REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 29 OF 2017

LHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 462 of 2017

of the Chief Magistrate's Court at Malindi – Dr. J. Oseko, CM)

JUDGEMENT

1. This is an appeal by LHA, against the conviction and sentence arising from the judgement delivered on 22nd September, 2017 by Dr. Julie Oseko, Chief Magistrate in Malindi Chief Magistrate's Court Criminal Case No. 462 of 2017.

2. The Appellant was charged with two counts. In the first count he was charged with incest contrary to Section 20(1) of the Sexual Offences Act, 2006 (S.O.A.). The particulars being that on 10th June, 2017 at (particulars withheld) in Kilifi County he intentionally and unlawfully used his fingers and penis to penetrate the vagina of SLH. a child aged eleven years who to his knowledge is his daughter.

3. In the alternative to count 1, the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the S.O.A. The allegation being that on the date and place mentioned in the main charge he intentionally and unlawfully penetrated with his fingers the vagina of SLH. a child aged eleven years.

4. As for the second count, the Appellant was charged with the offence of sexual assault contrary to Section 5(1)(a)(i) as read with Section 5(2) of the S.O.A. The particulars of the offence being that on the date and place mentioned in the 1st count the Appellant unlawfully penetrated with his fingers the vagina of SLH. a child aged eleven years.

5. At the conclusion of the trial, the Appellant was found guilty on both counts and sentenced to life imprisonment on count 1 and ten years imprisonment on count 2.

6. Aggrieved by both conviction and sentence, the Appellant appeals to this court on the grounds that the trial court erred by admitting the minor complainant's evidence without first subjecting her to *voir dire* examination; that the trial court altered his plea of not guilty to a plea of guilty; that the trial court based its judgement on a medical report that had anomalies and failed to consider that a clinician examined the complainant; and that the court failed to consider that the evidence by PW1 had many illegalities and infringed on his fundamental rights.

7. The appeal was disposed off by way of written submissions which the parties relied upon entirely.

8. The Appellant commenced by submitting that the trial court considered inadmissible evidence as the court failed to properly examine the minor before taking her evidence. It is the Appellant's case that there is nothing on record to show that the minor understood the nature of an oath and that the court was satisfied that the minor understood the meaning of an oath. He urged that the trial court did not take essential steps hence the evidence was improperly received making the conviction and sentence unsafe. He further urged that the purpose of a *voir dire* examination is to guarantee a fair trial and in the circumstances his conviction cannot stand. He placed reliance on the decision of the Court of Appeal in **Patrick Kathurima v Republic [2015] eKLR** in support of this assertion.

9. The Appellant took issue on the age assessment report. He urged that as the trial court had made an order that the age assessment report be availed within 7 days from the date of plea on 19th June, 2017, the production of the same on 22nd September, 2017 and backdating it to 14th June, 2017 confirmed falsification of the report which was meant to achieve an ulterior motive.

10. In addition, the Appellant submitted that it was not clear on which plea the court proceeded to hear his matter. According to him, it was necessary for the court to enter a plea of not guilty for him before proceeding to hear his matter.

11. The Appellant further submitted that there was no fair trial as he was sentenced for the second count in absentia. According to him, this amounted to an infringement of his rights. He placed reliance on the decision in **Mombasa Criminal Appeal No. 142 of 2007, David Ngomani v Republic**.

12. The Appellant also submitted that the trial court indicated that the complainant suffered injuries though the examining clinician had not made such observations.

13. According to the Appellant, the trial court did not take into account the bad blood between him and his wife thus failing to reach the proper conclusion that the whole case was a fabrication. He urged that the medical evidence did not indicate the presence of Vaseline in the vagina and that his wife who allegedly caught him in the act never alerted any of the neighbours. Further, that the examining clinician was not called as a witness and no tangible reasons were given for the failure to do so.

14. The Appellant took issue with the allegation that the defilement happened repeatedly for almost a month questioning why the other children were not called as witnesses and where his wife was all this time considering that they lived in a one-roomed house. In his view, the complainant was coached so as to achieve an ulterior motive.

15. The Appellant further submitted that his neighbours, the clinician and his other children were not called as witnesses and the burden of proof was thus not discharged. According to the Appellant, the complainant was not a reliable witness as she claimed that he was found by his wife in the act but failed to explain why their neighbours were not alerted. This, in his view, goes to show that there was ill motive.

16. The Appellant ultimately submitted that penetration is not at all times caused by defilement. In his view, the fact that no injuries were noted, despite the minor claiming she felt pain, was an indication that the medical evidence was contradictory.

17. Further, that PW1's evidence misled the court and there was no consistency throughout rendering his conviction null and void. He prayed that his appeal be allowed, the conviction quashed and the sentence set aside.

18. In reply, counsel for the Director of Public Prosecutions appearing for the Respondent submitted in brief that the evidence was overwhelming and convincing and called for the confirmation of the conviction and sentence.

19. This being a first appeal, this court has a duty to look at the evidence afresh, reconsider and re-evaluate the same in order to reach its independent conclusion. In doing so, this court is guided by the fact that unlike the trial court it did not have the opportunity of seeing and hearing the witnesses testify in order to gauge their demeanour.

20. The court is also guided by the principle that a finding of fact made by the trial court should not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or that the trial court acted on the wrong principles.

21. A perusal of the record shows that on 19th June, 2017 when the Appellant took plea, a plea of not guilty was entered on each count and the trial court ordered that a report on his background and impact assessment be availed within seven days. The trial court did not order for assessment of the age of either the victim or the Appellant. That puts to rest the Appellant's query about a doctored age assessment report.

22. The other issue that requires addressing at this preliminary stage is the manner in which the plea was taken. When the Appellant first appeared in court he entered a plea of not guilty on all counts. However, when the matter came up for hearing on 27th July, 2017, the charges were read afresh to the Appellant who stated that **"it is true"**. Nevertheless, the trial court directed that the matter proceeds to hearing. I do not understand what the Appellant's problem is. His matter was determined after a full trial and he cannot say that he was convicted on a plea that was equivocal.

23. Now turning to the evidence adduced, I note that when the victim gave her testimony as PW2 she had been placed in safe custody at a rescue centre. She testified that she lived with her parents and two younger siblings in a one-roomed house where the alleged act took place. She stated that in the month of April she was sleeping with her six-year-old sister and her father on one mattress in the said house. Her mother and brother were admitted in hospital and detained there for failure of payment of the hospital bill.

24. Her ordeal started on a day she slept sandwiched between the Appellant and her sister. The Appellant turned her to face him, took some Vaseline jelly and applied it on his penis after removing his clothes. He then removed her skirt and pants, turned her on her back, applied some Vaseline on her genitalia before inserting his penis in her vagina. She experienced pain but pretended to be asleep.

25. PW2 explained that prior to that day the Appellant had applied Vaseline to his fingers and her genitalia and inserted his fingers severally into her vagina. He had done this day and night for a couple of days before he started inserting his penis which he also did for several days. She further explained that there were times he would switch off the lantern lamp.

26. When PW2's mother returned from hospital the Appellant sent her way telling her that he had gotten another wife and did not want her anymore. PW2 stated that her parents had disagreements and that the Appellant usually accused her mother of infidelity. The chief was involved and her mother was returned home.

27. According to PW2, it was the landlord who informed her mother of the disturbing occurrences between her and the Appellant. She had not told a soul about her encounters as her father had promised her money for clothes if she kept mum. PW2 stated that she informed Mama Lenny about the acts and the Appellant threatened her but she nevertheless reported the matter again.

28. The Appellant was caught red-handed by his wife while atop PW2 having applied Vaseline as usual and inserted his penis in her vagina. The Appellant was asked if that was the new wife he had talked of and he dropped on the mattress and pretended to be asleep. PW2's mother called neighbours and she was taken to the hospital where she was tested and her age assessed before being taken to the police station to file a report.

29. When cross-examined she stated that she did feel pain when the Appellant inserted his fingers inside her vagina and that she informed Mama Lenny about her ordeal. She testified that it was her first time to see a man's manhood. PW2 informed the court that she feared reporting the matter as the Appellant had threatened her and would always follow her so that she could not get an opportunity to tell on him. PW2 explained that she was not told what to tell the court and had testified on what she had experienced.

30. The medical evidence was given by PW1 Ibharim Abdullahi, a clinical officer. He testified that on examination it was established that the alleged victim had no injuries but the hymen was not intact. PW1 produced a P3 form, treatment notes, laboratory test report and an age assessment report as exhibits. When cross-examined, he explained that the hymen would not be intact if there was penetration.

31. The victim's mother, A.K.D., testified as PW3. She confirmed that there was a period she had taken her son to hospital leaving the other children in the care of their father, the Appellant. She testified that her daughter was born on 18th November, 2011 and the Appellant was her biological father.

32. Her evidence was that on the day she caught the Appellant in the act she had come home from casual work at 8.00 p.m. and found the door of their one-roomed house closed. She peeped through the window to request her husband to open the door. It was then that she saw him apply Vaseline to his penis then to PW2's genitalia before turning her on her back and inserting his penis inside her vagina. The child who had been asleep woke up and looked at the Appellant but kept quiet.

33. PW3's testimony was that she then went back to the door and pushed it open startling the Appellant who pulled out of the child and pretended to be asleep. PW3 left to get the Appellant's brothers who lived near their home but when they arrived the Appellant was fully dressed and pretending to be asleep. PW3 described what she had seen to the Appellant's relatives. They took PW2 to a nearby clinic although the Appellant was very harsh. PW2 explained to the doctor that she had been defiled but the doctor had no equipment for swabbing specimen. All the while, the Appellant kept pointing at PW2 as he put his fingers across his throat and his index finger to his mouth. PW2 was scared and could not talk. The Appellant became harsh, wanted to beat up the child and was displeased that PW3 had sought the assistance of his brothers without his permission.

34. The following day PW3 took PW2 to hospital where she was examined in her presence. She learned that at the time she had taken her son to hospital her husband was preying on their daughter. They then filed a report with the police.

35. Cross-examined by the Appellant, PW3 disclosed that although she at times disagreed with the Appellant she had never gone back to her parent's home. She acknowledged that the Appellant had never paid her dowry but she had not complained about it. PW3 further stated that she had once disagreed with the Appellant over her having the charcoal dealer's phone number. She explained that she had the number so that she could make orders as and when she needed charcoal. She informed the court that the government hospital released her over the unpaid hospital bill which the Appellant refused to foot. Further, that she opted not to alert neighbours as she feared that the Appellant would be lynched as he had allegedly done the same act on other children. In re-examination she stated that the narrative was not fabricated.

36. PW4 Corporal Mariam Hussein investigated the matter and apprehended the Appellant who wanted to make an escape before charging him. The investigating officer testified that she did not establish any grudge between PW3 and the Appellant. In cross-examination PW4 explained that the victim could not recall dates and that neighbours were not interviewed. The investigating officer denied beating up the Appellant or turning down a money offer from him so as not to take him to court.

37. In his defence, the Appellant stated that on 9th June, 2017 he disagreed with his wife over an affair with another man. He stated that he did not know who gave her money when they were admitted in hospital. He stated that after the disagreement she did not spend the night at their home and neither did she sleep there upto 13th June, 2017 when he was arrested. His evidence was that the investigating officer had asked for money so as not to take the matter forward. The Appellant denied the charges stating that he had disagreed with his wife over a particular man and the disagreement led to the false charges.

38. In cross-examination the Appellant stated that he knew that his wife was having an affair with a certain man though he did not put questions to her about the affair when she testified. The Appellant's evidence was that at the time his wife was admitted with their son he lived at the school where he worked as a teacher and the children lived and slept on their own. He confirmed that PW2 was eleven years old. According to him, his wife did not see the child being defiled.

39. The offence of incest created by Section 20(1) of the Sexual Offences Act, 2006 prohibits indecent act or penetration of a daughter, granddaughter, sister, mother, niece, aunt or grandmother by a male person. For one to be found guilty, he has to have knowledge of the relationship.

40. From the facts that were placed before the trial court, there was undisputed evidence from PW2 and PW3 that the Appellant is the father of PW2. The evidence adduced confirmed that the Appellant was aware that PW2 was his daughter.

41. The only issue is whether the Appellant penetrated PW2. PW2 painted a rather disturbing picture of what took place. Her evidence was corroborated by her mother who was an eyewitness to one of the episodes of repeated defilements. The medical evidence confirmed that the hymen was not intact meaning that there was high likelihood of penetration.

42. The trial court found that there were fresh bruises on the victim's genitalia. The finding was however a misapprehension of the contents of the P3 form which was clear that there were no fresh bruises on the genitalia at the time of examination. Be that as it may, the medical

evidence confirmed that penetration had taken place.

43. The Appellant's defence was that he lived at the school where he taught while his daughters lived and slept alone. However, his wife caught him in the act. The Appellant claims he had differences with his wife over an affair she had with another man. The Appellant's claim that he did not stay with the children is unbelievable. The children were of tender years and they could not have been left to live alone.

44. In order to support his claim that the charges against him were fabricated, he points to the fact that other witnesses like his brothers were not called to give evidence. I wonder whether his brothers could have testified against him. It must be remembered that sometimes it is difficult to get somebody to testify against his brother.

45. The question to be answered is whether the evidence availed was adequate. In the case at hand, the medical evidence availed confirmed penetration. There was the evidence of PW3 who stated that she found the Appellant in the act. PW3 admitted that the Appellant beat her frequently but it is not plausible that this led her to fabricate charges against the Appellant. It is not possible that PW3 could have convinced the other witnesses to tell lies against the Appellant.

46. It is noted that the trial court observed that the victim was intelligent, vocal, focused and consistent and did not give the impression that she was lying. The trial court believed that the victim was a truthful person. A perusal of the evidence adduced by PW2 is so detailed that she had to be a good actor if the Appellant's claim that she lied is to be believed.

47. The Appellant called for the disregarding of the child's evidence for lack of *voir dire* examination.

48. The Court of Appeal addressed at length the law applicable in regard to *voir dire* examination in **Maripett Loonkonok v Republic [2016] eKLR**; **Criminal Appeal No. 68 of 2015 (Mombasa)**. I beg to quote the court at length:

> **"We turn to consider the effect of failure by the trial court to administer voir *dire* on the complainant. 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….**
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> **Although this decision, through section 19 of Oaths and Statutory Declarations Act underpinned the legal practice in relation to children's testimony in Kenya, we reiterate that the format and procedure of testing the intelligence, and sufficient knowledge and nature of the oath has been varied. For instance, in the past the courts insisted that *voir dire* examination must be in the form of a dialogue, with the trial court recording questions posed to the child and the child's answers nearly verbatim in the first person before drawing its conclusion on the question of suitability of the child. See Johnson Muiruri v R (1983) KLR 447. The courts today accept both the question and answer format and the recording of the child's answers only. See James Mwangi Muriithi (supra). What is constant is that, whatever format the court adopts it must be on record. It is equally settled that by dint of sections 208 and 302 of the Criminal Procedure Code, the law allows cross-examination of a witness who does not give evidence on oath. See Nicholas Mutua Wambua and another v Msa Criminal Appeal No. 373 of 2006.**
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> **It is clear to us from the record that the trial Magistrate deliberately did not conduct *voir dire* examination for he believed, erroneously, that the complainant was not a child of tender years….**
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> **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."**

49. PW2 who was eleven years old was a child of tender years and a *voir dire* examination was necessary in her case. The question is whether the trial court examined PW2. The handwritten proceedings indicates:

> **"Prosecutor: The next witness is a young 11 years old juvenile. I request the court to examine her.**
>
> **Court: I have examined the young minor. She is 11 years old. She is well grounded on matters of religion. She understands meaning of oath. She is intelligent enough for her evidence to be received."**

50. The trial court did not record the questions put to the child during cross-examination. Indeed the answers given by the child were never captured by the trial court. It was necessary for the trial court to, at the very least, record the answers given by the child witness – see the Court of Appeal decision in **Patrick Kathurima v Republic [2015 eKLR**.

51. In **DWM v Republic [2016] eKLR; Criminal Appeal No. 12 of 2014**, the Court of Appeal commenting on the **Kathurima** case (supra) observed that:

> **"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 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.

12. 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."**

13. On account of the above observation this court in the *Kathurima case* vitiated the prosecution case totally on account of it having been anchored on the minor's contradictory evidence and on that account allowed the appeal in its entirety.

14. There was however no hard and fast rule laid down by this Court in the *Kathurima case* (supra) that in all cases where *voir dire* procedure had not been strictly administered 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 question put and the answers given by the child during the voir dire examination be recorded..."**
>
> **The trial magistrates' failure to reflect on the record the questions put to H.W. during the voir dire examination was not therefore per se fatal to the prosecution case. The sustainability or otherwise of the prosecutions' case solely depended on whether the evidence on which it was anchored met the thresh hold of proof beyond reasonable doubt. (Emphasis added)**

15. The failure to give sworn evidence notwithstanding, *H.W.* was subjected to cross-examination by the appellant. In *Sula versus Uganda (supra*) the supreme court of Uganda ruled that:

"A child who gives evidence not on oath is liable to cross-examination to test the veracity of his/her evidence.""

52. Although the trial magistrate erred in failing to record the answers given by the PW2 during the *voir dire* examination, it would be unjust for this court to ignore the evidence of PW2 when the record clearly shows that *voir dire* examination was conducted before the child was allowed to give evidence on oath. The manner in which the trial court proceeded should however be discouraged as it does not avail this court, in its appellate jurisdiction, the opportunity of determining if the child truly understood the meaning of an oath or was intelligent enough to give evidence. It is only by considering the answers given by the child that this court can say whether the child was competent to testify and if the child understood the meaning of an oath. Having said so, I find no merit in the Appellant's appeal on this issue.

53. As regards sentencing, I note that the punishment provided by Section 20(1) of the S.O.A. for the offence of incest is imprisonment for a term not less than ten years **"[p]rovided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person."**

54. In imposing life imprisonment, the trial magistrate observe that the Appellant was a danger to children.

55. The evidence on record shows that PW2 was born on 18th November, 2007 and the assault was discovered on 10th June, 2017 meaning that she was about ten years at the time of the assault. Had the Appellant not been the father of PW2, he would have been charged with defilement contrary to Section 8(1) as read with Section 8(2) of the S.O.A. and the sentence would upon conviction have been life imprisonment. Why then should a person convicted of incest get anything less than a life sentence when the victim is a child under eleven years? Life imprisonment for the offence was appropriate in the circumstances of this case.

56. As for the second count, I find that the same was so intertwined with the first count and it ought to have been charged as an alternative to count one. In the circumstances I quash the conviction on count two and set aside the sentence imposed on the Appellant in respect of that count.

57. Save for what is stated above, I find this appeal without merit. The appeal is therefore dismissed.

Dated, signed and delivered at Malindi this day of 6th December, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT