REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 50 OF 2015

(Being an Appeal from Original Conviction and Sentence in Criminal Case No. 821of 2013 of the Chief Magistrate's Court at Naivasha before E. Kimilu – Ag.PM)

GEOFFREY NJIHIA MWARANGU……………………………………APPELLANT

VERSUS

REPUBLIC……………………………..…………………………….PROSECUTOR

J U D G M E N T

1. **Geoffrey Njihia Mwarangu**, the Appellant herein was tried for the offence of Defilement contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act. The particulars stated that on the 9th day of April 2013, at [particulars withheld] village of Naivasha Municipality of Nakuru County, intentionally did cause his genital organ namely a penis to penetrate the genital organ namely a vagina of **J. W. K.** a girl child aged 14 years. Following a full trial the Appellant was found guilty, convicted and sentenced to serve 15 years imprisonment.

2. Aggrieved by the decision, he filed an appeal and later amended grounds of appeal. The summary of the amended grounds is that the charge sheet was defective, that the trial was irregular due to the failure by the trial court to conduct a *voir dire* examination of the complainant, that the prosecution case was not fool proof and, finally that the trial court erred by rejecting the Appellant's "plausible defence". The Appellant supported these grounds by written submissions.

3. Regarding the first ground the Appellant argues that the charge sheet was defective because the charge was not preferred as against Section 8 (1) as read with Section 8 (3), as the former section was omitted. On the second ground, the Appellant relied on the case of **John Muiruri -Vs- Republic [1983] KLR 445** for the proposition that the trial herein was irregular arising from the failure by the trial court to conduct a *voir dire* examination of the complainant who was aged under 18 years.

4. He also takes issue with the prosecution for failing to tender evidence regarding the alleged blood stained panty of the complainant and to prove her proper age. He complains further that he was not taken for medical examination as required under Section 36 of the Sexual Offences Act.

5. In opposing the appeal, Mr. Mutinda for the DPP submitted that all the elements of the offence were proved at the trial. He pointed out that the Appellant did not challenge the charges laid out in the lower court and that in any event the charge sheet was not defective. He urged the court to dismiss the appeal.

6. The duty of the first appellate court is to analyse afresh the trial evidence and to draw its own conclusions. As stated in **Pandya -Vs- Republic [1957] EA 336** that:-

> **"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."**

7. The prosecution called four witnesses during the trial. The gist of the prosecution case was as follows. The complainant **J.W.K.** (**PW1**) was born in November 1999 and was therefore aged 14 at the time of the offence.

8. On 9/4/2013 while undertaking an errand at Bondeni, she got late. She met the Appellant who was well known to her. She asked to use his phone to call her father to escort her home. The Appellant offered to take her home on his motor cycle and seek payment at her home. But the complainant proposed a neighbour known as **Kibe**.

9. The Appellant asked the complainant to wait at his house as he went in search of the said **Kibe**, locking her in the said house. On return, he made a meal. He undressed the complainant and had sexual intercourse with **PW1**, releasing her at 1.00am. Upon leaving, the complainant reported to police manning a road block.

10. Her father was contacted and took her to the hospital and later a report was made to police at Naivasha Police Station. It seems that the Appellant approached the complainant's parents proposing to "settle" the case. When **Catherine Nyambura Kamau** (**PW3**) a paralegal with a Non-Governmental Organization got wind of the development, she went directly to the hospital and ensured that the matter was reported to the police. The Appellant was arrested and charged.

11. In his defence the Appellant stated that he was a milk vendor. That on the evening of 9/4/2013 the complainant went to his house. She presented a sample bottle of milk. She had been sent by her parents to ask that he confirms if it was good for consumption, the intention being that her family would supply him with milk. He advised that they wait a few more days.

12. As the complainant went away he returned to his own work and eventually retired for the night. He was roused from sleep by a knock on the door. On opening the door police officers, the complainant, her parents and others confronted him. He was arrested and taken to the Administration Police Camp for interrogation.

13. He and the complainant were escorted to the district hospital after which he was released, only to be rearrested and placed in the cells. He learned of the offence facing him and pleaded innocence. He requested to be escorted for medical examination but he was charged instead.

14. There is no dispute that the Appellant and the complainant were well known to each other; that they met at his house on the material evening albeit the circumstances are disputed.

15. On this appeal, the evidence in respect of the age of the Appellant, and indeed the entire prosecution case has been challenged. Also raised was the propriety of the charge sheet and regularity of the trial.

16. I have considered the submissions in respect of the appeal and the record of the trial. Firstly, the charge sheet in the lower court clearly cites Section 8 (1) and 8 (3) of the Sexual Offences Act in the

statement of the offence. The submission that the former Section was missing from the statement is therefore inaccurate. Even if that were the case, it would not follow that the charge sheet was defective. The failure to cite Section 8 (1) of the Sexual Offences Act could not be fatal.

17. In the case of **Robert Mutungi Muumbi -Vs- Republic [2015] eKLR** the Court of Appeal while considering the effect of such omission delivered itself as follow:-

> **"The appellant is correct that ideally the charge must include both the section creating the offence and that prescribing the punishment, although it is worth noting that the forms provided in the Second Schedule to the Criminal Procedure Code on the framing of charges do not make any reference to the punishment section. This Court has emphasized time and again the importance of drawing a charge sheet with care and precision so that the accused person understands in clear and unambiguous terms the offence with which he or she is charged. That makes it easier for the accused person to plead to the charge and also to effectively prepare his or her defence. This is also a fundamental requirement of Article 50(2) (b) of the Constitution, which demands that every accused person be informed of the charge with sufficient detail to answer it. (See also Yosefu -Vs- Uganda [1969] EA 236)……..**
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> **Section 382 of the Criminal Procedure Code is also relevant to the question raised by the appellant. That provision insulates a finding or sentence of the trial court from challenge on account of any error, omission or irregularity in the charge, unless it has occasioned a miscarriage of justice. (See George Njuguna Wamae -Vs- Republic, CR. APP. NO. 417 OF 2009)………**
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> **Similarly in Amedi Omurunga -Vs- Republic, CR. APP. NO. 178 OF 2012, this Court invoked section 382 of the Criminal Procedure Code and declined to interfere with the conviction where the appellant had, like in the present case, been charged under the punishment section without any reference to the section creating the offence. The Court found that the appellant had an opportunity to raise the issue before the trial court but did not; that he was well aware of the charge against him and its particulars; that he had effectively participated in the trial; and that no miscarriage of justice had been occasioned.**
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> **The Court also rejected the reasoning of the High Court in Samuel Fondo Gona -Vs- Republic, (supra) *and* Mutinda Mwai Mutana -Vs- Republic (supra), which had held, without reference to section 382 of the Criminal Procedure Code, that a charge sheet that cited only the punishment section was fatally defective. The Court expressed itself thus:**
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> > ***"To our mind, we are satisfied that the irregularity in the charge-sheet did not imperil the appellant or occasioned him a failure of justice. Given the foregoing, the decisions of the High Court that the appellant sought to rely on were decided without subjecting the conclusions to the test of whether that omission occasioned a failure of justice and thereby prejudiced the appellant. To that extent they do not represent good law and ought to be discarded or disregarded."***

18. Regarding the regularity of the trial, a *voir dire* examination is only necessary where the proposed witness is a child of tender years. The term 'child of tender years' was defined by the Court of Appeal in **Maripett Loonkomok -Vs- Republic [2016] eKLR** that:-

> **"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.

19. In **Haro Guffil Jillo -Vs- Republic [2014] eKLR** the Court of Appeal stated regarding a child aged over 14 years that:-

"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……"

20. It is true as stated by the Appellant that while **PW1**, asserted her age to be 14 years, the copy of a birth certificate (Exhibit 2) tendered showed that she was 17 years old. The trial court erred by placing reliance on the said birth certificate. The copy was produced by **PC Arwa** (**PW4**). The record does not indicate that it was shown to **PW1** and **PW2** during their evidence. The parents who allegedly gave it to **PW4** did not identify it in court. Its production by **PW4** was irregular therefore.

21. Besides, there was evidence by **PW1** and **PW2** that **PW1's** parents had desired to 'settle' the complaint against the Appellant in return for payment. The complainant clearly stated her age and date of birth, which is confirmed by the PRC form and P3 form. Contrary to the Appellant's assertions on this appeal, the clinical officer **Dorcas Wandanje** (**PW3**) did not testify that **PW1** was 17 years old. Rather, that the Birth Certificate (**Exhibit 2**) itself a copy, showed such an age.

22. Whatever the case, the complainant was a minor aged between 14 and 18 years of age, from the evidence tendered. There was no requirement for a *voir dire* examination of the complainant. The trial was therefore regular.

23. Regarding the sufficiency of the prosecution evidence, the fact of contact on the material date between the Appellant and complainant is undisputed. **PW1's** evidence regarding the events of the evening was not shaken during cross-examination. Besides, **PW1's** evidence regarding penetration is confirmed by the PRC form and P3 form. Failure to produce the blood stained pant or to have the Appellant medically examined does not detract from that evidence. The Appellant's defence was a denial which in my view was properly rejected by the trial court, having found that the prosecution evidence was overwhelming.

24. The Appellant benefitted however through the conviction recorded under Section 8 (4) of the Sexual

Offences Act which provides for a lighter sentence than prescribed under the original preferred charge under Section 8 (3) of the Sexual Offences Act. The trial court was empowered to record a conviction under Section 8 (1) as read with Section (4) of the Sexual Offences Act. In my considered view, the Appellant was properly convicted and sentenced under the said Section. His appeal before this court has no merit and is accordingly dismissed.

Delivered and signed at Naivasha, this **14th** day of **July, 2017.**

In the presence of:-

Mr. Mutinda for the DPP

N/a for the Appellant

C/C - Barasa

Appellant - Present

C. MEOLI

JUDGE