



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 17 OF 2014

(Formerly Nakuru HC.CR.A. No. 248 of 2013)

(Being an Appeal from Original Conviction and Sentence in Criminal Case No. 1442 of 2012 of the Chief Magistrate's Court at Naivasha before E. Boke - PM)

SAMWEL NDUNGU KIMANI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant herein was tried for the offence of Defilement contrary to Section 8 (1) and (2) of the Sexual Offences Act. In that on the 15th day of May 2012 at [particulars withheld] in Nyandarua County, he willfully and unlawfully did cause his penis to penetrate in the vagina of **M.W.O.** a girl aged 13 years. He was sentenced to serve 20 years imprisonment.

2. Aggrieved by the result, the Appellant has challenged the conviction by his four amended grounds filed on 11/10/2016. The grounds state that:

“1) THAT the learned trial magistrate erred both in law and fact when she conducted an unfair trial (Voir dire examination) never conducted.

2) THAT the pundit trial magistrate erred both in law and fact when she convicted me in the present case yet failed to find that the age of the alleged victim was not ascertained.

3) THAT the learned trial magistrate erred both in law and fact when she convicted in the present case yet failed to find the mandatory procedures were not achieved.

4) THAT, the learned trial magistrate erred both in law and fact when she convicted me while relying on relying on testimonies advanced by hostile witnesses.

5) THAT, the learned trial magistrate erred both in law and fact when she dismissed my plausible defence.” (sic)

3. In submissions on grounds 1 to 3, the Appellant argues that the trial court erred in failing to conduct a *voir dire* examination of two minors **M.W.O. (13)** and **A.W. (17)**, before they testified on oath as **PW1** and **PW4** respectively. Secondly he contends that oral evidence tendered regarding the age of **PW1** was insufficient to prove her age. He also complains that he was not subjected to medical examination and takes issues with a medical evidence tendered in respect of the examination on the complainant.

4. Claiming that evidence against him was the result of a conspiracy by witnesses, based on a grudge, he described the witnesses as **“hostile”**. He finally submitted that he gave a good defence, and complains that the trial court was not impartial; that *‘vital’* exhibits and *‘crucial’* witnesses were not brought to court.

5. The appeal was opposed by the Director of Public Prosecutions. Through Mr. Koima, the DPP submitted that the prosecution evidence which he restated, was overwhelming. He disclaimed any existence of a grudge by the witnesses against the Appellant and asserted that the medical evidence tendered supported the charge, and in particular concerning the issues of the age of the complainant and penetration.

6. In response, the Appellant challenged the value of **PW4’s** evidence asserting further that the P3 form did not support penetration.

7. In **Pandya -Vs- Republic [1957] EA 336** the Court of Appeal of East Africa outlined the duty of the first appellate court in the following words:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

8. At the trial, the prosecution called six witnesses. The prosecution case was that the complainant (**M.W.O.**) who was aged 13 was a resident of [particulars withheld] and a standard 5 pupil at [particulars withheld] School in 2012. The Appellant who was a neighbour was well known to her family, which included her mother **G.A. (PW2)** and older sister **A. N. (PW4)**. The children were frequent visitors to the Appellant’s house as they attended the same church as the Appellant. The Appellant was an elder of sorts in the church.

9. On 14/5/2012 **PW1** had sold a tin of charcoal from her home to the Appellant, who promised payment on the next day, 1st May, 2012. After school, on the evening of 15th May, 2012, the complainant went to the Appellant’s house to collect the payment of Shs 40/=. She found the Appellant making supper in his external kitchen. He invited her to share the meal. After the meal he pretended to get the money. He held out his hand and pulled the complainant before carrying her into the main living house or bedroom. He placed her on a bed and proceeded to have sexual intercourse with her.

10. Meantime, it was growing late, and **PW2** dispatched **PW4** to go bring **PW1** home, as well as ask for some flour from the Appellant. On arrival, **PW4** lingered outside and listened to the goings on in the Appellant’s house, before knocking. After some delay, the Appellant opened the door slightly and lied to **PW4** that **PW1** had been sent to another home to collect milk. He gave some flour as requested by **PW4**. Leaving the flour aside, **PW4** stated that she preferred to first go in search of **PW1** at the home where her alleged errand had taken her.

11. Believing from what she had heard, that **PW1** was still in the house, **PW4** then hid by a tree and saw the complainant emerge from the Appellant’s house. The two girls went home together and reported to their mother **PW2**. On the same evening a report was made to Administration Police Constable **Mutinda (PW5)** of [particulars withheld] School Administration Police Post. The complainant and her mother were referred to the local hospital. At Engineer District Hospital **PW1** was examined and treated. She

was found to have sustained a tear to the hymen and inflamed labia minora, with whitish discharge. At 4.00am on 16/5/2012, **PW5** received the reportees back and he proceeded to the home of the Appellant and effected arrest.

12. The Appellant upon being placed on his defence elected to make a sworn statement. The rather lengthy statement was to the following effect. The Appellant hailed from Banana Kiambu but was in the material period residing at Kinangop and engaging in odd jobs. He stated that contrary to the prosecution witnesses' evidence he resided at [particulars withheld] and not [particulars withheld]. After the day's work on 15/5/2012 he proceeded home. That while weeding his vegetable patch outside his house he was approached by **PW4** who waved a Shs 200/= asking for loose change. He gave her only Shs 100/- as she plucked some vegetables for him before going away. He made supper and retired for the night. Before long a woman's voice and knock at the door woke him up.

13. Upon opening the door he saw police officer and outside the house, met **PW1**, **PW2** and **PW4**. He learned of the defilement complaint against him. He was shocked. He was placed in custody and eventually charged. He stated that at 65 years of age he was barely sexually active and that the case against was a "frame-up". The defilement allegations false, he said. The rest of the statement amounts to submissions concerning the prosecution evidence.

14. There is no dispute that the Appellant was known to the complainant and her family. That they related as neighbours, in the course of which they would visit each other's respective homes. Thus whether or not the name of the village in which they lived is [particulars withheld] does not matter. [particulars withheld] seems to be the general name of the area. The trial magistrate correctly observed as much, believed the evidence of **PW1** and **PW4** and was satisfied that the charge had been proved against the Appellant.

15. Before examining the evidence, I find it necessary to deal with the challenges raised on this appeal in respect of the testimonies of **PW1** and **PW4**. The Appellant asserted that they were children of tender years whose evidence ought not to have been received without the prerequisite of a *voir dire* examination by the trial court. In the recent case of **Maripett Loonkomok -Vs- Republic [2016] eKLR**, the Court of Appeal grappled with a similar challenge concerning the trial evidence of the minor complainant.

16. In connection to the question of age, the Court of Appeal had this to say:

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.

We can only reiterate what has been said before that at a certain age and in this day and age a child of a certain age bracket is able to give his or her age accurately. (emphasis added)

17. In this case, **PW1** stated her age to be 13 years. Equally, the doctor who examined her and completed her P3 form estimated her age as 13 years. It is not correct, as the Appellant asserts that age must necessarily be proved through documentary evidence such as birth certificate or baptism cards.

18. In the case of **Mwalongo Chichoro Mwajembe -Vs- Republic, Msa Cr.App. No. 24 of 2015 (UR)** the Court of Appeal stated concerning proof of age that:

".....the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even

been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See Denis Kinywa -Vs- Republic, Criminal Appeal No.19 of 2014 and Omar Uche -Vs- Republic, Criminal Appeal No.11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in Francis Omuroni -Vs- Uganda, Criminal Appeal No. 2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable..."

19. In her judgment the learned trial magistrate correctly relied on its own assessment of the age of the minor, erroneously ignoring the oral evidence by PW1 and the P3 form indicating PW1's age. The said evidence was not challenged at the trial, the Appellant admitting during his cross-examination that the complainant was aged "around 13 years." But as to whether a *voir dire* examination should have been conducted in respect of PW1 and her sister PW4, birth evidently minors, that depends on whether or not the two are children of tender years.

20. In the Maripett case, the Court of Appeal observed:-

"Section 19 of the Oaths and Statutory Declarations Act is concerned with the reception and admissibility of evidence of a child of tender years. The section starts by declaring that where the child does not, in the opinion of the court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath. But that evidence shall only be received if, again in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth. So long as that evidence, though not on oath, is taken down in writing, it amounts to a deposition under Section 233 of the Criminal Procedure Code. The Code does not prescribe the precise manner of ascertaining and determining whether the child witness understands the nature of the oath or is possessed of sufficient intelligence or even his or her ability to understand the duty of speaking the truth. *Voir dire*, a latin phrase (*verum dicere*) for saying "what is true", "what is objectively accurate or honest" has been used in most Commonwealth jurisdictions and in some instances in the United States of America,

as "a trial within a trial", a hearing to determine the admissibility of evidence or the competency or qualification of a witness or juror See Duhaime, Lloyd. "*Voir Dire* definition" Duhaime's Legal Dictionary. But the origin of the rule on *voir dire* examination of a child witness as we know it today was first applied in the ancient yet landmark English case of Republic -Vs- Braisier (1779) 1 Leach Vol. I, case XC VIII, PP 199 – 200, which incidentally was a case involving sexual assault on a girl under 7 years of age. The twelve Judges in that case stated, in part, that;

".. an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath... for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence" (our emphasis)

The question therefore is, who is a child of tender years? The Sexual Offences Act and the Oaths and Statutory Declarations Act are silent on this question. However way back in 1959 in the celebrated case of Kibageny Arap Kolil -Vs- Republic (1959) EA 82 the Court of Appeal for Eastern Africa held that the phrase "a child of tender years" meant a child under the age of 14 years. The only statutory definition of a "child of tender years" is Section 2 of the Children Act where it is defined to mean a child under the age of 10 years. This Court has recently in Patrick Kathurima -Vs- Republic, Criminal Appeal No.137 of 2014 and in Samuel Warui Karimi -Vs- Republic Criminal Appeal No.16 of 2014 stated categorically that the definition in the Children Act is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to

testify. It follows therefore that the time-honoured 14 years remains the correct threshold for *voir dire* examination. 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 -Vs- Republic Cr.Appeal No.11 of 2015”

21. In the present case and light of the foregoing, **PW1** was definitely a child of tender years and her evidence should have been preceded by a *voir dire* examination to confirm her competency to testify. The complainant in **Maripett** was aged about 7 years. Her evidence at the trial was sworn but was not preceded by a *voir dire* exam. The Court of Appeal did not agree with defence submission that the evidence was irregular therefore the trial vitiated.

22. The court stated:

“We turn to consider the effect of failure by the trial court to administer *voir dire* on the complainant. It is fully settled that not in all cases that *voir dire* is not administered or is not administered properly the entire trial is vitiated. This court sitting at Nyeri has recently reiterated what has been said many times before that the question will depend on the peculiar circumstances and particular facts of each case See James Mwangi Muriithi –Vs- Republic Criminal Appeal No. 10 of 2014.”

23. The court revisited this question in the passage cited previously by state that in appropriate cases, despite the court's failure to conduct a *voir dire*, where independent evidence supports the charge a conviction could be upheld.

24. In conclusion, the Court of Appeal stated in **Maripett** that:-

“On the peculiar facts and circumstances of this case, it is our considered view that the trial was not vitiated by failure to conduct *voir dire* examination. The complainant's evidence was cogent, she was cross-examined and medical evidence confirmed penetration.....”

The court also considered the admitted fact that the Appellant had taken the complainant and lived with her as a wife and the existence of medical evidence to corroborate defilement.

25. It can be seen from the foregoing that while **PW1** was a child of tender years, **PW4** was not. In her case, no *voir dire* examination was necessary. This position is buttressed by the decision of the Court of Appeal in **Haro Guffil Jillo –Vs- Republic [2014] Eklr:-**

“PW2 was aged 17 years, she gave sworn evidence; the age of seventeen cannot by any stretch of imagination be regarded as that of a child of tender years....The true purpose of a *voir dire* examination is to establish whether a child of tender years understands two things: the nature of an oath and the need to tell the truth. In sum the court would be trying to establish whether the child possessed sufficient intelligence to understand the duty of speaking truthfully.....”

26. As in **Maripett's** case, the complainant herein was steadfast and gave a vivid account of the entire incident concerning the material evening. She was subjected to lengthy cross-examination and remained unshaken. The fine details in her testimony could not have been made up, in my opinion. She denied making up the defilement allegations to get even because the Appellant had earlier on spotted her in the company of a boy or that the boy had given her some gifts (bottles).

27. This suggestion loses significance in light of medical evidence in the form of the P3 form and PRC form, containing initial treatment notes. The latter [**Exhibit 2**] indicates that bleeding was noted on the complainant upon examination. The comment in the PRC form states:

“Had penetrative vaginal sex (associated) with bleeding.”

28. Contrary to submissions by the Appellant that the age of injuries was not known, the clinical notes in the PRC in respect of the genital examination of the survivor indicated inflamed labia minora, and torn hymen with the comment that “has a fresh torn hymen PVD whitish discharge”. This evidence confirms the oral evidence by **PW1** that she was involved in a sexual activity (assault) on the material night. The complainant could not have made up these injuries, merely because the Appellant had spotted her with a boy.

29. In addition to this evidence, was testimony by **PW4**, who said that before knocking on the Appellant’s door on the said night, she eavesdropped and heard the complainant crying as the Appellant uttered words to reassure her. She said she heard the bed creaking and heavy breathing in the room of the Appellant. That the Appellant uttered words to soothe the complainant urging her to stop crying. This evidence corresponds with the testimony of **PW1** concerning the conduct of the Appellant in that situation. Indeed the Appellant while painting different circumstances admitted the visit to his home by **PW4** on the material evening. Assertions that **PW4** had visited the home in search of loose change were not canvassed with **PW4** at cross-examination.

30. **PW4** said that after pretending to leave the Appellant’s home she hid near a tree and saw the complainant emerge from the house of the Appellant. The two girls then proceeded home. The fact that the actual report was first delivered by **PW4** first to her mother discreetly, before **PW1** could speak to her, cannot detract from **PW1**’s testimony. It seems that **PW4** being the more mature girl acted sensibly and wise in dealing with the delicate situation.

31. Further evidence **PW3** of the state in which found **PW1** when notified, is confirmation of the report by **PW2** and what she noted on examining the minor’s genitalia. There was no credible evidence that **PW2** had a grudge against the Appellant, and if so, there is no explanation why all the other witnesses would have joined her to punish the Appellant through giving false testimonies. At any rate, if the Appellants theft allegations were true, if **PW2**’s children who had stolen from the Appellant, making him the aggrieved party, not them. The evidence on record concerning previous relations before the Appellant and the complainant’s family belies the existence of a grudge between them.

32. In concluding her analysis of the evidence before her, the learned trial magistrate observed that:

“The evidence of the two girls is so convincing and truthful; therefore accused is the one lying by pretending as if he did not do anything to the complainant. I dismiss his defence as a mere denial.” (sic)

33. While the choice of words may not be desirable, the trial magistrate was in this case entitled to accept the prosecution evidence as truthful. She gave reasons in her evaluation, which in my view was fairly exhaustive. The Appellant’s defence that he was incapable of having sex or had no contact with the complainant on the material night was displaced by the prosecution evidence.

34. There is no mandatory requirement to have the male suspect of defilement examined at the same time as the alleged victim as the Appellant appears to indicate in his submissions. It is also not clear what crucial exhibits or critical witnesses were not brought to court by the prosecution. The stained underwear shown to the court by **PW2** during the testimony was not produced, as it had not been released as an exhibit into the safe custody of the investigating officer as required. There is no requirement in this case for the prosecution to call a certain number of witnesses [see Section 143 of the Evidence Act].

35. Finally, the fact that the investigating officer did not testify does not diminish the weight of the 6 witnesses who testified and produced exhibits. All in all, I am satisfied that the Appellant was convicted

on sound and overwhelming evidence. His appeal has no merit and is dismissed in its entirety.

Delivered and signed at Naivasha, this **12th** day of **May, 2017**.

In the presence of:-

Mutinda for the DPP

Appellant – present in person

C/C – Barasa

C. MEOLI

JUDGE