REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 13 OF 2016.

BETWEEN

P M K.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the

Chief magistrate's Court at Makadara Cr. Case No. 6042 of 2013

delivered by Hon. L.C. Kosgei, R.M on 8th May, 2015).

JUDGMENT

Background.

1. P M K was charged with the offence of incest by a male person contrary to **Section 20(1) of the Sexual Offences Act**. The particulars of the offence were that on the 16th and 17th December, 2013 at Kayole Estate in Nairobi within Nairobi County, intentionally and unlawfully committed an act which caused his penis to penetrate into the vagina of MWM a child aged 6 years, who to his knowledge was his daughter. He was charged alternatively with committing an indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act** in that he unlawfully and intentionally touched the vagina of MWM a child aged 6 years with his penis.

2. The Appellant was found guilty of the main charge and sentenced to life imprisonment. He has preferred the instant appeal against both the conviction and sentence. He set out his grounds of appeal in an addendum to his written submissions. They are that the prosecution evidence was untenable, unworthy, contradictory, inconsistent and incapable of passing the test of credibility, that the *voire dire* examination was improperly conducted, that the life sentence was harsh in the circumstances of the case, that his right to legal representation was violated, that **Section 200(3) of the Criminal Procedure Code** was not complied with and finally that his defence was not considered.

Submissions

3. The Appellant's written submissions were filed on 7th March, 2018. It was his submission that the prosecution did not prove a key element of the offence of defilement namely penetration. He submitted that although the complainant testified that she was defiled on the night of 16th and 17th December, 2013, when she was attended to by a clinical officer at MSF Mathare on 18th December, 2013 no physical injuries were observed on her external genitalia and her hymen was intact and anus normal. He submitted that this evidence was inconsistent with penetration. He submitted that her evidence needed corroboration by medical evidence failure to which it lacked the relevant weight. He submitted that given the evidence of the initial attending physician any consequent evidence relating to penetration was void and called into question the evidence of PW5 who filled the P3 form who formed an opinion that there was penetration. He submitted that the inconsistency in the medical evidence should be accorded to his benefit.

4. He submitted that an improper *voire dire* examination was conducted on the minor before she could testify. He submitted that it was clear that PW1 did not understand the nature, meaning and purpose of an oath and she was therefore unqualified to testify on oath. That by failing to conduct a satisfactory and complete *voire dire* examination the court chucked its duty to ascertain whether she had sufficient intelligence to justify the reception of her evidence. Further, that the trial magistrate had misinterpreted the provisions of **Section 20(1) of the Sexual Offences Act** when she found that the penalty for the offence was compulsory thus abdicating her discretion in sentencing.

5. The Appellant also submitted that his right to a fair trial was violated when the prosecution failed to provide him with witness statements. He submitted that although an order was made for the prosecution to supply him with the statements the court did not follow up to confirm that the same had been supplied. He submitted that this violated **Article 50(2)(j) of the Constitution**.

6. He then submitted that he represented himself during the trial while the victim was represented by the State as well as one Ms. Farah. He submitted that in view of the seriousness of the offence he was entitled to legal representation at State expense.

7. His final submission was that **Section 200(3) of the Criminal Procedure Code** was not complied with by the succeeding magistrate, Hon Kosgei who heard the evidence after the testimony of PW4. Amongst the cases he cited to buttress the submissions were **David Ochieng Aketch *v.* Republic[2015]eKL R, Omari Ismael Mazzha *V.* Republic[2017] eKLR, Johnson Muiruri *v.* Republic [1983] KLR, MK *v.* Republic [2015] eKLR, Tomas Patrick Gilbert Cholmondeley *v.* Republic [2008] eKLR** and **Dominic Kamau Macharia *v.* Republic [2014] eKLR.**

8. Learned State Counsel, Ms. Sigei for the Respondent opposed the appeal. She submitted that penetration was proved by PW5, Dr. Shako who examined the complainant on 30th December, 2013 and noted a notch in the hymen at 2 o'clock. That this corroborated the evidence of the child that she had been defiled. She submitted that PW2, a clinical officer at MSF, also corroborated penetration as he found when he examined her on 18th December, 2013 that her vagina was moist and concluded that it was a case of sexual assault. Further, that that the age of the child was established by PW5 who assessed it at ten years. On identification of the Appellant, she submitted that the relationship between the Appellant and complainant was confirmed as the complainant testified that the Appellant was her father, a fact he did not dispute. She submitted that the Appellant's defence was a mere denial.

9. With regard to whether a *voire dire* examination was properly conducted, she submitted that the examination carried out was proper.

10. Regarding the failure to supply the Appellant with witness statements he submitted that the Appellant proceeded with the trial without complaining which meant that he was supplied with the statements.

11. She submitted that **Section 200(3) of the Criminal Procedure Code** was not violated as the entire trial was conducted by one magistrate, Hon. A. Macharia, RM and Hon. Kosgei only wrote the judgment. She submitted that in the circumstances hearing the case *de novo* was not warranted.

12. With regard to the sentence she submitted that **Section 20(1) of the Sexual Offences Act** prescribed a mandatory sentence. She concluded by stating that the appeal lacked merit and urged the court to dismiss it.

13. In reply, the Appellant submitted that it was not true that Hon. Kosgei only wrote the judgment as he had taken the evidence of three witnesses and that she failed to comply with Section 200(3) of the Criminal Procedure Code.

Determination

14. Before I settle to reevaluate the evidence on record, it is important that I first address the legal issues raised by the Appellant. These are whether **Section 200(3) of the Criminal Procedure Code** was violated, whether the Appellant's right to a fair trial was infringed and whether the *voire dire* examination accorded with Section 19 of the Oaths and Statutory Declarations Act.

15.**Section 200(3) of the Criminal Procedure Code** sets out the procedure to be followed when a magistrate takes over a matter that was previously heard, and evidence recorded, by a previous magistrate. It requires the trial magistrate to inform the accused of his right to elect to have any witnesses who already testified resummoned and reheard. The Appellant submitted that this requirement was not complied with by the succeeding magistrate.

16. The typed proceedings show that the evidence of PW1 taken on 7th July, 2014 was recorded by Hon. A. Macharia, RM while the rest of the prosecution evidence was taken by Hon. L.C. Kosgei, RM. A perusal of the handwritten record however indicates that all the evidence was taken down by one magistrate as is easily deducible from the attesting signature as required by **Section 197(1)(a) of the Criminal Procedure Code**. The handwriting is also similar throughout the trial and was recorded by Hon. Kosgei and not Hon. A. Macharia. This therefore points to an error in the Coram in the file which is technical in nature and curable under Section 382 of the Criminal Procedure Code. This ground of appeal accordingly fails.

17. The Appellant contended that his right to a fair trial was violated. He urges this ground on two limbs, that; he was not supplied with witness statements as required by **Article 50(2)(j)** and that he did not receive legal representation as provided by **Article 50(2)(h) of the Constitution**. With regard to the first limb the record shows that he applied for witness statements on 20th March, 2014. The court ordered that photocopies of the statements be done at the court. When the matter next came up on 3rd April, 2014 the court ordered that the witness statements be issue at the Appellant's cost. The witness statements were again in issue when the matter came up on 11th April, 2014 and 17th April, 2014 with the court adjourning the matter on the latter date notwithstanding the presence of two witnesses. This was the last time that the issue of the witness statements was raised.

18. The fact that an advocate came on record for the Appellant on 7th May, 2014 and never raised the issue of the witness statements is a clear indicator that the same were supplied. This is compounded by the fact that the Appellant ably cross examined the witnesses which points to advance knowledge of the evidence the prosecution wished to rely upon.

19. With regard to the right to legal representation the court finds guidance in the Supreme Court's interpretation of **Article 50(2)(h)** in **Republic v. Karisa Chengo & 2 others[2017] eKLR.** At para 88, the court expressed itself thus:

> ***"...the right to legal representation at state expense, under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more. We must however emphasize the fact that in accordance with the language of the Constitution, this particular right is not open ended. It only becomes available "if substantial injustice would otherwise result".***

20. The court went ahead to define what constitutes "substantial injustice" at paragraph 94, viz.:

> ***"…,it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the Legal Aid Act, various other factors which include:***
>
> *i.* ***the seriousness of the offence;***
>
> *ii.* ***the severity of the sentence;***
>
> *iii.* ***the ability of the accused person to pay for his own legal representation;***
>
> *iv.* ***whether the accused is a minor;***
>
> *v.* ***the literacy of the accused;***
>
> *vi.* ***the complexity of the charge against the accused;"***

21. It must be noted that the Supreme Court did find that legal representation at the State's expense was not as of right but subject to the criteria above and the guidelines set out in the Legal Aid Act. It is also trite that an application for admission to legal aid is to be undertaken before the trial court and in accordance with the guidelines the court will decide if the Appellant is an ideal subject to be admitted to legal aid. A perusal of the record attests that the Appellant did not apply for the legal aid and he cannot therefore at this point in time claim that his right legal representation was violated. Be that as it may, as indicated above, on 7th May, 2014 the Appellant was represented by Mr. Cohe advocate. It is not clear what transpired thereafter as the advocate did not continue with representation. The Appellant did not inform the court that he would continue with the case without legal representation. I do also accordingly find this ground of appeal unmerited.

22. The next issue relates to the Appellant's assertion that the *voire dire* examination was not properly conducted. The same was recorded as follows:

> "***PW1 voire dire exam***
>
> ***Q: What is your name?***
>
> ***A: MSW***
>
> ***Q: How old are you?***
>
> ***A: 10 years old***
>
> ***Q: Do you go to school?***
>
> ***A: Currently I'm not going. The last time I was in school was 2013. I was in pre-unit.***
>
> ***Q: Where do you live?***
>
> ***A: WRAP(Women Rights Awareness Program)***
>
> ***Q: Do you go to church?***
>
> ***A: No. We have a church inside.***
>
> ***Q: What does the church read??***

A: Bible. We used to go to church even before I went to WRAP.

Q: The bible and church teachings say you tell the truth?

A: To tell the truth.

Q: As per the bible church teachings what will happen if you lie?

A: They go to satan

Q: In court are you to tell the truth or lies?

A: To tell the truth.

Q: If you lie to the court, what can the court do?

A: I will be arrested.

Q: Do you know what it means to be sworn in court or to take oath?

A: I know it means ones want to be forgiven.

Q: Do you know what the case is all about?

A: I've come to say what dad did to me.

Court: Voire dire exam conducted. The minor understands the nature and duty to tell the truth as per the church teachings and the bible and the consequences of failing to do so as well as the importance of telling the truth in court and the consequences of doing so therefore to give sworn evidence."

23. A *voire dire examination* is a mandatory requirement under Section 19 of the Oaths and Statutory Declarations Act for children of tender years. The importance of the examination was underscored in the case of **Nyasani s/o Bichana *v.* R[1958] EA 190 as follows**:

"It is clearly the duty of the court under that section is to ascertain, first, whether a child tendered as a witness understands the nature of an oath, and, if the finding on this question is in the negative, to satisfy itself that the child

"is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth."

This is a condition precedent to the proper reception of unsworn evidence from a child, and it should appear upon the face of the record that there was due compliance with the section."

24. In the present case, when the child was asked if she understood what it means to be sworn in court or to take oath she replied that she knew it meant to be forgiven. This clearly indicates that the child did not understand the nature of an oath. The court was then under a duty to ascertain that the child understood the duty to speak the truth which is a necessary condition to ascertain reception of the child's unsworn evidence. In this case the court made the correct finding that the child understood the duty to tell the truth but made no finding as to her understanding of the nature of an oath. In the circumstances it the child should have given an unsworn statement of defence in light of the fact that she did not understand the nature of an oath. This clearly attests that although the *voire dire* examination was properly conducted, the learned trial magistrate arrived at a wrong finding that the child understood the meaning of taking an oath and would therefore give a sworn statement of evidence.

25. It was an error therefore, to subject the child to the process of taking an oath when in the real sense she did not appreciate its reception. For this single reason, I find and hold that the entire trial was a mistrial, reasons wherefore a retrial is the available recourse. The proper order to be made the circumstances is for a retrial. However, a retrial should not be ordered unless the appellate court is of the opinion that a consideration of the admissible and potentially admissible evidence a conviction might result, that the retrial will not prejudice the Appellant, that it will not aid the prosecution to ill up gaps in their case and on the whole it will serve the interests of justice. See: **Mwangi *v.*Republic[1983] KLR 522.**

26. To determine whether the admissible evidence would lead to a conviction the court must interrogate a contradiction in the medical evidence. The evidence of PW2 who carried the initial examination of the complainant was that whereas her vagina was moist the hymen was intact. PW5 who examined her in order to fill the P3 form found that her hymen was reddened and had widened and that there was a notch at 2 o'clock. She also had a foul smelling discharge. These contradictions were of great importance as they touched on whether there was penetration which is a crucial element for proof of the offence of defilement. The learned trial magistrate did not reconcile the differences in this evidence when reaching a decision that penetration was proved. The court is unable to reconcile the divergent evidence both coming from the experts. That is to say that the court cannot rely on either PW2's or PW5's evidence as the contradictions therein call into question its probative value. The net effect of this is that penetration was not proved beyond a reasonable doubt. Suffice it to state is that the failure to prove any of the necessary ingredients of the offence renders a fatal blow to the prosecution case.

27. On the whole, it is the court's view that even if a retrial were ordered, the same is unlikely to result in a conviction. Further, if a conviction would be secured, it is likely to be the result of the prosecution fetching further evidence to fill up gaps it their case. Therefore, in as much as the offence is serious and of public interest, a retrial would prejudice the Appellant.

28. In the result, the appeal succeeds. I quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held. It is so ordered.

Dated and Delivered at Nairobi this 5th day of April, 2018.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. *Appellant in person.*

2. Miss Sigei for the Respondent.