REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO 82 OF 2013

FREDRICK PAALA OTIE..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

***(*An appeal against the judgment and conviction of Hon. E. Michieka Ag. PM, delivered on 9th May 2013 in Criminal Case No. No. 133 of 2011 in the Chief Magistrate's Court at Mombasa)**

JUDGMENT

The Appeal

1. The Appellant was convicted and sentenced to serve ten (10) years imprisonment for an alternative offence of indecent act with a child, contrary to section 11(1) of the Sexual Offences Act. He had initially been charged with a main charge of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. The particulars of the offence he was convicted of were that the Appellant on 10 th January, 2011 in Mombasa District within the Coast Province, unlawfully and intentionally caused his penis to touch the vagina of D M, a girl aged 4 years.

2. The Appellant pleaded not guilty to the charges in the trial court on 21st September 2010, and was convicted and sentenced after a full trial. He is aggrieved by the judgment of the trial magistrate, and has preferred this appeal against the conviction and sentence. The Appellant's grounds of appeal as stated in a Petition filed in Court on 28th May 2013 and Amended Grounds of Appeal that he availed to this Court are as follows:

> a) That the learned trial magistrate erred in both law and fact by failing to consider that a *voire dire* examination was not conducted properly to the minor as per section 19(1) of the Oaths and Statutory Declaration Act, hence the resultant trial was a nullity.
>
> b) The learned trial magistrate erred in law and facts by failing to consider that no formal age assessment report or a copy of a birth certificate was prepared, processed and produced as an exhibit in court, to prove the exact age of the complainant for purposes of sentencing.
>
> c) The learned trial magistrate erred in law and facts in convicting and sentencing the Appellant without considering that the prosecution witnesses' evidence was not honest and truthful, hence should be disregarded.
>
> d) The learned trial magistrate erred in law and facts in convicting and sentencing the Appellant without considering that it was important for him to be given a chance for mitigation before sentence as required by law.

3. The appeal proceeded for hearing on 19th July, 2017, and the Appellant submitted that he would wholly rely on written submissions that he had availed to the Court. The Prosecution counsel made oral submissions.

4. The Appellant in his submissions contended that it is important to carry out a *voire dire* examination to determine the intelligence of a minor, and whether he understands the meaning of giving evidence while on oath or not on oath. Further, that it is the preserve of the court to give its opinion in writing regarding the person giving evidence on whether or not the examined person possesses sufficient intelligence.

5. According to the Appellant, the provisions of section 233 of the Criminal Procedure Code state that a failure to conduct such examination nullifies the trial. He further cited section 125(1) of the Evidence Act which provides that all persons are competent to give evidence save for children of tender age under section 19 (1) of the Oaths and Statutory Declaration Act. The Appellant in this regard cited the decision in **Kibangeny Arap Korir v. Republic [1959] E. A. 92,** and where tender age was said to be below 14 years, and the it was held that there is need for *voire dire* examination where a child is of tender age.

6. The Appellant further argued that it was mandatory for the prosecution to prove the age of a victim and penetration in an offence under the Sexual Offences Act, but that the prosecution failed to do so in this case. He cited various judicial decisions in support of these submissions.

7. The Appellant in addition submitted that the doctor's evidence revealed that the complainant's hymen was intact. Furthermore, that it was not clear and it was contradictory from the prosecution evidence whether it was the penis or a finger that was inserted in the complainant's vagina; as to who removed the complainant's panty; whether the complainant entered the Appellant's house; and the date the complainant was treated.

8. Lastly, the Appellant submitted that he was not given a chance to mitigate before sentence, and that the trial magistrate failed to disclose the entence he had imposed.

9. Ms. Mutua, the learned prosecution counsel, submitted that the proceedings of the trial Court show that a *voire dire* examination was properly undertaken. Further, that PW5 indicated that she was 5 years old, and that in any event age is not a determining factor in the offence of an indecent act as it is in defilement. Counsel also submitted that the evidence of the prosecution witnesses was consistent and corroborated, and that the Appellant did not challenge the evidence when put on his defence. Lastly that the Appellant when given the chance to mitigate pleaded for leniency.

10. My duty as the first Appellate court is to re-evaluate the evidence and draw independent conclusions as held in **Okeno v Republic (1972) E.A. 32**. However, I am alive to the fact that I did not have the advantages enjoyed by the trial court of seeing and hearing the witnesses, as was observed in **Soki v Republic (2004) 2 KLR** 21 and **Kimeu v/s Republic (2003) 1 KLR 756.**

The Evidence

11. A brief summary of the evidence adduced before the trial court is as follows. The prosecution called five witnesses. The complainant (D M) was PW1, and she testified that she knew the Appellant. Further, that the Appellant inserted his fingers in her private parts and this happened at the Appellant's house. PW1 testified that she did not have her panty on, as it was removed by her mother, and that she afterward informed Mama Kelly and was later taken to hospital. On cross examination she stated that it was K who took her to the Appellant's house.

12. S K (PW2) who was an aunt to the complainant, testified that while she bathing the complainant on 10th January, 2011, the complainant complained of pain in her genitals. On examining her, she noticed it was inflamed. The complainant then told her that the Appellant had inserted his fingers in her vagina, and had told her not to disclose. PW2 stated that the complainant was taken to Coast Provincial General Hospital on 11th January 2011. On cross examination, PW2 stated that she did not know the time the complainant went to the Appellant's house, but that when her husband came in the evening on 10th January 2011 and called out for K and the complainant, they emerged from the Appellant's house eating potatoes.

13. K C (PW3) testified that he was an uncle of the complainant who was at the time staying with his family. PW3 stated that he went home on 10th January, 2011 from fetching water, and noticed that K and the complainant were not at the corridor where he had instructed them to play. K then emerged from the Appellant's house, and told him that the complainant was in the Appellant's house. K then called the complainant who emerged from the Appellant's house, and appeared to have been crying.

14. PW3 further testified that on the following day when he came back home from work, PW2 informed him that the complainant told her that she was in pain since the Appellant had inserted his fingers in her private parts. He examined the complainant and noticed her genitals were inflamed, and he then took the complainant to hospital on 12th January 2011. PW3 stated that he then reported the matter to Nyali police station.

15. Domitila Matheka (PW4), who was attached to Nyali police station, stated that upon interrogation, the complainant told her that she entered the Appellant's house with a friend. Further, that the Appellant asked the friend to go and play, and that he then removed the complainant's pants and put his fingers in her vagina. It was PW4's testimony that it was not clear whether it was the finger or the penis that was inserted in the complainant's vagina. PW4 testified that she then charged the Appellant.

16. Dr. Lawrence Ngone (PW5) of Coast General Provincial Hospital stated that he examined the complainant on 13th January 2011. Further, that he found that her hymen was intact but her labia was tender with a laceration. In addition that there was no spermatozoa. PW5 testified that there was a presence of red blood cells, indicating that the complainant had bled from the laceration, and that the injury could have been caused by a blunt object. He assessed the injury as harm and produced the P3 form as P. Exhibit 1.

17. The Appellant was put on his defence and he indicated that he would wait for judgment and did not give any evidence or call any witnesses.

The Determination

18. I have considered the arguments made by the Appellant and the Prosecution, as well as the evidence before the trial court. I have considered the grounds of appeal and the arguments made thereon, and I note that the three issues for determination are whether a *voire dire* examination was conducted by the trial Court and the consequences thereof; and secondly, whether the Appellant's conviction was on the basis of sufficient and satisfactory evidence.

19. On the first issue, the conduct of a *voire dire* examination and its purpose was explained by the Court of Appeal in **Johnson Muiruri vs Republic [1983] KLR 445** as follows:

1. **"Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an**

opinion, on a *voire dire* examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.

2. **It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.**

3. **When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.**

4. **A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.**

5. **The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction."**

20. The Appellant alleges that the evidence of the complainant was given without a *voire dire* examination contrary to section 19 of the Oaths and Statutory Declarations Act which provides as follows:-

"where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person understand the nature of an oath, his evidence may be received, though not on oath, if in the opinion of the court or such a person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced in writing in accordance with Section 233 of the Criminal Procedure Code shall be deemed to be a deposition within the meaning of that Section."

21. In the case of **Julius Kiunga M'rithia vs. Republic, [2011] eKLR**, the court held as follows as to the purpose of the said section -

"Under Section 19 of the Oaths and Statutory Declarations Act, (Cap. 15, Laws of Kenya), where a child of tender years is called as a witness in a proceeding there are two things the trial court must be severally satisfied about -

(1). whether the child understands the nature of an oath; or

(2) 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."

22. The procedure for conducting a *voire dire* examination was set out in **Fransisco Matove vs. Regina [1961] E.A**. as follows: the trial magistrate should question the child to ascertain whether the child understands the nature of the oath, and (2) if the court does not allow the child to be sworn, it should record whether or not, in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of evidence, and understands the duty of speaking the truth.

23. In the present appeal, I have perused the record of the trial Court and note that on 14th December 2011, part of the proceedings were as follows:

"Prosecutor: I apply that a Duruma/Giriama interpreter be availed for the child.

Court: Mijikenda interpreter be availed

At 12:01 pm:

Coram be applied as before.

Matano – Court clerk/court interpreter – Duruma to English and vice versa

PW1 FEMALE

I am D M. I am 5 years old. I am a student at nursery school. I don't know the name of our home.

Court: Witness is young but knowledgeable. To give unsworn evidence.

PW1 FEMALE CONTINUES STATES

I know Baba Harun, He is here……."

24. It is evident from proceedings that there was an examination and finding by the trial Court on the intelligence of PW1 and her understanding of the oath, before it proceeded to direct that PW1 gives unsworn testimony. On the procedure employed by the trial magistrate to make his finding, the Court of Appeal observed as follows in **James Mwangi Muriithi vs Republic [2016] eKLR:**

> "**10. 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 Declarations 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:-**
>
> **11. In *Patrick Kathurima versus Republic Nyeri CRA 137 of 2014* this Court after reviewing case law on the subject observed thus:-**
>
> ***"It is best though not mandatory in our context that the questions put and the answers given by the child during voir dire examination be recorded verbatim as opined by the English Court of Appeal in Regina versus Compell (Times) December 20, 1982 and Republic versus Lalkhan [1981] 73 CA 190 for the benefit of the appellate court which must satisfy itself on whether that important procedure was properly followed."***
>
> **On account of the above observations the court in the *Kathurima case* arrived at the conclusion that the minor's evidence in that appeal had wrongly been received and therefore vitiated the prosecution case which stood or faltered on the said minor's evidence. Further that the minors evidence which had formed the back bone of the prosecution case was riddled with contradictions and on that account allowed the appellant's appeal in its entirety.**
>
> **12. There was however no hard rule laid down in the *Kathurima case* (supra) that in all cases where *voir dire* procedure had not been properly administered before reception of a minor's evidence, the prosecution case stood vitiated. Each case has to depend on its own set of facts and that is why the court observed thus:-**
>
> ***"It is best though not mandatory in our context that the questions put and the answers given by the child during the voir dire examination be recorded..."***

25. In the present appeal, in response to a questions put to her during the *voir dire* examination, the complainant responded that she was 5 years old and in nursery school. Her testimony was coherent and forthright. The Appellant's counsel questioned her in cross-examination and she answered truthfully, coherently and without any contradictions. It is thus my finding that the coherent flow of the complainant's testimony in demonstrated that she was intelligent enough to understand the nature of the proceedings and the obligation to speak the truth. I therefore find that her evidence was reliable, and the trial was therefore not vitiated by any lapses in the procedure applied by the learned trial magistrate's to conduct the *voir dire* examination.

26. The Appellant also argued that the complainant's age was not established and therefore the offence he was convicted of was not proved. In **Maripett Loonkomok v Republic [2016] eKLR** it was stated as follows by the Court of Appeal on the issue of proof of age in sexual offences:

> **"The question of age, as we have stated earlier is a question of law under the Sexual Offences Act, at least to prove that the victim was a child at the time of defilement and also for purposes of sentence. However the question whether the complainant was 9, 10 or 13 is a question of fact with which we can only interfere if it is demonstrated that the High Court made conclusions of fact on no evidence at all or that the conclusions were perverse in nature. It follows that to constitute a question of law the wrong finding should stem out of a complete misreading of evidence or it should be based only on conjectures and surmises."**

27. The said Court in ***Moses Nato Raphael vs Republic*** **[2015] eKLR** further clarified the difference between proof of age for purposes of establishing the offence of defilement and for purposes of sentencing as follows:

> ***"On the challenge posed by the uncertainty in the complainant's age, this Court had occasion to deal with a similar issue in Tumaini Maasai Mwanya v. R, Mombasa CR.A. No. 364 of 2010, where we held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability."***

28. Therefore, the Court has discretion to find what the apparent age of a victim is from the documents presented to it and from the victim's testimony, when the only inconsistency is as regard the age of a minor as regards the various categories of ages provided by section 8 of the Sexual Offences Act for purposes of sentencing. This was also the position taken by the Court of Appeal in **Stephen Nguli Mulili vs Republic, Criminal Appeal No 90 of 2013**.

29. In the present appeal, PW1 did testify that she was 5 years old and both the prosecution and trial Court noted that she was a child and young. In addition, the offence of committing an indecent act with a child is provided in section 11 (I) of the Sexual Offences Act as follows:

> **"(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."**

An indecent act is further defined in section 2 of the Sexual Offences Act as:

> **"indecent act" means an unlawful intentional act which causes—**
>
> **(a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;**
>
> **(b) exposure or display of any pornographic material to any person against his or her will;**

30. Therefore the only finding that required to be made by the trial Court was that the victim was a child, which was established by PW1's testimony that she was 5 years old, and the trial Court also observed that she was young and took judicial notice of this fact. As regards proof of the offence of indecent act with a child, the evidence of PW1 that the Appellant inserted his fingers into her private parts was corroborated by the medical evidence by PW5, and the Appellant was also placed with the complainant at the scene of the crime by both PW1 and PW3. There was thus no uncertainty or contradictions in the evidence by the Prosecution.

31. Lastly, the record of the trial Court shows that at the sentencing hearing on 9th May 2013, the prosecution did indicate that the Appellant was a first offender, and the Appellant thereafter pleaded for leniency. He was thus granted an opportunity to mitigate contrary to his submissions.

32. I accordingly uphold the conviction of the Appellant for the offence of an offence of indecent act with a child, contrary to section 11(1) of the Sexual Offences Act, and the sentence of ten years imprisonment imposed upon the Appellant for this conviction, which is the minimum sentence for the offence. The Appellant's appeal is accordingly dismissed.

It is so ordered.

DATED AND SIGNED THIS 16TH DAY OF APRIL 2018

P. NYAMWEYA

JUDGE

DELIVERED AT MOMBASA THIS 7TH DAY OF JUNE 2018

D. O. CHEPKWONY

JUDGE