REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL APPEAL NO 26 OF 2015

jackMUTHAMA MUNGUTI……..… APPELLANT

VERSUS

REPUBLIC…… RESPONDENT

(From original conviction and sentence in Criminal Case Number 886of 2014 in the Senior Principal Magistrate's Court at Voi delivered by Hon E. M. Kadima(RM) on 6th March 2015)

JUDGMENT

INTRODUCTION

1. The Appellant, Muthama Munguti, was tried and convicted by Hon E.M.Kadima Resident Magistrate for the offence of defilement of a girl contrary to Section 8 (2) of the Sexual Offences Act No 3 of 2006. He was sentenced to serve life imprisonment.
2. The particulars of the offence were as follows :-

> **"On 2nd day of November 2014 at 6.00 pm in Taita Taveta County** (sic)**intentionally and unlawfully caused your penis to penetrate the vagina of J W a child aged 9 years."**

3. The Alternative Charge was for the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No 3 of 2006. The particulars were as follows:-

> **"On 2nd day of November 2014 at 6.00 pm in Taita Taveta County** (sic)**intentionally and unlawfully touched the vagina of J W a child aged 9 years with your penis** (sic)**."**

4. Being dissatisfied with the said judgment, on 20th March 2015, the Appellant filed a Notice of Motion application seeking leave to be allowed to file an appeal out of time. Subsequently, on 29th April 2015, M/S J.M. Muthami & Co Advocates filed a Notice of Motion application dated 23rd April 2015 to seeking leave to amend the Petition of Appeal on his behalf, which application was allowed.
5. On 20th May 2015, the said firm of Advocates filed an Amended Petition of Appeal which listed the following grounds of appeal:-

    1. **THAT the Learned Trial Magistrate erred in law and fact by conducting a wrong *vore dire***(sic)**.**
    2. **THAT the Learned Trial Magistrate erred in law and fact by convicting the appellant**

without a (sic) **concrete evidence to do so.**

3. **THAT the Learned Trial Magistrate erred in law and fact by taking silence is** (sic) **a form of defence.**
4. **THAT the Learned Trial Magistrate erred in law and fact by relying on a Medical report (P3)** (sic)**which did not link the appellant to the offence.**
5. **THAT the Learned Trial Magistrate erred in law and fact by not ordering a mental examination of the petitioner out of his** (sic)**conduct and behavior.**
6. **THAT the Learned Trial Magistrate erred in law and fact by not offering the accused** (sic) **a fair trial.**

6. His Written Submissions dated 11th December 2015 and List of Authorities were filed on even date while the State's Written Submissions and List of Authorities were both dated 16th December 2015 and filed on 17th December 2015.
7. When the matter came up for the hearing of the appeal on 17thDecember 2015, both the Appellant and the State requested the court to render its decision based on the said Written Submissions. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

8. Being the first appellate court, this court is under a duty to re-examine the evidence that was adduced in the lower court as was held by the Court of Appeal in the case of **Odhiambo vs Republic Cr. App No. 280 of 2004 (2005) 1 KLR** where it was stated that:-

> "**On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".**

9. It did appear from the respective parties' Written Submissions that the following issues were really what had been placed before the court for its determination:-
    a. **Whether or not the Learned Trial Magistrate conducted a proper *voire dire* enquiry before taking the evidence of the Complainant;**
    b. **Whether or not the Appellant herein was accorded a fair hearing during the trial; and**
    c. **Whether or not the Prosecution had proved its case to the required standard.**
10. The court therefore dealt with the issues under separate heads shown hereinbelow.

I. **THE APPELLANT'S RIGHT TO FAIR TRIAL**

11. The Appellant submitted that the Learned Trial Magistrate misdirected himself by taking his silence to mean that he had no question to answer (sic). It was also contended that the Appellant never uttered a word during the trial and that a Kamba interpreter was brought at the very end of the trial and that having not been brought at the commencement of the case, the trial was a nullity.
12. On its part, the State averred that the Appellant took the plea before the Senior Principal Magistrate, Hon S. Wahome on 4th November 2014 and that he pleaded not guilty. It further stated that the Appellant requested for Witness Statements but that he opted to remain silent and not cross-examine the Prosecution witnesses during the trial.
13. A perusal of the proceedings shows that when the Main and Alternative Charges were read to the Appellant, he answered to both charges as follows

"Not true."a plea of guilty was then entered. However, it is not clear whether or not the Appellant responded in English and those were his exact words or whether he answered in Kiswahili which the Learned Trial Magistrate translated in the English language as **"Not true"**.

14. Indeed, the language in which a charge is read, the translation, if any and the exact answer must

be properly recorded in the proceedings, even if a translation is to be assigned to the answer, ingredients that were set out in the cases of **Adan vs Republic [1973] EA 445** and **Njuki vs Republic [1990] KLR 334.**Failure to do so would render the proceedings defective.

15. Having said so, the question the court was being asked to determine was whether or not the Appellant was accorded a fair trial and not whether he did not understand the contents of the Charge that was read to him. On 18th November 2014, the Appellant made an application to be supplied with witness statements, which the Trial Court duly allowed. The language of the proceedings was shown to have been **"English/Kiswahili"**.
16. There was no indication that what had transpired in court had been translated to the Appellant in Kamba language, which the Appellant seemed to suggest ought to have been used at the commencement of the trial as he appeared to have requested for written statements in a language that the Trial Court immediately and clearly understood and required no interpretation into the language of the Court.
17. The circumstances of this case was thus different from that of **Jackson Mutunga Matheka vs Republic [2015] eKLR** that the Appellant relied upon where the appellate court therein ordered a re-trial as the appellant therein was found to have remained silent possibly due to the fact that he did not understand what the trial court therein had stated.
18. In fact, in this case, there was no legal obligation on the part of the Learned Trial Magistrate to have brought in an interpreter to translate the proceedings from the language of the court to Kamba language. His bringing in an interpreter during the course of the trial was merely discretionary and showed that he went out of his way to ensure that the Appellant was accorded a fair trial.
19. Hence, this court agreed with the State that the Appellant was given a fair trial in accordance with the provisions of Article 50 of the Constitution of Kenya, 2010 and that he had the liberty to exercise his constitutional right to remain silent during the trial by not cross-examining the Prosecution witnesses, a path he voluntarily opted for.
20. Accordingly, Grounds of Appeal Nos 3 and 6, which were related, to the effect that the Appellant was not accorded a fair trial failed and the same are hereby dismissed.

II. **THE APPELLANT'S MENTAL STATUS**

21. It was also argued on behalf of the Appellant that he ought to have been taken to a doctor to ascertain his mental status when he remained silent during the trial. The court agreed with the State that from the proceedings in the Trial Court, there was no indication that the Appellant had suffered a mental condition necessitating him to be taken for a medical examination.
22. The Learned Trial Magistrate could not therefore have been faulted for having proceeded with the Trial in the manner that he did and for that reason, this court found Ground of Appeal No 5 to have been unsuccessful and the same is also hereby dismissed.

III.**PROOF OF THE PROSECUTION CASE**

A. ***VOIRE DIRE*** **ENQUIRY**

23. The Appellant submitted that the *voire dire* enquiry did not meet the threshold set by the courts. He placed reliance on the case of **Kivevelo Mboloi vs Republic [2013] eKLR** and argued that failure by the trial court in setting out the questions it framed and J W (hereinafter referred to as "PW 1") answers to those questions was fatal and could not be cured.
24. The State distinguished the case of **Kivevelo Mboloi vs Republic** (Supra) and argued that the appellate court therein only faulted the trial court for not having recorded the reasons for allowing the minor therein to testify on oath.
25. It argued that in the case facing the Appellant herein, the Trial Court gave reasons why it found PW 1 eligible to testify on oath and that her evidence was without a doubt, cogent. It referred this court to the case of **Alex Mungai Waweru vs Republic (2014) eKLR** to buttress its argument that the Learned Trial Magistrate herein conducted a *voire dire* enquiry.
26. In the case of**Kivevelo Mboloi vs Republic** (Supra), Korir J outlined the guidance of the Court of Appeal in the case of **Johnson Muiruri vs Republic [2013] eKLR** in which it was stated as

follows:-

> **"We once again with to draw attention of our courts as to the proper procedure to be followed when children are tendered as witnesses. In Peter Kariga Kiune, Criminal Appeal No 77 of 1982(unreported) we said:**
>
> **"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. If the court is not so satisfied his unsworn evidence may be received if it is the opinion of the court he is possessed of sufficient intelligence and understands the duty of talking 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 (sec.19, Oaths and Statutory Declarations Act, cap 15. The Evidence Act (section 124, cap 80). 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, and not be forced to make assumptions."…"**

27. Though there is great emphasis that actual questions and answers during the *voire dire* enquiry be recorded, it was the view of this court that it is a strongly recommended practise or procedure to avoid an appellate court making assumptions of the questions asked by a trial court and answers given to it by a minor as was observed in the case of **Peter Kariga Kiune, Criminal Appeal No 77 of 1982** (Supra) cited in the case of **Johnson Muiruri vs Republic** (Supra).There was, however, no legal requirement that the same must be done or that if the same is not done, it will prejudice an accused person during trial, unless of course the same causes actual prejudice to an appellant.
28. Bearing in mind that the recommendations in the said case were made prior to the promulgation of the Constitution of Kenya, 2010 and that the provisions of Article 159(2)(d) of the Constitution mandates courts to administer justice without undue regard to technicalities, in the mind of this court, it is sufficient if from the way the proceedings have been recorded in a narrative form, it is abundantly clear that a child witness testifies that he understands the importance of saying the truth and his knowledge of what an oath is before the oath is administered. Where a minor has no knowledge of what an oath is, the trial magistrate must clearly set the same out.
29. In both instances, the trial magistrate must also clearly record that the child is possessed of sufficient intelligence to adduce the evidence before giving his opinion of how the evidence shall be adduced, that is, whether the same shall be sworn or unsworn. Additionally, the trial magistrate must record theminor's answer of the consequences of not telling the truth to enable the appellate court determine whether or not the *voire dire* enquiry was properly conducted.
30. Where a trial court opts to record answers only, then it is incumbent upon it to record the questions asked as well. If the above steps are followed, then the *voire dire* enquiry will be deemed to have been in compliance of the provisions of Section 19 of the Oaths and Statutory Declarations Act failing which the trial can only be deemed to have been defective and a nullity.
31. A perusal of the proceedings shows that the Learned Trial Magistrate conducted what appeared to be a *voire dire* enquiry and recorded as follows:-

> **"Prosecutor- I have the child witness in court.**
>
> **J W**
>
> **9 years**
>
> **[particulars withheld] Primary School.**
>
> **I converted to Islam.**

We are taught to say the truth.

I understand the meaning of taking an oath. It is to say the truth.

Court

After carefully considering all the evidence on record this, (sic) **court is convinced that the child victim on question understands the meaning of taking an oath.**

J W alias A A.

[particulars withheld]Primary School

Class One

9 years

I remember on 2nd November, 2014. I was crossing the railway line at Maungu going to the market…"

32. From the way evidence was taken and recorded, it is not clear at all who conducted the *voire dire* enquiry. Was it conducted by the Prosecutor, the Learned Trial Magistrate or by both of them? This is because the *voire dire* enquiry ought to be conducted by a trial magistrate to satisfy himself or herself that a child witness is sufficiently intelligent to testify in court andfor his direction as to whether the evidence to be adduced will be under oath or unsworn.
33. Additionally, it was not clear what the questions were, as only statements appeared to have been recorded. Most importantly, it was not clear whether what was recorded were really the answers of PW 1 or they were merely statements or observations by the Prosecutor and the Learned Trial Magistrate, given on their own motion. There was also no indication whether or not PW 1 was sworn or adduced unsworn evidence, which rendered her evidence defective *ab initio* particularly after the Learned Trial Magistrate formed an opinion that she understood what an oath meant.
34. There was therefore no doubt in the mind of this court that the threshold of a *voire dire* enquiry was not met as had been correctly argued by the Appellant as the same fell short of the required standard. Bearing in mind that the Appellant's liberty could be curtailed for the rest of his life time, the procedure for the *voire dire* enquiry herein could not be allowed to stand. The court thus found Ground of Appeal No 1 to have been merited and was successful.

B. **INCONSISTENT PROSECUTION EVIDENCE**

35. Although the court found and held that the *voire dire* enquiry was not properly conducted by the Learned Trial Magistrate, it nonetheless addressed the other issues that had been raised in the respective parties' Written Submissions with a view to establishing what power it could exercise under the provisions of Section 354 (3) of the Criminal Procedure Code Cap 75 (Laws of Kenya) in the event the appeal herein were to succeed.
36. PW 1 was emphatic that she knew **"Apewe"** and he used to pass by their school and that whenever, he saw her, he used to tell her, **" W njoo bibi yangu."**There was also documentary evidence adduced by Dr Ngugi, a Medical Officer at Moi Hospital (hereinafter referred to as "PW 2") purportedly showing that PW 1 had been defiled.
37. However, while the court noted the submissions of both the Appellant and the State on the issue of inconsistent evidence, it encountered serious difficulties as PW 1 did not identify the Appellant in the dock. In fact, she was not asked to identify the Appellant by pointing him out to the court. Her mother, M W (hereinafter referred to as "PW 3") did not also identify or point him out. She merely stated as follows:-

"Shetani is before the court. He is also called Muthama…"

38. The statement **"before the court"** was ambiguous as several meanings could be attached to it. The Appellant could also have been in court as a spectator. For the reason that the Appellant was not identified in the Trial Court, this court was unable to come to a definite conclusion of his guilt or otherwise. It was therefore unsafe to convict him on the basis of the evidence that was tendered by the Prosecution witnesses.
39. As PW 1's failure to identify the Appellant in court was itself a nullity, this court found that it could not analyse and make a determination of Grounds of Appeal Nos 2 and 4. The merits or otherwise of the Prosecution's case were rightly within the province of a trial court, which in this case could be achieved through a Re-Trial, a route the State conceded could be considered herein, if this court were to find that the trial was not properly conducted.
40. 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** (Supra) 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."**

CONCLUSION

41. Appreciably, although this court made a finding hereinabove that the Appellant did not appear to have demonstrated to the Trial Court his inability to proceed with the trial due to his mental capacity, the Appeal herein could not proceed for a considerable length of time as further assessment of his mental status had not been undertaken. He never uttered a single word and merely looked down during the proceedings in this court. The saving grace was that he was represented by counsel.
42. The court only proceeded with the hearing of the Appeal after both the Appellant and the State agreed that the Judgment herein could be delivered without Medical Evaluation that Mureithi J who was at one time seized of this matter ordered on 8th July 2015 to be undertaken. This court nonetheless directed that the said psychiatric evaluation be undertaken for completeness of record.
43. It was not lost to this court at the time that in a report dated 15th July 2015 prepared after examining the Appellant herein, Dr C.M. Mwangome, Consultant Psychiatrist stated as follows:-

> **"I interviewed the above named accused on the 15/7/15 in the presence of CPL. STEVEN KIVALI and PC MACDONALD MWAMODENYI who said the accused was of normal behaviour while in remand.**
>
> **No further assessment was possible.**

OPINION

1. **There is** (sic) **for an interpreter (sign language to assist in his mental state.)**
2. **FITNESS TO PLEAD deferred till further assessment."**

44. Notably, Dr Mwangome had requested that plea taking be deferred. He, however, observed that the Appellant was said to be behaving normally while in remand. In view of this court's finding that a Re- Trial of the Appellant would be the most prudent course to take, its order of 23rd November 2015 that he undergoes the psychiatric evaluation, which order it reiterated when it deferred the Judgment herein on 17th December 2015,must now be acted upon with urgency to enable the Appellant take a fresh plea at an appropriate time.

45. The Appellant was sentenced to life imprisonment and has been incarcerated since 6th March 2015. The Appellant will thus not be prejudiced by a Re-Trialas this court expects that the Re-trial shall be held and determined expeditiously.

DISPOSITION

19. As the Appellant's Petition of Appeal succeeded on Ground of Appeal No 1, it would be unsafe to allow his conviction to stand. The same is therefore hereby quashed. Consequently, the sentence is also hereby set aside.
20. However, in view of the fact that an offence was alleged to have been committed, it is hereby directed and ordered that there shall be a Re-trial of the Appellant herein so that the matter can be heard on its own merits. The Appellant shall be arraigned afresh before a different magistrate at the Voi Law Courts to hear and determine this matter.
21. In this regard, it is hereby directed and ordered that the Appellant remain in custody for production before the Senior Principal Magistrate Voi Law Courts on 15th February 2016 for purposes of taking a plea and further hearing of this matter. It is the expectation of this court that the new trial court will bear in mind Dr Mwangome's observations in the aforementioned Medical Report.
22. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 9th day of February 2016

J. KAMAU

JUDGE

In the presence of:-

Muthami…….……for Appellant

Sirima……..for State

Simon Tsehlo– Court Clerk