REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 8 OF 2015

CHARLES MWAKISAKA MVOI…….……... APPELLANT

VERSUS

REPUBLIC…… RESPONDENT

(From original conviction and sentence in Criminal Case Number 526of 2012 in the Senior Principal Magistrate's Court at Voi delivered by Hon E.M. Kadima(RM) on 26th March 2015)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Charles Mwakisaka Mvoi, was tried and convicted by Hon E.M. Kadima, Resident Magistrate for the offence of defilement of an imbecile contrary to Section 146 of the Penal Code Cap 63 (Laws of Kenya). He was sentenced to serve ten (10) years' imprisonment.

2. The particulars of the charges were as follows :-

> **"On the night of 11th and 12th day of February 2011 at [particulars withheld]within Taita Taveta County had carnal knowledge of A M a girl aged 16 years old and who is an imbecile."**

3. Being dissatisfied with the said judgment, on 15th January 2014, the Appellant filed a Notice of Motion application seeking leave to file his appeal out of time, which application was allowed. His Mitigation Grounds of Appeal were as follows:-

> **1. THAT he was a father to eight children and also extended family depended on him for the upkeep.**
>
> **2. THAT he used to do farming but since he was arrested and convicted the said farm had no one to control and further the production** (sic)**.**
>
> **3. THAT he was remorseful and recount any kind of behaviour which was contrary to the law**(sic)**.**
>
> **4. THAT in prison he had develop** (sic) **some funny diseases which were expensive to treat.**

4. When the matter was mentioned on 7th February 2017 to confirm if both the Appellant and the State had filed their respective submissions, this court noted that only the Appellant had complied with its directions of 1st December 2016. His submissions raised several issues that could be summarised as follows**THAT**:-

1. There was a mistrial or a nullity of the trial as the matter proceeded without his plea having been taken.

2. The OB Reference Number on the Charge was different from the OB Reference Number on the P3 Form (sic).

3. Medical examination was conducted on the Complainant three (3) days after the alleged incident.

4. The age of the Complainant was not proven.

5. The Complainant could not give evidence under oath when she did not understand the meaning of taking an oath.

6. The Complainant was an un-reliable, un-credible and doubtful witness.

7. There were contradictions in the Prosecution's evidence.

5. On its part, counsel for the State indicated that the State had opted not to file its Written Submissions as it was had conceded to the appeal on three (3) grounds. The first ground was that there was no proof, documentary or medical evidence in the entire proceedings which showed that the Complainant herein, A M (hereinafter referred to as "PW 1") was an imbecile, which was itself an ingredient of the charge of defilement of an imbecile as defined in Section 146 of the Penal Code.

6. The second ground was that the *voire dire* examination was not conducted properly as the Learned Trial Magistrate allowed PW 1 to adduce sworn evidence despite her having told the Trial Court that she did not understand what taking an oath entailed. The third ground was that the said *voire dire* examination was conducted without the assistance of an intermediary.

LEGAL ANAYSIS

7. Despite the State conceding to an appeal, it is prudent that an appellate court satisfies itself if indeed the reasons given in conceding to an appeal are fair and reasonable. This is to avoid situations where a concession could be given against the backdrop of a case that clearly shows that an alleged offence did in fact occur.

8. This court therefore carefully perused the proceedings of the Trial Court and noted that just as the Appellant and the counsel for the State had pointed out, no proper *voire dire* examination was conducted. If PW 1 was an imbecile as had been contended by the Prosecution, it was reasonable to expect that an intermediary ought to have assisted her in adducing her evidence.

9. Save for the indication in the P3 Form that PW 1 was mentally retarded in a Spinal Unit School**(sic)**, no other evidence was adduced in the Trial Court to demonstrate that she was an imbecile. Assuming that the Learned Trial Magistrate observed that she was indeed an imbecile, it followed that she was by all standards, a vulnerable personas she had mental disabilities.

10. As imbeciles have some degree of intellectual disability, their communication would need to be interpreted by another person who is conversant with their manner of speech. It is evident that PW 1's evidence ought to have been adduced either by an intermediary or interpreted by an intermediary if PW 1 was able to communicate adequately as provided for in Sections 31(1) and (4)(b) of the Sexual Offences Act Cap 62A of the Sexual Offences Act, a fact that the Learned Trial Magistrate ought to have taken up.

11. In the event the Learned Trial Magistrate was satisfied that PW 1 was competent to adduce evidence on her own despite of her having been an imbecile, then he ought to have noted that fact, with an explanation of how he came to that conclusion, in the proceedings or in his Judgment. This was necessary as it would have enabled this appellate court appreciate that he had arrived at a reasonable conclusion that she was a witness who was competent to adduce evidence without the help of an intermediary.

12. The only thing that this court noted from the said Learned Trial Magistrate's Judgement, which fact was not clear in the proceedings, was that PW 1 adduced sworn evidence. Again as was rightly pointed out by both the Appellant and the State, PW 1 ought not to have adduced sworn evidence when she had specifically stated that she did not understand what the taking of an oath entailed.

13. Allowing PW 1 to adduce sworn evidence when she clearly did not understand what an oath was, was greatly prejudicial to the Appellant. The effect of her sworn evidence was that the Appellant herein could easily have been found liable based on her evidence alone. This was an issue that was dealt with in the case of **Johnson Muiruri vs Republic [2013] eKLR** in which the Court of Appeal rendered itself as follows:-

> **"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…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 (sec.19, Oaths and Statutory Declarations Act, cap 15.**.

14. Indeed, in his judgement, the Learned Trial Magistrate relied on the proviso of Section 124 of the Evidence Act Cap 80 (Laws of Kenya) that provides as follows:-

> **"Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is 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."**

15. Having said so, this court also noted that the Learned Trial Magistrate appeared to have sworn PW 1 even before he conducted the *voire dire* examination. This was a serious procedural flaw.Notably, the procedural flaws emanated from the Trial Court. This could have been persuaded this court to consider referring this matter for a re-trial.

16. It is important to point out, however, that a matter will not be referred for a Re-trial if it appears to an appellate court that an appellant was likely to suffer bias and/or prejudice.

17. In this regard, this court fully associated itself with the holdings in the cases of **Ahmedi Ali Dharamsi Sumar vs Republic [1964] E.A. 481** and re-stated in **Fatehaji Manji vs Republic [1966] E.A. 343** that Mutende and Thuranira Jaden JJ cited in the case of **Jackson Mutunga Matheka vs Republic [2015] eKLR** where it was stated as follows:-

> **"… a retrial will only be ordered when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence of for the purpose of enabling the prosecution fill up gaps in its evidence at the first trial, even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on**

particular facts and circumstances and an order for retrial should only be made where the interest of justice required it and not ordered where it is likely to cause an injustice to the accused."

18. This court found that although a re-trial would ordinarily have been ordered in a case where errors or omissions have been made by a trial court such as those that were made by the Learned Trial Magistrate, this was not a good case to order such re-trial. Undoubtedly, an offence was said to have been committed herein. Unfortunately, there is very high likelihood that PW 1, who was an imbecile might not be able to recall the details of the incident that was alleged to have occurred about six (6) years ago. Whether her evidence would remain the same as was given on 22nd October 2012 is a matter of speculation.

DISPOSITION

19. Bearing the aforesaid into consideration, this court saw no need to analyse the merits or otherwise of the Prosecution's case and right at the outset concurred with the submissions of both the Appellant and counsel for the State that it would be very unsafe to rely on the evidence that was adduced herein to sustain the conviction against the Appellant herein.

20. Accordingly, this court hereby quashes the conviction and sets aside the sentence that was meted upon the Appellant by the Trial Court as it would be clearly unsafe to confirm the same. The court hereby orders that the Appellant be set free forthwith unless held or detained for any other lawful reason.

21. It is so ordered.

DATED and DELIVERED at VOI this 16th day of February 2017

J. KAMAU

JUDGE

In the presence of:-

Charles Mwakisaka Mvoi…….. Appellant

Miss Anyumba……..for State

Josephat Mavu– Court Clerk