REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO. 59 OF 2016

(From original conviction and sentence in Criminal Case No. S. O 10 of 2015 of the Chief Magistrate's Court at Kerugoya).

EPHANTUS WACHIRA KARUU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with the offence of defilement contrary to section 8(2) of the Sexual Offences Act. It was alleged that on 5/6/15 at [particulars withheld] village within Kirinyaga County he intentionally and unlawfully caused his penis to penetrate the vagina of AWM a girl aged six years. He denied the charge when he was charged before the Chief Magistrate's Court Kerugoya in Criminal Case No. 10/2015. After a full trial he was found guilty and was convicted. He was then sentenced to imprisonment for life.

The appellant was dissatisfied with both the conviction and sentence and filed this appeal.

In a petition of appeal dated 28/11/16. The appellant raises the following grounds:

1. The learned Magistrate erred in law and fact by failing to carry out proper voire dire inquiry before taking the complainant's evidence.

2. The learned Magistrate erred in law and fact by failing to appreciate the evidence adduced did not support the charge.

3. The learned trial Magistrate erred by law and fact in failing to appreciate that were gaps and discrepancies in the evidence tendered by the prosecution witnesses.

4. The learned trial Magistrate erred by law and fact in failing to appreciate that the charge was not supported by the medical evidence.

5. The learned trial Magistrate erred by law and fact in failing to appreciate that the conviction was against the weight of evidence adduced.

6. The learned trial Magistrate erred by law and fact in failing to consider the defence tendered by the appellant and his witnesses.

7. The learned trial Magistrate erred in law and fact by shifting the burden of proof upon the appellant in this case.

8. That the sentence was manifestly harsh and excessive with regard being made to all circumstances of the case.

He prays that the conviction be quashed the sentence be set aside and he be set at liberty.

The state opposed the appeal and filed written submissions through Mr. Obiri, the prosecution counsel.

This is a 1st appeal. I have carefully analysed the evidence and evaluated it afresh while bearing in mind that I neither saw nor heard any of the witnesses and giving due allowance for that as held in ***Okeno –v- R(1972) E. A 32***.

I have considered the evidence which was tendered before the trial Magistrate and the submissions. I will first deal with the grounds of appeal as raised in the submissions by the counsel for the appellant Mr. Ngigi Gichoya.

1. Voire dire inquiry was not conducted as stipulated by the law.

It is submitted that the trial Magistrate did not conduct a proper **'voire dire'** examination as she only recorded the answers to questions she put to the complainant without recording those questions.

It is further submitted that the trial Magistrate did not make a ruling to state why she opted to take the complainant's testimony. That it was not clear from the record whether the complainant gave a sworn or unsworn statement.

He relies on the case of ***John Mururi –v- R(1983) KLR 445, Ben Maina Mwangi –v- R 2006 eKLR*** and ***Reagan Mokanya –v- R Cr. Appeal No. 49 of 2006***

For the State it was submitted that **'voire dire'** examination was done before the trial Magistrate proceeded to record the testimony. The court noted that she understood the nature of the oath before she testified.

Voire dire examination is conducted to determine whether the intended witness who is a minor is intelligent enough to testify, whether she understands the meaning of the Oath and the need to tell the truth. The examination is conducted in line with ***Section 19 of the Oaths and Statutory*** declarations Act which requires that where the court is receiving the evidence of a child of tender years it must form the opinion that the child is possessed of sufficient intelligence to understand the nature of oath and the duty to speak the truth. The section provides:

> ***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 given upon oath, if, in the opinion of the court or such 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 into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section***.

In the case of ***John Muiruri –v- R (1983)KLR 445*** the Court stated:-

> ***2. 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 voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied, his unsworn evidence maybe received if in the opinion if 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.***
>
> ***3. 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.***
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> ***4. 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.***
>
> ***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 the conviction.***

This is the correct procedure to be followed by the trial court that is receiving the evidence of a child of tender years in order to satisfy itself on her intelligence, her understanding of the nature of the oath and duty to tell the truth.

From the record of the trial Magistrate at Page 4 of the record, she noted that the child was aged six years and therefore conducts a voire dire examination pending recording of her evidence. She proceeds to conduct voire dire examination whereby she records what appears to be answers. That is –

> ***"I am Agnes Wanjiku, I am in Nursery, I am herein to tell the truth, that is why I am in court. Those who tell lies will go to satan. I was told that by my Sunday School teacher. I am ready to tell my story".***
>
> ***"Court notes that the child understands the nature of proceedings and proceeds to record the same."***

This record shows that voire dire was conducted. Questions were asked but only answers were recorded. The authority cited states that it is important for the questions and answers to be set out. The question is whether failure to record the questions and record only answers is fatal to the prosecution case. It should be noted that the evidence of a child of tender years requires corroboration. It is for the court to look at the circumstances of the case to determine whether a court can rely on the evidence to convict. In a recent decision by the Court of Appeal this is the finding of the court on voire dire examination.

In the case of **Maripett Loonkomok v Republic [2016] eKLR**

The Court of Appeal held;

> **It is firmly settled that not in all cases that *voir dire* is not administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has recently reiterate what has been said many times before that that question will**

depend on the peculiar circumstances and particular facts of each case. See James Mwangi Muriithi v R, Criminal Appeal No.10 of 2014…….

It follows therefore that the time-honoured 14 years remains the correct threshold for *voire dire* examination. It follows from a long line of decisions that *voire 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 voire dire is not conducted, but there is sufficient independent evidence to support the charge… the court may still be able to uphold the conviction."

In this case voire dire examination was not properly conducted since the trial Magistrate only recorded the answers. In line with the above decision, the court will consider whether there was sufficient independent evidence to support the charge.

Section 124 of the Evidence Act provides that the evidence of a child of tender years requires corroboration. However the proviso thereto states that the evidence may be received and be relied on if the trial Magistrate, for reason to be recorded is satisfied that the witness is truthful. The section provides:-

Corroboration required in criminal cases

Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

At page 18 of the record the trial Magistrate stated in her Judgment –

"This court had also the benefit of observing the victims demeanor as she testified and believed her."

The trial Magistrate properly applied her mind to the proviso under ***Section 124 of the Evidence Act(supra***). It is clear that she considered the complainant's testimony and believed her. This is an observation which is exclusive to the trial Magistrate as she had the opportunity to observe her demeanor. In line with ***Okeno –v- R (supra)*** the appellate court must leave room for the fact that it did not see and hear the witness nor observe her demeanor. Having found that the testimony of the complainant was believable, that was sufficient and the trial Magistrate did not have to go further to consider whether the evidence was corroborated. She could rely on the evidence to convict.

Be thus as it may, there was sufficient medical evidence to corroborate the testimony of the complainant. PW-3- Stephen Peter Kilonzo testified that upon examining the complainant, he found that the hymen was broken with no sign of destruction indicating repeated sexual intercourse and there was whitish and foul smelling discharge. She examined her on 13/6/15 when he filled the P3 form but had been treated on 9/6/15 while offence was committed on 5/6/15. The child had difficulties walking. The broken hymen indicated sexual intercourse. The object used was penetrating instrument. He stated that –

"Since the hymen was broken it was significant to establish that there was an act of penetration. There was also a repeated penetration" Page -7- of the record.

This testimony corroborates the testimony of the complainant that she was defiled. I find that failure to conduct a proper voire dire is cured by the proviso to ***Section 124 of the Evidence Act*** and the fact that the testimony of the complainant is well corroborated by the medical evidence. This ground must therefore fail.

2) **It is submitted that the evidence adduced does not support the charge and there were gaps and discrepancies in the evidence tendered.**

It is submitted that the offence is said to have taken place in June on 5/6/15 but the complainant did not state the date. That from her testimony nothing can be construed as defilement. In a weird submission it is stated that the complainant did not talk of an interruption or intrusion during the incident or tell how it ended. This is disgusting. Such details cannot be expected from a minor child aged six years. The minor stated:-

"I am in [particulars withheld] Nursery school.

I know the man standing in court (pointed out). He is Ephantus. He is our neighbour. Our houses are very close.

I do remember I was playing with my friends when he came held me and told me to go to his house, he then removed my clothes,

he applied oil in my private part my vagina (pointing the part), she told me not to tell my grandmother. My friends are S and A. They continued to play.

He did place me on his bed. He removed my clothes, applied oil in my vagina and he inserted his penis in my vagina. He also removed his clothes. He threatened me that if I tell my grandmother, she will beat me up.

I later on reported to my grandmother M wa K who alerted my grandfather. I was taken to the hospital. The police were told.

The accused is in court.

That is all.

The witness was cross-examined and she gave answers that ***"it was you. I was admitted in hospital Kerugoya hospital".***

I have quoted in verbatim what the complainant stated in court. Though she did not state maybe due to her age and could not have remembered, the date of offence was confirmed by PW-2-. The evidence tendered by the complainant supports the charge of defilement. She clearly stated what was done to her. I fail to see any gaps or discrepancies in the testimony. PW-1- identified the accused as the perpetrator. He was her neighbour and she knew his name. The offence was committed in broad day light leaving no room for mistaken identity of the perpetrator.

On the issue of penetration the child did explain in detail as quoted above. Some oil was used. The applicant was walking in difficulties. As pointed out above medical evidence proved penetration. The fact that she did not tell the court that she felt pain, it is noted that questions are put in examination –in-chief. If she was not asked how she felt she may not have informed the court. Failure to tell court that she felt pain does not mean there was no pain. From that moment onwards she had difficulty in walking. Such is indicative of pain. This ground is without merits.

3) **Was the charge supported by the medical evidence or was the conviction against the weight of evidence.**

I have stated above that the medical evidence corroborates the evidence of the complainant. The P3 form and the treatment notes exhibit 2 & 1 respectively show that the complainant was defiled by somebody who was well known to her. There was no doubt that the complainant was defiled. The conviction was based on cogent and overwhelming evidence. I find that this ground is without merits.

4) **Defence of the appellant was not considered**. The appellant faults the court stating as follows:-

"……. His parents Hellen Muthoni (DW2) and John Karuu(DW2) were defence, witnesses and both claim that the girl's story was fabricated since there existed a grudge between the families but non explained to this court what was the cause of the family feuds"

This in my view does not amount to shifting the burden. This in the first place shows that the court considered the defence of the appellant. Secondly the appellant is the one who with his witnesses alleged there was a grudge. The court had to consider the defence and either accept it or reject it. Where a court states that the accused has not explained, it is stating that such defence is a sham. In the case of **Bhutt –v- R** the Court stated that a prima facie case is one where a court can convict on the evidence in the absence of an explanation. This does not amount to shifting the burden of proof. It is comment by a court which amounts to stating that the defence is not plausible. It is trite law that the burden of proof in criminal law rests on the prosecution and the burden never shifts. The defence was a mere allegation which the court rejected and found that the prosecution had discharged its burden to proof the case beyond any reasonable doubts. The ground is therefore without merits.

Harsh and excessive sentence.

Section 8(1) of the Sexual Offences Act No. 3 of 2006:

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

Section 8(3) of the Sexual Offences Act No. 3 of 2006:

A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

The above Section 8(2) gives the mandatory sentence as life imprisonment therefore the sentence was not excessive.

The sentence was deserved as the court noted that he was not remorseful. The sentence was lawful. The trial Magistrate exercised her discretion in sentencing within the confines of the law. I find no reason to interfere with the sentence or the exercise of discretion by the trial Magistrate.

1. Did the prosecution prove its case beyond reasonable doubt?

Looking at the evidence as a whole, I find the prosecution proved its case beyond all reasonable doubts. The entire evidence on record left no

doubt, as the trial court found, that the appellant defiled PW 1 in the manner described. The evidence of PW 1 was corroborated by the medical evidence of PW 3.as required under the law in cases of defilement.

The trial court considered all the evidence presented and having done so, came to a proper and inevitable conclusion. The appeal is without merits and is dismissed.

Dated at Kerugoya this 8th day of November 2018.

L. W. GITARI

JUDGE