REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO 54 OF 2014

PETER WAHOME…...APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

***(*An appeal against the original conviction and sentence of Hon. J. Omburah SRM delivered on 22nd May 2012 in Criminal Case No. 2904 of 2010 in the Chief Magistrate's Court at Mombasa)**

JUDGMENT

The Appeal

1. The Appellant was convicted and sentenced to serve twenty (20) years imprisonment for the offence of defilement , contrary to section 8(1) (3) of the Sexual Offences Act. The particulars of the offence were that on 19th September 2010 at Fort Jesus area in Mombasa District within Mombasa County, the Appellant intentionally caused his penis to penetrate the vagina of B H M, a child of 12 years.

2. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, based on the same particulars.

3. The Appellant pleaded not guilty to the charge in the trial court on 21st September 2010, and was after a full trial convicted on the first count of defilement and sentenced to 20 years imprisonment. 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 and Amended Grounds of Appeal that he filed in this Court are as follows:

a. The trial magistrate erred in law and fact by convicting and sentencing the Appellant to 20 years imprisonment without conducting a *voire dire* examination on the complainant, who was a minor aged 12 years, contrary to section 19(1) of the Oath and Statutory Declaration Act Cap 15 of the Laws of Kenya.

b. The trial magistrate erred in law and fact by convicting and sentencing the Appellant to 20 years imprisonment without a proper finding that no documentary proof was availed in Court to show the exact age of the complainant.

c. The trial magistrate erred in law and fact by convicting and sentencing the Appellant to 20 years imprisonment without a proper finding that if the complainants hymen was perforated as alleged, then a medical examination P3 form would not have failed to detect this and the evidence in the P3 form was therefore at variance.

d. The trial magistrate erred in law and fact by convicting and sentencing the Appellant to 20 years imprisonment without a proper finding that the evidence adduced was in variance with the findings in the P3 form that the complainant appeared for examination 5 days later on 23rd September 2010.

e. The trial magistrate erred in law and fact by convicting and sentencing the Appellant to 20 years imprisonment by making assertions that the complainant was a street child which the complainant had not alleged.

4. 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.

5. The Appellant in his submissions argued that the trial magistrate failed to subject the complainant to *voire dire* examination which is required under section 19 (1) of the Oaths and Statutory Declarations Act. It was also submitted that the prosecution did not prove the age of the complainant to the required standard. In addition, that while PW 3 stated that she was aged 12 years, PW4 stated that she was aged 10 years.

6. Furthermore, that no documentary evidence was produced to establish the complainant's age therefore the charges were not proved. In support thereof the Appellant relied on the decisions in **Okethi Okale vs Republic (1965) EA 555** and **Kaingu Elias Kasomo vs Republic Malindi Criminal Appeal No. 504 of 2010,** where the courts emphasized that age is a critical component since it forms part of a charge and must therefore be proved.

7. The Appellant further contended that while the complainant stated that the offence occurred on 19th September 2010, the P3 form indicated otherwise since it stated that the complainant was sent to hospital on 23rd September 2010, and the complainant therefore appeared for examination 5 days after the alleged incident. Furthermore, that since the P3 form indicate that there was no spermatozoa and physical injury, the evidence therein did not corroborate that of the complainant.

8. Ms. Mutua, the learned prosecution counsel, submitted that the Appellant was charged with the offences known in law and the particulars were supported by the evidence adduced. That in the event the charge is found to be defective, the said defect is curable under section 382 of the Criminal Procedure Code. It was urged by the Prosecution that even though the *voire dire* examination of the complainant was not done, this was not fatal as her evidence was corroborated.

9. On the ground that the complainant's age was not ascertained, the Prosecution conceded that no age assessment report or birth certificate was produced, but that age assessment only goes to the sentencing and does not determine guilt or otherwise. Further, that the trial Court took judicial notice of the fact that the child was a minor. Therefore, that the offence of defilement was proved.

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 (A B) was PW1, and she testified that she was swimming with her friends when the Appellant held her and took her to the bush where he started to defile her and removed her pants. She screamed and members of the public rescued her. The Appellant was taken to Central Police Station and later to Coast General Hospital. She testified that she could not walk well since she was in a lot of pain.

12. Mwinyi Abdalla (PW2), a security officer, was on the material day watching a swimming competition at the Museum, when he heard cries of a girl calling out for help. He went to the scene and found the complainant crying and the Appellant then ran away. Further, that the complainant was half naked without her panties, and she only had a top clothing. He stated that the Appellant was chased down and taken to Central Police Station. On cross examination, he stated that he only heard the complainant crying, and admitted that he did not witness the incident, but that he was told of the ordeal by the complainant.

13. Corporal Eunice Mwiti (PW3) who was attached to Central Police Station and who was the investigating officer in this case, testified that on the material day she saw members of the public carrying the complainant and they informed her the Appellant was arrested at the scene of the offence. Further, that the complainant was taken to hospital. She later visited the scene and found that it was disturbed and she then preferred charges against the Appellant.

14. Dr. Lawrence Ngone (PW4) examined the complainant and found that her hymen had been perforated and she had laceration on her vaginal opening. He stated that the complainant had white discharge, but that there was neither spermatozoa nor physical injury. He produced a P3 form to that effect as an exhibit.

15. The Appellant was put on his defence and he indicated he would give unsworn testimony. He however he closed his defence case without adducing any evidence.

The Determination

16. 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 of PW1 was conducted by the trial Court; and if not the effect thereof. Secondly, whether the complainant's age was determined, and lastly, whether the Appellant's conviction was on the basis of sufficient and satisfactory evidence.

17. 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."

18. 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."

19. 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."

20. In addition, 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.

21. Various decisions of the Court of Appeal have also held that the age of fourteen years remains a reasonable indicative age of competency to testify for purposes of Section 19 of the Oaths and Statutory Declarations Act. In this respect see **Maripett Loonkomok v Republic, [2016] eKLR , Patrick Kathurima vs Republic, Criminal Appeal No.137 of 2014,** and **Samuel Warui Karimi vs R, [2016] eKLR**.

22. In the present appeal, I have perused the record of the trial Court and note that on 29th November 2010, the proceedings were as follows:

"29/11/2010

Before H.B. Yator

Prosecutor: I.P. Suntu

Court Clerk: Maurice

Accused: Present

Prosecutor:

2 Witnesses

Accused:

Ready

Court to Proceed

PW1: SWORN AND STATES AS FOLLOWS:

My names are B H M. I am in Class 1. Stay with mother at Likoni…."

23. It is evident from proceedings that no *voire dire* examination was conducted on PW1, who was the complainant, before she proceeded to give sworn testimony, and in particular no finding was made by the trial Court as to whether she understood the nature of an oath.

24. The effect of this non-compliance with section 19 of the Oaths and Statutory Declarations Act was enunciated by the Court of Appeal in **Samuel Warui Karimi v Republic [2016] eKLR** as follows

> **"…we are in agreement the purpose of undertaking *voire dire* examination in a criminal trial is to protect the guaranteed right of a fair trial. Where the witness as in this case was aged 12 years and that essential step was not taken in a criminal trial, that trial becomes problematic. In the circumstances we find the evidence by the complainant was not properly received thus, the conviction of the appellant becomes unsafe to sustain as she was the complainant and not any other witness."**

25. In **Maripett Loonkomok v Republic [2016] eKLR** a different bench of the Court of Appeal was of a slightly different view of the effect of non-compliance with the said section and held as follows:

> **" It follows from a long line of decisions that *voir dire* examination on children of tender years must be conducted and that failure to do so does not *per se* vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that;**
>
> **"In appropriate case where voir dire is not conducted, but there is sufficient independent evidence to support the charge… the court may still be able to uphold the conviction."**
>
> **See Athumani Ali Mwinyi v R Cr.Appeal No.11 of 2015**
>
> **On the peculiar facts and circumstances of this case, it is our considered view that the trial was not vitiated by the failure to conduct *voir dire* examination. The complainant's evidence was congent; she was cross-examined and medical evidence confirmed penetration. But of utmost significance is the admitted fact that the appellant took the complainant and lived with her as his wife after paying dowry. So that even without the complainant's evidence the offence of defilement of a child was proved from the totality of both the prosecution and defence evidence, especially the medical evidence which corroborated the fact of defilement."**

26. From the said decisions, it is evident that while the evidence of a witness of tender years who is not subjected to a *voire dire* examination is not reliable evidence, the other evidence adduced in a criminal trial can still be relied upon to determine the guilt or otherwise of an accused person.

27. In the present appeal, the complainant who was PW1 testified that she was 12 years old, and therefore a child of tender years for purposes of *voire dire* examination. Her evidence cannot therefore be considered in determining the guilt or otherwise of the Appellant, as it is not reliable evidence, for reasons that she was not subjected to a *voire dire* examination. The issue therefore is whether the remaining evidence in this case establishes a case against the Appellant.

28. Having excluded the evidence of PW1, I find that it would be unsafe to uphold the conviction on the basis of the remaining evidence for reasons that even though the medical evidence by PW4 did find that there was penetration of PW1, no other witness placed the Appellant with the complainant, and he was arrested by members of the public after the alleged defilement had taken place. PW2 who was the only other witness at the scene testified that he did not witness the defilement, but was told of the ordeal by PW1.

29. The Appellant also raised the issue of the complainant's age not having been proved, and therefore that one of the essential elements of defilement had not been proved. Defilement is defined in section 8(1) of the Sexual Offences Act as follows:

> **"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement"."**

Section 2 of the Sexual Offences Act provides that penetration entails the partial or complete insertion of the genital organs of a person into the genital organs of another person.

30. The ingredients of defilement were further highlighted in **Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013** as follows**:**

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

The Court of Appeal in addition stated in the case of ***Kaingu Elias Kasomo vs Republic, Malindi CRA No. 504 of 2014*** that age is a key ingredient to the offence of defilement, and failure to prove it beyond reasonable doubt amounts to failing to prove the offence.

31. This issue was also addressed in **Maripett Loonkomok v Republic [supra],** where 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."

32. 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."**

33. Therefore, the Court has discretion to find what the apparent age of a victim is from the documents and evidence presented to it. In the present appeal, as the only evidence as to PW1's age was that of PW1, whose testimony has been excluded for the reasons given in the foregoing, it is indeed the position that there was no reliable evidence tendered as to the age of the complainant.

34. I accordingly quash the conviction of the Appellant for the offence of defilement, contrary to section 8 (1) (3) of the Sexual Offences Act. I also set aside the sentence of twenty (20) years imprisonment imposed upon the Appellant for this conviction, and order that he is set at liberty forthwith unless otherwise lawfully held.

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