has been done from the evidence adduced by the child's mother and the medical reports for both the complainant and the accused person. This evidence was credible and full proof. It raised no doubt that an offence had been committed. The accused person never challenged it at all.

The accused person merely denied committing the offence, he never put up a credible defence to the allegations.

The prosecution has established this case beyond reasonable doubt. Accordingly, I convict the accused person under section 215 CPC."

Being aggrieved, the appellant appealed to the High Court raising various grounds. At the conclusion of the hearing of the appeal, the first appellate court Judge reminded himself of the role of a first appellate court as enunciated in the case of **Okeno versus Republic [1972] EA32,** namely to review the facts and evidence and come to own conclusion on the matter bearing in mind that it neither saw nor heard the witnesses testify. The Judge then made observations that the minor discrepancy in the framing of the charge was not only inconsequential, but also curable under **section 382** of the CPC as read in conjunction with **section 134** of the CPC, especially when there was no demonstration that any miscarriage of justice had been occasioned on the appellant.

On the evidence tendered on the record, the Judge made observations thereon that the child identified the appellant as the person who "**did bad things to her**". She also identified him to PW2 who also knew him very well as he worked for a relative. In the Judge's view, all that evidence pointed to the appellant as the perpetrator of the defilement against the minor.

On penetration which is a core element in the proof of the offence of defilement, the Judge made findings that this had been proved beyond reasonable doubt by the testimony of PW1 the minor, PW2 the child's mother who found the child in pain and upon examining her found injuries on the child's private parts and presence of a whitish discharge from the child's private parts. Also that the fact that the child was in pain when PW2 found her was additional proof that the child had been defiled. Lastly, that medical evidence was additional proof that the child had been defiled. The Judge then weighed the appellant's defence against the evidence assessed above and affirmed the trial court's finding that it was wanting and also rejected it as baseless and on that account affirmed the trial court's finding that there was sufficient evidence to prove that it was the appellant who had defiled the child.

On proof of age, the Judge relied on the evidence of PW2 that the child was five years old, a position which according to the Judge was supported by the child's clinic card and medical age assessment through the testimony of PW3 the clinical officer. Also considered was the fact that the child was in nursery school which according to the Judge meant that she was below 11 years which fell within the age bracket for the offence charged.

Turning to the mode of receipt of the evidence of the minor, the Judge took into consideration **section 19** of the oaths and statutory Declarations Act Chapter 15 of the Laws of Kenya, as construed and applied by the Court in **Johnson Muiruri versus Republic [1983] KLR 445**, and **Mohamed versus Republic [2005] 2KLR 138.** Applying that threshhold to the evidence on record before him which indicated clearly that the appellant had been precluded from cross examining the child, the Judge stated as follows:

"17. According to the record the learned magistrate acceded to the suggestion by the prosecutor to stand down the witness on ground that she was not capable of being cross-examined. The learned magistrate acceded to this request without giving an opportunity to the appellant to respond. Furthermore, the appellant was not given an opportunity to cross-examine or put questions to the witness. Article 50(2) (K) of the Constitution protects the right of every accused to challenge evidence given against him. Even where the victim is young or vulnerable, the right to challenge evidence through cross-examination should not be denied. The accused should always be given an opportunity to put forth his questions. It is for the court to provide sufficient safeguards to the vulnerable witness under section 31 of the Sexual Offences Act by for example asking the questions through an intermediary. Article 50(7) of the Constitution likewise provides that, "*In the interests of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.*

18. In the present case neither the learned magistrate nor the prosecutor directed their minds to the appointment of an intermediary. As a result, the appellant was denied the chance to put forth his questions to the child. Was there a miscarriage of justice in this case. In MM V. Republic CA NRB Crim. App. No. 41 of 2003 [2014] eKLR, the Court of Appeal considered such a position and stated as follows:

> ***"****Turning to the appeal before us, we reiterate that the victim did not herself testify due to her tender years. In cases like this where the victim is too young to give evidence, section 33 of the Sexual Offences Act allows the trial Court to rely on either the evidence of the surrounding circumstances, or under section 31(4), to give evidence through an intermediary or both.*

In the absence of the complainant's testimony, there was independent evidence of the complainant's mother, that of the father and the clinical officer that linked the appellant to the defilement of the complainant. 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"

The above observations notwithstanding, the Judge ruled that no miscarriage of justice was occasioned to the appellant by the failure of the trial court to follow the above procedure and on that account dismissed the appeal and affirmed both the conviction and sentence meted out against the appellant.

Undeterred, the appellant is now before this Court on a second appeal raising four home grown grounds of appeal in a memorandum of appeal filed on 28th May 2019. These may be paraphrased as follows: *that the learned Judge of the Superior Court failed to properly analize the evidence on the record before dismissing his appeal on a charge that did not accord with the evidence on record; that both the two courts below failed in law to consider the safeguards to vulnerable witnesses under* ***sections 31*** *of the SOA No. 3 of 2006 as read with* ***section 19*** *of Cap 15 Laws of Kenya; that the two courts below failed to observe his fundamental rights under* ***Article 50(2) (k)*** *of the Constitution; and lastly, that the two courts below also failed to appreciate that in terms of* ***sections 33 & 36*** *of the SOA medical evidence was insufficient to link the appellant to the commission of the offence he faced at the trial.*

The appellant argued his appeal by way of written submissions that he filed in person and fully adopted. In response, **Mr. L.K. Sirtuy**, the learned Public Prosecution counsel (P.P.C.) highlighted written submissions that were filed on behalf of the State.

In support of the appeal, the appellant submitted that the OB number in the charge sheet was indicated as OB No. 51/2/4/2012 while the P3 form indicated the OB Number as 50/2/4/2012. According to the appellant, the two courts below failed to reconcile this discrepancy and on that basis he urged us to find that the P3 form was not genuine hence the conviction was unsafe. The appellant also urged us to fault the Judge of the first appellate court in failing to find that the trial court's failure to appoint an intermediary to facilitate appellant's cross examination of PW1, occasioned an injustice to the appellant warranting an acquittal. It was also the appellant's argument that both courts below failed to appreciate that the medical report did not indicate *inter alia* details of whether the victim was admitted in hospital and the duration of time that lapsed before the victim accessed medical assistance. In the appellant's view, this was fatal to the prosecution case.

In opposition to the appeal, the learned P.P.C, **L.K Sirtuy** submitted very briefly that the High Court rightly held that there was no miscarriage of justice in the failure of the appellant to cross examine PW 1 as there was sufficient independent evidence to support the conviction. On that account, he urged that we confirm the appellant's conviction and sentence.

This is a second appeal and by dint of the provision of ***Section 361*** of the ***Criminal Procedure Code,*** only points of law fall for our consideration. See also ***Chemangong -vs- R. [1984] KLR 611***. In ***Karingo -vs- R. (1982) KLR 213 at p. 219*** this Court said:-

> ***"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja -vs- R. (1956) 17 EACA 146)".***

We have considered the record, and the rival submissions of the respective parties in light of the above mandate. Only three issues fall for our determination namely;

1. Whether the High Court discharged its mandate judiciously.

2. Whether the Superior Court erred in failing to set aside the conviction based on the fact that an intermediary was not appointed for purposes of facilitating cross examination of PW1 by the appellant.

3. Whether the medical report is inconclusive

On the first issue, it is now trite that a first appeal always proceeds by way of a re-hearing based on the evidence on record. An appellant is therefore entitled to expect that the first appellate court will go beyond a mere rehashing of what is on record or a repetition of the findings of the trial court. It is required and must be evident on the record that the first appellate court consciously and deliberately subjected the entire evidence to thorough scrutiny so as to arrive at its own independent conclusions on the factual issues in contention, and to determine on its own, the guilt or otherwise of the appellant taking into account that it has not had the advantage, enjoyed by the trial court, of seeing, observing and assessing the witnesses as demeanor of they testified.

See ***PANDYA vs. REPUBLIC [1957] EA 336.***

We have examined the charge sheet and the P3 form. We find substance in the observation made by the appellant with regard to the existence of a discrepancy in the OB numbers as reflected in the charge sheet and the P3, as OB/NO.51/2/4/2012, and OB No. 50/2/4/2012 respectively. However, this in our view, is no more than a typographical error as the totality of the evidence shows without a reasonable doubt that both the charge sheet and the P3 form relate to the same incident that led to the prosecution resulting in this appeal. Although we appreciate and agree with the appellant's assertions that the two courts below did not address their minds to the above discrepancy, we find that the discrepancy is inconsequential and not prejudicial to the appellant and therefore curable under **section 382** of the CPC. We therefore reject that ground.

On the issue of failure by the first appellate court to set aside the conviction based on the trial court's failure to appoint an intermediary for purposes of facilitating appellant's cross examination of PW1, the Judge's observations are as already highlighted above.

The use of an intermediary in evidence in trials involving sexual offences was introduced through the enactment of the Sexual Offences Act, 2006 and extended to other trials through **Article 50 (7)** of the Constitution of Kenya, 2010 which stipulates as follows:-

> ***"(7) In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court."***

According to **section 2** of the Sexual Offences Act, an intermediary is defined to mean *inter alia*, a person who gives evidence on behalf of a vulnerable witness.

Section 31 (1) provides *inter alia* that:-

> ***"A court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary."***

The role and place of an intermediary was explained by the Court in **M M V Republic NRB Criminal Appeal No. 41 of 2013 (2014) eKLR** as follows:

> ***"Is an intermediary the mouth piece of the vulnerable witness or is he or she the witness? According to section 2 of the Sexual Offences Act, an intermediary is defined to mean among other things, a person who gives evidence on behalf of a vulnerable witness.***
>
> ***Section 31(1) provides inter alia that:-***
>
> ***A court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary.***
>
> ***We have seen that in Article 50(7) of the constitution an intermediary is a medium through which the accused person or complainant communicates with the court. In our understanding, the evidence to be presented is not that of the intermediary himself or herself but that of the witness relayed to court through the intermediary. 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.***
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> ***The key word in sub section 7 is emphasized as shown below to demonstrate the place of the intermediary's evidence.***
>
> ***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.***
>
> ***The word "through" is used also in subsection 4(b) in describing the protection of the witness by providing an intermediary through whom his evidence is relayed. It is the witness who gives the evidence which is explained, communicated to the court and the reverse through an intermediary in the manner and style developed between the two.***

The question we have to ask ourselves is whether a miscarriage of justice was occasioned to the appellant by the failure of the two courts below to appreciate firstly, the need for proper *voir dire* to be carried out by the court on the minor; and secondly, the need to avail an intermediary to facilitate appellant's cross-examination of the minor. When similarly confronted, the court **in DWM versus Republic [2016] eKLR** had this to say:

> ***"[11] The need for the administration of voir dire on minor witnesses before reception of their testimonies especially in criminal trials is entrenched in section 19 of the Oaths and Statutory Declaration Act Cap 15 laws of Kenya. This provision does not of itself provide for the format to be applied in the course of such administration. The format used has basically evolved through case law. In Sula versus Uganda [2001] 2EA 556 the Supreme Court of Uganda approved two formats. The first one is where the trial court can write down the questions put to the witness and the answer of the witness in the first person in the words spoken by the witness in a dialogue form and then make its conclusion after the dialogue. In the second format the court may omit to record the questions put to the witness but record the answers verbatim in the first person and then make his conclusion thereafter."***

In light of the above, It is our finding that the trial Court's failure to indicate the questions put to the child and the responses the child gave to

those questions before the trial court arrived at the conclusion that the child was incapable of giving evidence on oath was not fatal. We therefore affirm the two courts' concurrent findings that the child was not in a position to understand the obligation to speak the truth, and was therefore rightly excluded from giving sworn evidence.

As for the failure to accord the appellant an opportunity to cross-examine the minor, the correct position which ought to have been taken by the two courts below is the position taken in **Nicholas Mutula Wambua & Another versus Republic Mombasa Criminal Appeal No. 373 of 2006 (UR),** in which the Court when confronted with a similar issue construed section 208 and 302 of the Criminal Procedure Code governing trials in the subordinate courts and the High Court respectively, and arrived at the conclusion that cross-examination of a witness who had given evidence not on oath is permitted by law, for purposes of testing the veracity of such child's evidence. Of more importance, the right to cross examine a witness is part of the constitutional right to a fair trial given to an accused person under **Article 50(2) (K)**, that gives an accused the right to adduce and challenge evidence. In light of the above, we find that the 1st appellate court fell into error when it failed to fault the trial court's failure to allow the appellant to cross examine the minor.

Turning to the issue of an intermediary, it is also our finding that the first appellate court fell into error when upon correctly laying out the correct constitutional and statutory position in law with regard to the role of an intermediary where a vulnerable witness is required to give evidence and the right of an accused to cross examine such witness, failed to vitiate the process adopted by the trial court in failing to observe the required process. We therefore agree with the appellant's contention that there was miscarriage of justice occasioned to him by the failure to accord him a constitutionally entrenched right to put questions to the child witness who was found incapable of giving evidence on oath.

Having arrived at the above conclusion, it is imperative for us to make orders for ends of justice to be met to both parties. This calls for consideration as to the appropriate order to make to balance the scales of justice. In this regard we have considered whether to order a retrial or acquittal of the appellant.

In **Bernard Lolimo Ekimat Vs. R. Criminal Appeal No. 151 of 2004** the court stated:-

> ***"There are many decision on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it."***

See also **Muiruri Vs. R. [2003] KLR 552** wherein, the Court at page 556 observed as follows:

> ***"Generally whether a trial should be ordered or not must depend on the particular facts and circumstances of each case. It will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial (see Zededkiah Ojoundo Manyala Vs. R. Criminal Appeal No. 57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution's making or the court's."***

Applying the above threshhold to the circumstances in this appeal, it is our considered opinion that the ends of justice herein demand that ordering a retrial would not serve the ends of justice considering the fact that the child was of very tender years when the defilement was committed on her. Secondly, there is the possibility of the child suffering psychological trauma by reliving the incident. Thirdly, there is nothing on the record to suggest that the witnesses who testified in court at the trial will easily be accessed by the prosecution to facilitate a speedy trial. Fourthly, appellant who was arrested on 3rd April, 2012 has been incarcerated for seven (7) years and almost four (4) months to the hearing of his appeal, which we consider sufficient punishment for wrongs committed against an innocent vulnerable child.

In the result, we find merit in the appeal. We accordingly allow the same, set aside the conviction and sentence affirmed by the High Court and substitute thereto an order directing that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and Delivered at Kisumu this 7th day of October, 2019.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH M. OKWENGU

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.